REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

PETITION NO. 33 OF 2013

JOSEPH MUTUURA MBEERIA……..…….1ST PETITIONER

NAFTALY RUGARA MUIGA……..…….....2ND PETITIONER

VERSUS

THE CABINET SECRETARY FOR EDUCATION, SCIENCE AND TECHNOLOGY ……..…….1ST RESPONDENT

THE HON. ATTORNEY GENERAL ……..…...2ND RESPONDENT

AND

THE COUNCIL, JOMO KENYATTA UNIVERSITY OF AGRICULTURE &TECHNOLOGY…….INTERESTED PARTY

Mr. Muigai for the Petitioners

Mr. Daniel Saidi Wamotsa for the 1st and 2nd Respondents

Mr. Oluoch Olunya for the Interested Party

JUDGMENT

1. This Petition was commenced under ***Articles 10, 23, 47, 73, 165*** and ***232*** of the ***Constitution of Kenya***.

2. The Petition faults the 1st Respondent for appointing the Council of Jomo Kenyatta University of Agriculture and Technology (Interested Party) without adhering to the laid down constitutional and statutory principles of inclusiveness and openness in public appointments.

3. The 1st and 2nd Petitioners are Lecturers of the Interested Party and are the Secretary General and Assistant Secretary General respectively of the University Academic Staff Union (UASU) JKUAT Chapter.

4. The 1st Respondent is the Cabinet Secretary for Education, Science and Technology and in the Ministry responsible for matters relating to University Education.

5. The 2nd Respondent is the Hon. Attorney General sued as the legal representative of the National Government and the state officer enjoined under ***Article 156*** of the ***Constitution of Kenya*** to promote, protect and uphold the rule of law and public interest.

6. The description of the parties is of special significance in this matter as will be seen later in this judgment.

7. The Petition dated 14th August 2013 faults the appointment of;

a. Ekuru Aukot (Dr) – chairman;
b. Bertha Joseph Dena;
c. Amb. Stephen Arphaxard Loyatum;
d. Rose Muraguri Mwololo (Dr)
e. John K. Tanui
f. Khadija Sood Shirkely (Dr)

via a Gazette Notice No. 798 published in ***Kenya Gazette Volume No. CXV No. 10*** published on 25th January 2013.

8. The Petitioners allege that the appointment replaced the erstwhile Council comprising of;

a. Eng. Julius Riungu – Chairman;
b. Hon. Rose Waruhiu – Vice Chairman
c. Bertha Joseph Dena – Treasurer
d. Amb. Stephen Arphaxard Loyatum;
e. Rose Muraguri Mwololo
f. Eng. Ali Abdurazik.

It should be noted that three (3) of the former members of the council were retained in the new Council.

<u>Particulars of unlawfulness and violation of the Constitutional provisions.</u>

9. The Petitioners allege that the 1st Respondent;

i. Purported to invoke powers that she did not have in appointing the said persons under ***Section 36(1)(d)*** of the ***Universities Act, 2012*** which clearly provides that five (5) members of the Council must be appointed through an open process

10. The 1st Respondent did not adhere to the provision in that;

a. The positions were not advertised;
b. There was no open process of recruitment through shortlisting of candidates;
c. No interviews were conducted;
d. The opaque manner of appointment violated ***Article 232*** of the ***Constitution of Kenya*** which provides for the values and principles of Public Service enumerated in ***Clauses (a) – (i)*** and in particular ***Clause (i)*** which provides for;

"affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public Service, of;

i. **men and women;**

ii. **members of all ethinic groups; and**
iii. **persons with disabilities and**

(e)"accountability for administrative acts" interalia;

11. Furthermore the provisions of ***Article 232***, demand that there be fair competition and merit as the basis of appointment and promotions.

That the process was done in a hurried manner and did not await the appointment of the Cabinet Secretary in the new Constitutional dispensation.

That no recruitment process took place but there was a simple swapping of (individual) names of some of the members of the Council.

That the same error was perpetuated in Council appointments in other public Universities hence entrenching the illegality.

12. The Petitioners submit that the Courts need to establish guiding principles for all recruitment into Public Offices as enshrined in the Constitution and in particular there be an open and competitive process of recruitment of all Public Officers.

13. The Petitioners pray for;

a. a declaration that there is no properly constituted and appointed University Council for the Jomo Kenyatta University of Agriculture and Technology.
b. An order quashing the ***Gazette Notice No. 798*** published in ***volume CXV No. 10*** of the ***Kenya Gazette*** published on 25th January 2013;
c. An order of Mandamus directing the 1st Respondent to commence the recruitment process of members of JKUAT University Council in accordance with the law;
d. An order for costs.

14. The Petition is opposed by a replying Affidavit of **Ambassador Stephen Loyatum** a Council member of the Interested Party herein deposed to on 19th January 2014.

15. What is very interesting in this matter is that neither the 1st Respondent, The Cabinet Secretary for Education, Science and Technology and the 2nd Respondent The Hon. Attorney General have filed any papers in opposition to the Petition.

16. It is to be noted at this stage that Ambassador Stephen Loyatum, is a beneficiary of the impugned appointment.

17. Nowhere in the replying Affidavit of Ambassador Stephen Loyatum is it stated;

i. that the appointment of the council members was done pursuant to an advertisement inviting qualified members of the public to apply for the position of chairman and member of the Council;
ii. followed a shortlisting process;
iii. interviews of any nature were conducted by an interviewing panel;
iv. and the names of the appointees were announced to the members of the public prior to the official appointment by way of a Gazette Notice.

18. Instead the Ambassador, in the replying Affidavit makes generalized bald allegations to the effect that;

a. all the members that were appointed to the Council of the Interested Party are both qualified

and competent to handle their respective dockets and have proved themselves in the manner and style they have discharged their responsibilities.

b. that the 1st Respondent discharged her proper mandate in terms of the ***Universities Act*, *2012*** by going through the huge data base of Applicant and thoroughly vetting them before making the appointments.

19. The Court notes that the 1st Respondent has not made similar assertions in this suit and it is curious that a 3rd Party would do so on her behalf.

20. Secondly, no documentary prove of any such applications and vetting has been placed before Court for scrutiny. Indeed, the replying Affidavit has no annextures at all in support of the position taken by the Interested Party.

21. To make matters worse, The Hon. Attorney General, the official Legal representative of the 1st Respondent, the Cabinet Secretary, who is enjoined under Article 156 of the Constitution to promote, protect and uphold the rule of law and the public interest has not only failed to oppose this Petition but has gone ahead to file written submissions wherein he fully associates himself with the Petition presented before Court by the Petitioners and directly contradicts the assertions by the Interested Party that the appointment of the chairman and members of the Council of JKUAT was done in a transparent and open manner.

22. Indeed The Hon. Attorney General submits as follows in the ultimate paragraph of his able submissions;

> **"we rely on the provisions set out above in holding the view that the Minister should have applied the provisions of *Articles 10 and 232* of the *Constitution* as well as *Section 36(1)(d)* of the *Act* and subjected the appointment of the Interested Party's Council members subject of this Petition to an inclusive, competitive, accountable and transparent process that involves public participation and best practices in management, equal and affordable opportunities for all, promotes public trust, is non-discriminatory, promotes equity, equality and social justice.**

This would be through advertising for the position, shortlisting for interviews and conducting the interviews in accordance with the stated provisions.

Even where the immediate incumbent is seeking re-appointment and the employer has assessed his performance to be good and wants to retain him, we are of the view that the vacant position must be subjected to the appointment process. His performance will be a factor to be considered in determining whether to retain him or not as against the other candidates who have been afforded an opportunity to compete for the same position."

Emphasis mine.

23. I fully concur with the above submissions by the learned Hon. Attorney General.

24. I hold that the Interested Party (Cabinet Secretary) is bound by the legal advice of The Hon. Attorney General which in the Court's considered view is sound and in line with the obligations of the office of The Hon. Attorney General in terms of the provisions of ***Article 156*** of the ***Constitution*** *of* ***Kenya 2010***.

25. The Court upholds these to be the minimum standards applicable to the appointment of the chairman and members of the Council of JKUAT;

26. Further the Court holds these standards to be the minimum standards applicable to the appointment of the chairman and members of the Council of all other Public Universities;

27. and further hold these to be the minimum standards applicable to other similar positions of Public Service in terms of ***Articles 10*** and ***232*** of the ***Constitution*** *of* ***Kenya*** as read with the relevant statutory provisions.

28. In this case, the relevant provision is ***Section 36(1)(d***) of the ***Universities Act, 2012*** which mandates the Cabinet Secretary to appoint five (5) members of the Council through an **"open process."**

Furthermore ***Section 3(2)*** of the ***Act*** provides;

"In discharge of its functions and exercise of its powers under this Act, a University shall be guided by National values and principles of governance set out under *Article 10* of the *Constitution*, and shall in that regard……..;

a. **……**
b. **……**
c. **Promote inclusive, efficient, effective and transparent governance systems and practices and maintenance of public trust;**
d. **Ensure sustainable development and adoption of best practices in management and institutionalization of system of checks and balances;**
e. **……..**
f. **Institutionalize non discriminatory practices."**

29. It is the Courts considered view, and the Court so holds that the minimum standards articulated by The Hon. Attorney General and fully embraced by this Court herein are in line and fully consistent with the aforesaid provisions of ***36(1)(d)*** as read with ***Section 3(2)*** of the ***Universities Act*** and in conformity with the letter and spirit of ***Article 10*** of the ***Constitution*** *of* ***Kenya 2010***.

Accordingly, the Petition fully succeeds and the Court;

a. declares that the University Council for the Jomo Kenyata University of Agriculture and Technology (JKUAT) is not properly constituted.
b. Quashes the Gazette Notice No. 798 published in Volume CXV No. 10 of the Kenya Gazette published on 25th January 2013.;
c. Makes an order of mandamus directing the 1st Respondent (Cabinet Secretary for Education, Science and Technology) to commence the recruitment process of members of JKUAT Council in accordance with the law; and
d. For the avoidance of doubt, orders (a) and (b) above take effect within 30 days from the date of this judgment and shall not operate retroactively with respect to any matters done by the Interested Party in the conduct of its responsibilities.
e. 1st Respondent and the Interested Party are jointly and severally held responsible for the implementation of this judgment including payment of costs of the Petition to the Petitioners.

Dated and Delivered at Nairobi this 19th day of Sept. 2014

MATHEWS N. NDUMA

PRINCIPAL JUDGE