



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 89 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 18th December, 2015)

OKIYA OMTATAH OKOITI.....PETITIONER

VERSUS

KENYATTA UNIVERSITY COUNCIL & OTHERS.....RESPONDENT

RULING

1. The Application before Court is one dated 7th December, 2015, brought under Articles 20, 22, 50(1), 23(3), 159(2)(d), 165 and 258 of the Constitution of Kenya 2010, Sections 19 and 24 of the Constitution of Kenya (Protection of Rights and fundamental freedoms) Practice and Procedure Rules 2013, and all other enabling provisions of the law, in which the Applicant basically seeks the following Orders:

1. ***THAT pending hearing and determination of this Application and/or the Petition herein the Honourable Court be pleased to grant a stay Order staying the 1st Respondent's on-going recruitment exercise as stated in the Press advertisement titled Declaration of Vacancy for the position of the Vice Chancellor, which was published in the media, including on page 9 in the Standard printed on Wednesday December 2, 2015, and/or on other dates within the media, inviting applications from eligible candidates to fill the vacancy in the office of the Vice Chancellor for Kenyatta University.***
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 1st Respondent, whether by itself, or any of its employees or agents or any person claiming to act under its authority from proceeding to give effect in any way whatsoever, the press advertisement titled Declaration of Vacancy for the position of the Vice Chancellor, which was published in the media, including page 9 of The Standard printed on Wednesday December 2, 2015, and/or other dates within the media, inviting applications from eligible candidates to fill the vacancy in the office of the vice Chancellor for Kenyatta University.***
3. ***THAT pending the hearing and determination of this Application and/or Petition herein the Honourable Court be pleased to quash the 1st Respondent's Press advertisement titled Declaration of Vacancy for the position of the Vice Chancellor, which was published in the media, including on page 9 of the Standard printed on Wednesday, December 2, 2015, and/or other dates within the media, inviting applications from eligible candidates to fill the vacancy in the office of the Vice Chancellor for Kenyatta University.***

4. ***THAT*** in the alternative to prayers 1, 2, and 3, and without prejudice to the long term need to have the criterion for the appointment of the Vice Chancellor entrenched in the Kenyatta University Charter and/or Statutes, the advert(s) announcing a vacancy in the office of the Vice Chancellor for Kenyatta University, which the 1st Respondent has published and publicized, be withdrawn in favour of the following:
 - a. *Within seven (7) days of the withdrawal, the Petitioner the 1st -4th Respondents, and the 2nd interested Party hold a roundtable to review the advert and agree on the contents and wording of a new advert to be used to announce the vacancy in the Kenyatta University Vice Chancellor's Office, stating the criterion for eligibility among others;*
 - b. *The 1st Respondent publishes and publicizes the agreed advert and proceeds with the recruitment process provided in law of competitively filling the vacancy in the office of the Vice Chancellor for Kenyatta University.*
 - c. *The 1st interested party proceeds on leave and takes up all her pending leave days;*
 - d. *The matter be mentioned on a convenient date, preferably within 14 days' time, for this Honourable Court to review the status and to provide further directions.*
 5. ***THAT*** subsequent to the grant of the prayers above the Honourable Court be pleased to issue such 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.
2. The Application is supported by the grounds on the face of the Application which are further restated in their submissions and on an Affidavit sworn by the Petitioner/Applicant **Okiya Omtatah Okoiti**.
 3. The Petitioner alleges that there is no objective criterion for appointment of the Vice Chancellor of Kenyatta University and that the appointment of the latter is not the prerogative of the 1st Respondent. The Applicant states that the criteria for appointment should be set out in the University Charter and/or statutes so as to ensure that the appointment of the vice chancellor is made on merit following an open, transparent and consistent appointment process.
 4. The Applicant further alleges that he has read the advert on The Standard newspaper of 2.12.2015 at page 9 thereof and he is of the opinion that the advert is tailored to favour a preferred candidate. The Applicant states that his petition and Application raise issues that are weighty and need to be determined as they relate to the values and principles of good governance, transparency and accountability, integrity and participation of the people set out in Article 10 of the Constitution as the principles of involvement of the people in policy making, fair competition and merit as the basis of appointments and affording equal opportunities for appointments under Article 27 , and 232 (1) of the Constitution.
 5. The Applicant/Petitioner is of the view that in the circumstances there is need for the formulation of an objective, inclusive, participatory, merit-based, predetermined and competitive criteria for the appointment of persons in the office of the Vice-Chancellor Kenyatta University which has not been cured by the criteria set out in the newspaper Advert annexed as Exhibit OOO -3.
 6. The Applicant states that unless the Orders sought are granted the substantive Petition will be rendered nugatory and his case will suffer irreparable injury. He also states that the balance of convenience favours the granting of the Orders sought.
 7. The 1st Respondent is opposed to the Application and has filed a Replying affidavit sworn by Professor Ratemo Michieka on 30/11/15 and filed on 1/12/2015 and a further replying affidavit

sworn on 14/12/2015 and filed on the same dated. The 1st Respondent states that there are five broad issues before Court:

8. Firstly that the Petition is founded on the belief that the current VC Prof Olive Mugenda intends to stick to her position beyond the statutory limit which ends on 30.3.2016.
9. Secondly that the 2nd Respondent has failed in its mandate by failing to commence recruitment by a competitive process. This according to the 1st Respondent has been overtaken by events as the current VC does not intend to vie for the position of VC and council is discharging its mandate by advertising for the position.
10. The 1st Respondent is of the view that what is actually in issue is the validity of the University Charter and Regulations governing the University and unless the petition is amended to have an Order to quash the advert there will be nothing to support the Motion presented to Court.
11. The 1st Respondent is also of the view that the Petitioner lacks Locus Standi as the jurisdiction of the Court is special and the Petitioner does not have any relationship with the 1st Respondent and is not envisaged under Section 12 of the Industrial Court Act.
12. According to the 1st Respondent, the Petitioner states that the cause of action was precipitated by certain stories published in the weekly citizen. There is no correspondence produced before Court to show that there was a problem in the procedure. The Applicants apprehension has no merit and there is no criterion that makes the Court to stop the 1st Respondent from exercising its mandate.
13. The 1st Respondent further states that the Application reeks of mischief and if the Court prolongs the mischief there will be a vacuum in the position of Vice Chancellor. The Respondent also states that the 2nd Respondent is not entitled to be involved in the recruitment process of the Vice Chancellor of Kenyatta University. The 1st Respondent submits that the Court should make an objective assumption that the process will be fair. In the event that it is unfair it can always be nullified.
14. The 1st Respondent also submits that this Court lacks jurisdiction to handle this application given that it is a challenge to an administrative action of the advert presented in Court. They submitted that the correct Court would be the Judicial Review Division of the High Court.
15. The 2nd interested party supports the Petitioner's application and has filed two affidavits in support, one on 27.10.2015 and another on 11.12.2015. They reiterate that a criterion for recruitment ought to be established and the process also ought to be clear and participatory.
16. The other Respondents supported the 1st Respondent's submissions.
17. Having considered the submissions from each party, the issues for determination by this Court are as follows:
 1. **Whether this court has jurisdiction to entertain this application.**
 2. **Whether the Applicant has Locus Standi to file this application/petition.**
 3. **Whether the petition filed herein has raised valid issues which can be addressed by this application.**
 4. **Whether the application herein raises valid reasons which can be addressed by this Court.**
 5. **What remedies if any, this Court can grant.**
18. On the 1st issue, jurisdiction is everything and without it, this Court would rather stop here. In the case of Lilian S. this issue of jurisdiction was addressed and the Court made a finding that

jurisdiction is everything.

19. The issue of jurisdiction of the Industrial Court is covered by Section 12 (1) of Industrial Court Act 2011 which states as follows:

“ (1) The Court shall have exclusive original and appellate

jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including:-

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers' organisation and a trade unions organisation;

(d) disputes between trade unions;

(e) disputes between employer organizations;

(f) disputes between an employers' organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.

20. Numerous case law has also addressed this issue. In the Industrial Court of Kisumu **Cause No. 81/2014 Evans Kaiga Inyangala & 2 Others vs. County Government of Vihiga & 2 Others**, this issue was also raised and I held that this Court has jurisdiction to handle any employment related issue.

21. In the case of United States International University & Eric Rading (2012) eKLR Hon. J. Majanja also addressed this Court's jurisdiction and stated as follows:

“43. The intention to provide for a specialist court is further underpinned by the provisions of Article 165(6) which specifically prohibits the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters its competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of constitutional matters incidental to labour matters would lead to the High Court supervising a superior court. Ordinarily where the High Court exercises jurisdiction to interpret the Constitution or enforce fundamental rights, its decision even where declaratory in nature will require the court to follow or observe the direction. This would mean that the High Court would be supervising the Industrial Court which is prohibited by Article 165(6).

44. In the final analysis, I would adopt the position of the Constitutional Court of South Africa in Gcaba v. Minister of Safety and Security (Supra). The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article

162(3), Section 12 of the industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of Section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it.

45. In light of what I have stated, I find and hold that the Industrial Court as constituted under the Industrial Court Act, 2011 as a court with the status of the High Court is competent to interpret the Constitution and enforce matters relating to breach of fundamental rights and freedoms in matters arising from disputes falling within the provisions of Section 12 of the Industrial Court Act, 2011”.

22.J. Majanja’s approach was also upheld by the Court of Appeal in **Civil Appeal No. 6 of 2012. Prof. Daniel N. Mugendi vs. Kenyatta University & Others** where they rendered themselves thus:-

“in the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial & labour relations matters alongside claims of fundamental rights ancillary and incident to these matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment & land with any claims of breaches of fundamental rights associated with the two subjects”.

23.Considering the issues raised by the Applicant herein and which touch on an employment issue which is the appointment of a Vice Chancellor of Kenya University, it is my finding that this Court has jurisdiction to deal with the matter.

24.This application is brought under Articles 20, 22, 50(1), 23(3), 159(2) (d) 165 and 288 of the Constitution. All these Articles deal with issues of fundamental rights and in this case the Applicant has contended that the advertisement of the position of the Vice Chancellor of Kenyatta University is flawed. Article 47 of the Constitution deals with fair administrative action and Article 35(1) on access to information. Both these articles envisage a situation where the processes undertaken by public officers must be above board and the public must be given information accordingly.

25.This process would in my view fall under this Court’s jurisdiction in ensuring due process not only during the subsistence of an employment relation but also the pre-employment process which is the advertisement and interview process.

26.This issue also falls squarely under Article 41 which provides a right to fair Labour practices.

27.On the 2nd issue of Locus. I believe Article 22 of the Constitution is clear. The Respondents had argued that the Applicant has no Locus to bring this claim. Article 22(1) of the Constitution provides that:

”Every person has a right to institute Court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened”.

28.Article 258(1) of the Constitution also provides that:-

“Every person has a right to institute Court proceeding claiming that this Constitution

has been contravened or is threatened with contravention”.

29. I addressed this issue in the case of **Wilfred Otieno Okoth vs. county Government of Kisumu & Another Industrial Court of Kenya at Kisumu Petition No. 248 of 2014** and found a Petitioner who had alleged unfair recruitment process due to cancellation of an advertisement had Locus being a person envisaged under Article 258(1) of the Constitution though she was neither an employee or employer of the Respondents.
30. On the 3rd issue, the Respondent have submitted that the Application has no correlation with the Petition as the 1st Interested Party is no longer interested in being appointed as a Vice Chancellor and that the issues raised in the Petition are already spent after the advertisement for the appointment of the Vice Chancellor placed in the dailies.
31. Some of the prayers sought in the Petition relate to the current Vice Chancellor of the Kenyatta University Prof. Mugenda. However, other prayers relate primarily to the conduct of the 1st Respondent, the Kenyatta University Council in regard to the competitive appointment of a new Vice Chancellor of Kenyatta University.
32. Others relate to objective, inclusive, participatory, merit-based and competitive criteria for the appointment of a person to the office of the Vice Chancellor of Kenyatta University under the law. These 2 prayers indeed touch on what the Applicant is contesting in the application and therefore the application still have a place of standing within the Petition as it is.
33. On the 4th issue, I turn to the merits of this application. The Applicant has contended that the advertisement placed in the Standard Newspaper of 2.12.2015 was placed primarily as a reaction to the filing of this Petition on 21.10.2015.
34. The Applicant however contends that the advertisement lacks objective criteria for appointment of a Vice Chancellor of Kenyatta University and is also discriminatory and skewed to favour certain Applicants.
35. The Applicant contends that the Kenyatta University Charter lacks the criteria for appointment of a Vice Chancellor. One of the conditions contended by the applicant as advertised is that the Applicant must have recommendation from at least 3 referees and one such referee must be the current employer.
36. The Applicant contends that this requirement of the referee would impact negatively to certain Applicants who may be perceived in bad standing with their current employer (read Kenyatta University).
37. The Respondent submitted that they are willing to remove any offending requirement in the advert.
38. The Applicant also submitted that this process is not transparent and is devoid of public participation as envisaged under the Constitution – Chapter 10.
39. The criteria that should also be used in appointment of Vice Chancellor is contested by the Applicant who states that it is missing in subsidiary regulation of Kenyatta University as envisaged under Statutory Instruments Act.
40. I have looked at the advert as placed and one glaring commission which has been alluded to by the 1st Respondent is on issue of referees to be submitted.
41. Another problem, is the glaring omission to state that the public can submit Memorandum in respect of the Applicants whose names would have to be published so that they are clearly known

and comments made. This has been the trend in recent public appointments which is a good practice.

42. This process would largely have the public participate. The 2nd Interested Party have submitted that they are key stake holders representing the interests of the academic staff and they state that they have been excluded. There is correspondence attached showing their quest to be part and parcel of the process but this was ignored.

43. It is indeed this Court's finding that the advert as stated has flaws which should be corrected and it will not be prudent to let a flawed process continue and then correct it later. I therefore find that the application has merit and I allow it in terms of prayer 1, 2, and 3.

44. I also direct that the 1st Respondent do convene a meeting with the stakeholders of Kenyatta University especially the Respondents and the 2nd Interested Party within 7 days from today and chart the way forward and do place a fresh advert within 14 days from today for recruitment of the Vice Chancellor of Kenyatta University to enable the process move forward. It was submitted that the 2nd Interested Party is an employee and cannot sit and discuss with the employer the 2nd Respondent and discuss how they should be employed.

45. 2nd Interested Party in this Court's view is a union of Academic staff composed of learned men and women and their input in setting the criteria for appointment of Vice Chancellor is key and should therefore not be ignored. In any case Article 41 of the Constitution is clear that an employee has a right to join and participate in the activities of a trade union which union has the mandate to ensure fair labour practices.

46. On issue of 1st Interested Party proceedings on leave, this is the mandatory provisions for all Chief Executive Officers under the State Corporation Act. Given that her term expires in less than 6 months on 31.3.2016, it would be prudent for her to proceed on terminal leave so that the process of recruitment of the next Vice Chancellor is not seen as being influenced by her or those perceived close to her. She must therefore vacate her office immediately and proceed on terminal leave immediately to pave way for a transparent, open, participatory recruitment of a new Vice Chancellor of Kenyatta University.

Those are the orders of this Court.

Dated and delivered in open court this 18th day of December, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Petitioner – Present

Kibe Mungai for 1st Respondent and holding brief Mwihuri for 1st Interested Party

Otieno holding brief Enoda for 2nd Interested Party