



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

PETITION NO. 3 OF 2014

(Formerly Petition No. 602 of 2013 in the High Court at Nairobi)

PROFESSOR ELIJAH BIAMAPETITIONER

-VERSUS-

UNIVERSITY OF ELDORET.....1ST RESPONDENT

**CABINET SECRETARY, MINISTRY OF EDUCATION.....2ND
RESPONDENT**

PROFESSOR TERESA AKENGA.....3RD RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 19th September, 2014)

JUDGMENT

The petitioner filed the petition on 24.12.2013 through Mitey & Associates and an amended petition on 30.01.2014. The petitioner prayed for:

- a. A declaration that the respondents herein have infringed and continue to infringe on the petitioner's constitutional rights.
- b. A declaration that the release of the petitioner from his duties as the Vice Chancellor of the University of Eldoret is against the law.
- c. An order of certiorari, quashing the decision of the 1st and the 2nd respondents of appointing Professor Teresa Akenga as the Vice Chancellor University of Eldoret.
- d. An order of mandamus compelling the 1st respondent to reinstate the petitioner as Vice Chancellor of the University of Eldoret.

IN ALTERNATIVE

- e. An order that the 1st and 2nd respondents pay general damages to compensate the petitioner for the sufferings and economic embarrassment he suffered as a result of the respondent's actions of unlawfully releasing him from his duties as the Vice Chancellor of University of Eldoret.
- f. An order of mandamus compelling the respondents to pay the petitioner his benefits including:
 - i. 60 days of annual leave for the two years he served and 32 days of quarterly leave for two years he served and 32 days of quarterly leave for two years and nine months sabbatical leave from the

- University immediately;
- ii. gratuity for two years, salary for 18 days of June 2013, his acting Vice Chancellor allowances from February 11, 2013 to June 18, 2013;
 - iii. salary for the remaining contract period of three years;
 - iv. salaries and house allowances due to senior management staff of Public Universities Councils Consultative Forum (IPUCCF) negotiated benefits and due arrears be backdated to June 24, 2011 when the appointment as the Principal of Chepkoilel University College as per the Kenyan Gazette Notice number 7665 of 8th July 2011 and the letter of appointment from Council;
 - v. annual leave allowance of Kshs.50,000.00 and a passage and baggage allowance as per the terms and conditions of service;
 - vi. as a substantive Principal, the petitioner was entitled to at least one watchman, cook, and a gardener paid monthly by Chepkoilel University College and, the benefits should be quantified and considered for the leave period of one year; and
 - vii. benefits of vice chancellor for the remaining period of three years.
- g. The honourable court makes such order or further orders, issues such writs and gives such directions as it may consider appropriate for the purpose of enforcing or securing enforcement of the petitioner's constitutional rights and freedoms.

The 1st respondent and the interested party filed on 20.02.2014 a notice of preliminary objection through Gumbo & Associates and further filed on 13.03.2014 the answer to the petition.

The 2nd respondent filed the grounds of opposition on 19.05.2014 through Yvonne Khatambi, Litigation Counsel, for the Attorney General.

The petitioner took an unpaid leave from his employer, the University of Nairobi on 24.06.2011 following successful application and appointment to the office of Principal, Chepkoilel University College then a constituent college of Moi University. The petitioner's appointment was published under gazette notice number 7665 of 8.07.2011 signed by the acting Minister for Higher Education, Science and Technology in exercise of the powers conferred by section 8(1) of the Chepkoilel University College Order, 2010. The appointment was for a term of 5 years with effect from 24.06.2011 so that the tenure would lapse on or about 24.06.2016. The appointment was conveyed to the petitioner by the Ministry's Permanent Secretary by the letter dated 18.07.2011 and the terms of the appointment conveyed to the petitioner by the letter dated 26.07.2011 signed by the Chairman of Council, Chepkoilel University College one Professor Sarone Ole Sena. The petitioner served with dedication and rendered exemplary service as Principal and as shown in exhibits PEB 6 and PEB7 on his supporting affidavit filed together with the petition.

Chepkoilel University College was elevated to a fully fledged university under the name University of Eldoret. Consequently, the Minister appointed the petitioner to act as the Vice Chancellor of the University for four months effective 11.02.2013. Subsequently, the University of Eldoret Council extended the acting appointment indefinitely pending the advise by the Minister and in accordance with the provisions of section 35(1) (a) (i) of the Universities Act, 2012. Section 35(1) (a) (i) empowers the Council to employ staff of the University while section 39 of the Act provides that the Vice Chancellor of a University shall be employed competitively by the Cabinet Secretary on recommendation of the Council. In exercise of the provisions, the Council advertised and undertook competitive interviews that culminated in the recruitment and recommendation of the interested party as the University's Vice Chancellor. The cabinet secretary appointed the interested party to the office of Vice Chancellor by the letter dated 11.06.2013 for a term of 5 years effective 10.06.2013 and the terms of service were to be communicated in the contract document provided by the Council.

Thus, the service of the petitioner as acting Vice Chancellor came to an end by or on 10.06.2013 following the substantive appointment of the interested party to the office of Vice Chancellor. The petitioner was dissatisfied with the turn of events and filed the petition. The court has considered the pleadings, the affidavits, the exhibits and the submissions on record and the court makes the following findings on the issues in dispute that fall for determination.

The **1st issue** for determination is whether the petitioner has valid claims under the contract of service as the Principal of Chepkoilel University College. The court finds that upon the elevation of the Chepkoilel University College to a fully fledged university under the name University of Eldoret, the office of Principal as held by the petitioner was thereby abolished. The abolition of the office, in the opinion of the court, was an overriding circumstance that superseded any claims by the petitioner to continued employment in the office of Principal. The court finds that the petitioner served as a Principal from 24.06.2011 to 11.02.2013 and the termination of appointment by reason of abolition of office was subject to the termination clause 1 in the letter of appointment dated 26.07.2011. The clause provided thus, **“...the Council may terminate your appointment by giving six months’ notice in writing of such termination.”** The court finds that the parties were bound by that agreement and further finds that the claimant was not accorded the six months notice and is entitled to 6 months’ salaries at the rate of the petitioner’s prevailing monthly salary at end of January, 2013. The court has carefully considered the redundancy situation under which the petitioner ceased to serve as a Principal. It is clear that the petitioner was entitled to terminal dues as envisaged in section 40 of the Employment Act, 2007 being pay in lieu of due leave not taken (30 days), pay of one month notice, and severance pay for 15 days for the one complete year served as a principal. The court finds that the petitioner is entitled accordingly. As the court has found that the petitioner’s service as Principal was to be terminated in accordance with the contract and section 40 of the Employment Act, 2007, the court finds that the claim and prayer for salary for the remaining contract period of three years on the basis of the contract of service as Principal was misconceived and the prayer shall fail. The court finds that the petitioner is entitled as found due by the court and subsequent to the termination of service as Principal especially in view of the prayer for such order or further orders as the honourable court shall consider appropriate.

The **2nd issue** for determination is whether the petitioner has valid claims under the contract of service as the acting Vice Chancellor of the University of Eldoret. The petitioner has prayed for 30 days annual leave, gratuity for two years inclusive the year served as Principal, acting allowance as Vice Chancellor from February 11, 2013 to June 18, 2013. By the letter dated 26.08.2013 being **exhibit PEB 15** the respondent agreed to pay gratuity for the 2nd year, salary owed up to 18th June 2013 and 15% acting allowance and the court finds that the petitioner is entitled as prayed for especially that the respondents did not file evidence of payment of gratuity for the 1st year of service as Principal.

The **3rd issue** for determination is whether the petitioner is entitled to quantified pay for at least one watchman, cook, and a gardener paid monthly by Chepkoilel University College while he served as the Principal. The court finds that the entitlement was not remunerative and if the petitioner failed to access and benefit the privilege as the Principal while in the service of the respondent, then the same cannot be accorded belatedly. In any event there is no material before the court to show the measure of the pay as claimed and the prayer shall fail.

The **4th issue** for determination is whether the petitioner is entitled to an order that the 1st and 2nd respondents do pay general damages to compensate the petitioner for the sufferings and economic embarrassment he suffered as a result of the respondent’s actions of unlawfully releasing him from his duties as the Vice Chancellor of University of Eldoret. The court has carefully considered the petitioner’s terms and conditions of service as an acting Vice Chancellor. The appointment was for an initial tenure of 4 months and extended for an indefinite tenure **“...until advised accordingly by the Cabinet Secretary.”** By the letter dated 2.07.2013 being **exhibit PEB10**, the 1st respondent conveyed to the petitioner the Cabinet Secretary’s decision to appoint the interested party to the position of Vice Chancellor and the cessation of the petitioner’s acting appointment with effect from 10.06.2014. The court finds that the acting appointment lapsed in accordance with the communicated tenure and which the petitioner did not object to and by his conduct accepted to continue in service as such so that in the opinion of the court, there was nothing illegal in the release of the petitioner after the interested party was substantively appointed as the Vice Chancellor. The prayer will therefore fail.

The **5th issue** for determination is whether the petitioner’s constitutional rights were contravened. As submitted for the respondents and the interested party, the interested party was appointed in accordance with the provisions of section 35(1) (a) (i) and section 39 of the Universities Act, 2012. The appointment

was in accordance with the statutory and constitutional standards that govern appointments in the public service. The court upholds its opinion in **Robert Muriithi Ndegwa –Versus- Minister for Tourism, Petition No. 41 of 2012 at Nairobi**, where it stated thus, “...Article 232 of the Constitution provides for the values and principles of public service to include:

- a. **high standards of professional ethics;**
- b. **efficient, effective and economic use of resources;**
- c. **responsive, prompt, effective, impartial and equitable provision of services;**
- d. **involvement of the people in the process of policy making;**
- e. **accountability for administrative acts;**
- f. **transparency and provision to the public of timely, accurate information;**
- g. **subject to paragraph (h) and (i), fair competition and merit as the basis of appointments and promotions;**
- h. **representation of Kenya’s diverse communities; and**
- i. **affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service of men and women; the members of all ethnic groups; and persons with disabilities.**

Section 22 of the Public Officer Ethics Act, 2003 provides that public officers shall practice and promote the principle that public officers are selected on the basis of integrity, competence and suitability or elected in fair elections. Thus, by the Constitution and by statute, the standards for undertaking public employment have been determined. In the instant case, the petitioner was recruited competitively and it is not said that he lacks qualifications. The court holds that there would be no suitability or merit in public employment in event of presence of bribery, cronyism, nepotism, tribalism, and in absence of qualifications, competence, competition, integrity and respect for inclusion and diversity....”

The court has also considered its opinion in **Trusted Society of Human Rights Alliance –Versus- Nakuru Water and Sanitation Services Company and Another [2013]eKLR**, where the court stated thus, “Fourthly, the court has carefully examined the score sheets filed for the respondent as the basis of performance of the candidates at the interviews. The court finds that the scores are mysterious as there were no explanatory notes and criteria applied to measure the performance of candidates. Essentially and in the opinion of the court, the 1st respondent was expected and constitutionally and by legislation obligated to draw an objective short-listing and interviewing instruments that reflected the criteria set out in Articles 73 and 232 on recruitment and appointment, as well as section 22 of the Public Officer Ethics Act, 2003. In the opinion of the court, the instruments were to take into account objective measures that achieve fair competition; merit; integrity; competence; suitability; and inclusion of men and women, the members of diverse ethnic groups, diverse communities and persons with disabilities. The court holds that such objective instruments were within the 1st respondent’s discretion to develop yet mandatory to achieve the constitutional and statutory standards of public recruitment, selection, appointment and promotion; without such instruments and evidence of their application it is impossible to establish compliance with the law.”

In the present case, the court has examined the recruitment documents. First, the vacancy was openly advertised and applications invited from all qualified persons. Secondly, the respondent established and documented an objective short listing parameters including requirements of the advertisement, academic qualifications, the management and leadership requirement, scaling or scoring criteria, and ranking of the candidates as per the set parameters and scoring. Thirdly, all shortlisted candidates were invited for the interviews and the performance by way of the scores attained and ranking were documented. The minutes of the proceedings were filed and the best three candidates were recommended by the Council for appointment by the Cabinet Secretary. Fifthly, explanations for decisions made throughout the recruitment process were documented. Finally, the Cabinet Secretary appointed the candidate who was ranked the best by the Council during the recruitment.

The court finds that the instruments and the methodology applied during the recruitment and the

appointment of the interested party has been demonstrated to have taken into account objective measures that achieved fair competition; merit; integrity; competence; suitability; and inclusion of men and women as well as other diversities. There was no constitutional, statutory or contractual provision that entitled the petitioner to continue in employment as a Vice Chancellor upon lapsing of the tenure of service as Principal and following abolition of the office of Principal. Accordingly, on those claims and considerations that the interested party was appointed Vice Chancellor, the court finds that the petitioner has not established contravention of his constitutional or other rights. The court further finds that the prayers for declarations and judicial review orders as made in that regard shall fail.

The petitioner cited and urged that his right to human dignity and to have that dignity respected and protected as provided for in Article 28 of the Constitution was contravened. The court has found that the petitioner, despite his exemplary service as Principal and acting Vice Chancellor, the respondent opted to breach the contract of service upon abolition of the office of Principal. The respondents also failed to accord the petitioner prompt payment of the due terminal dues upon lapsing of the tenure as acting Vice Chancellor. It is the opinion and finding of the court that such offensive conduct on the part of the respondents was in clear contravention of Article 28 as it also amounted to subjecting the petitioner to unfair labour practices in contravention of Article 41 of the Constitution. The court finds accordingly.

The 6th issue for determination is whether the court has jurisdiction to hear and determine issues of human rights. It was urged in the preliminary objection and submitted for the respondents and the interested party that the court did not have jurisdiction to hear and determine the petition as the relevant jurisdiction was vested in the High Court and not the Industrial Court. The court upholds the opinion of the High Court in the ruling in **United States International University (USIU) –Versus- Attorney General and 2 Others [2012] eKLR**, where *Majanja J* stated thus, “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 status of 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 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.”

The court also upholds its opinion in **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau [2012]eKLR, Industrial Court Cause No. 44 of 2011 at Nairobi**, where it was stated thus, “Further, sub-Article 165 (5) (b) of the Constitution provides that the High court shall not have jurisdiction in respect of the matters falling within the jurisdiction of the Industrial Court. Thus, in view of the High Court status of the Industrial Court and in view of the provisions of Sub-Article 165 (5) (b) of the Constitution and Subsections 12 (1) and (2) of the Act, the Industrial Court is also vested with the jurisdiction as follows:

- a) Unlimited original jurisdiction in disputes relating to employment and labour relations.
- b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights provided for in the Constitution of Kenya, 2010, as far as employment and labour relations is concerned, has been denied, violated, infringed or threatened.
- c) Jurisdiction to hear appeals from decisions of tribunals of competent jurisdiction in disputes relating to employment and labour relations.
- d) Jurisdiction to hear and determine any question respecting the interpretation of the Constitution in employment and labour relations including the determination of:
 - (i) the question whether any law is inconsistent with, or is in contravention of the

Constitution;

(ii) the question whether anything said to be done under the authority of the Constitution or of any other law is inconsistent with or is in contravention of the Constitution;

(iii) any matter relating to constitutional power of state organs in respect of county government and any matter relating to the constitutional relationship between levels of Government; and

(iv) a question relating to conflict of laws under Article 191 of the Constitution

The jurisdiction of the Industrial Court is therefore essentially the jurisdiction of the High Court as provided for in Sub-Article 165 (3) of the Constitution and with boundaries limited to the employment and labour relations as amplified in the Industrial Court Act, 2011. However, it is notable that the Constitution removes from the jurisdiction of the Industrial Court one aspect of employment and vests it in the exclusive jurisdiction of the High Court. Under Sub-Article 165 (3) (c), the High Court is vested with the exclusive jurisdiction to hear appeals from a decision of a tribunal appointed under the Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144 of the Constitution (being a decision by tribunal appointed for removal of the President on grounds of incapacity). Finally, the Industrial Court is vested with the jurisdiction, original or appellate, as may be conferred by any legislation with respect to employment and labour relations matters.”

Accordingly, the court holds that it has jurisdiction to hear and determine the petition.

The 7th issue for determination is whether the petitioner was entitled to move the court by way of a petition. The 2nd respondent relied on Harrikisson –Versus- Attorney General of Trinidad and Tobago (1980) AC 265 at 265, where the Privy council stated thus, “...The mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of court process....”

It was submitted that the petitioner had failed to establish actual or threatened breach of a right or freedom. The court has found that the petitioner has established that Article 28 was contravened and the petitioner’s human dignity was seriously undermined. The respondents adopted the strategy and attitude that they would, on two occasions (when service as Principal lapsed and service as acting Vice Chancellor lapsed), deal with the issues of payment of the petitioner’s terminal dues not in accordance with the contract but by invoking silence and making unfounded decisions and promises or silence in that regard. The court has found that to have been the respondents’ conduct that smacked the petitioner’s human dignity especially taking into account the top office he had held, the exemplary service he had rendered and the legitimate expectation for prompt payment of fair terminal dues.

The respondents spent considerable time urging that the petitioner ought to have filed an ordinary suit by way of an action and not a petition. Firstly, Article 159(2) (d) of the Constitution provides that in exercising judicial authority the court shall be guided by the principle that justice shall be administered without undue regard to procedural technicalities. Secondly, Article 23 (3) entitled the petitioner to seek declarations, injunction, conservatory orders, compensation and judicial review orders in the same pleading and process; so that in the opinion of the court, the dichotomy in moving the court based on the nature of reliefs has since been broken and litigants need not file more than one suit or to proceed exclusively by ordinary action or petition merely in view of the desired reliefs. Thirdly, Article 19(3) (b) declares that rights and freedoms in the Bill of Rights do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with the constitutional provisions on the Bill of Rights. Thus, the court holds that other rights and fundamental freedoms not in the Bill of Rights are incorporated into and as part of the constitutional Bill of Rights as they are equally rights and fundamental freedoms enforceable in accordance with and upon equal substantive and procedural pedestal as are the rights and fundamental

freedoms in the Bill of Rights. The court is directed in Article 20(3) (b) that in applying the Bill of rights, the court shall adopt the interpretation that most favours the enforcement of a right or fundamental freedom. The court has carefully considered all the cited and enumerated constitutional provisions. The court holds that a venture to distinguish the manner a litigant approaches or ought to approach the court merely on the basis of the remedy or the situ (prescription of the right or fundamental freedom as embedded in the Constitution or legislation or other formal source) of the right or fundamental freedom in issue is long dead under the former constitutional dispensation as the new constitutional order prescribes and favours universal approach towards the realization of the rights and fundamental rights irrespective their primary formal situ. In the opinion of the court, future measures of aligning court procedures to the new constitutional order will entail universal procedure for realization and enforcement of the rights and freedoms irrespective the formal source or residence of the right or fundamental freedom because the Constitution incorporates all as part of the Bill of Rights. If every dispute that comes to court entails enforcement of some legitimate right or fundamental freedom which the Constitution has incorporated in the constitutional Bill of Rights, then, in the court's opinion, time for a universal procedure by which parties should move the court has come and it would be pursuit in vanity to look for and attempt to sieve rights and fundamental freedoms that are expressly provided for in the Bill of Rights as was the case in the days of **Harrikson –Versus- Attorney General of Trinidad and Tobacco (1980) AC 265**. For the time being that the universal procedure is not in place, it is the opinion of the court that litigants will not be faulted for the option they shall adopt of the myriad procedural options that continue to peep their souls from the former constitutional dispensation to the new constitutional order.

The court has reflected upon the essence of the Bill of Rights. The court holds that the essence of the Bill of Rights and therefore every right or fundamental freedom is not some existence that is mysterious or alien to the rest of the justice system. Article 19 (1) provides that the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. Article 19 (2) provides that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of the individuals and communities and to promote social justice and the realization of the potential of all human beings. That is the essence of the Bill of Rights and it is the opinion of the court that as envisaged in Article 159(2) (d) of the Constitution, procedural technicalities should not be allowed to come in the way of realization of that essence of the Bill of Rights.

The court has revisited the prayers as made in the petition and makes further findings as follows:

1. The prayers based on the Public Universities Councils Consultative Forum (IPUCCF) negotiations shall fail as the petitioner did not show how the negotiations and the resolutions came to apply to his service in issue.
2. The petitioner was not entitled and was not appointed to serve for a term beyond the term he served as acting Vice Chancellor and the court finds that the prayer for benefits of Vice Chancellor for the remaining three years was misconceived and not justified.
3. The petitioner is entitled to annual leave allowance of Kshs. 50, 000.00 and passage and baggage allowance as per the terms and conditions of service and as prayed for.

In conclusion, judgment is entered for the petitioner against the respondents for:

1. A declaration that the respondents contravened the petitioner's inherent dignity and the right to have that dignity respected and protected as provided for in Article 28 of the Constitution.
2. The respondent to pay the petitioner a sum of money being:
 - a. pay in lieu of due leave not taken (30 days), pay of one month notice, and severance pay of 15 days salary for the one completed year served as a Principal;
 - b. 30 days annual leave, gratuity for two years being inclusive the year served as Principal, 15% acting allowance as Vice Chancellor from February 11, 2013 to June 18, 2013 and any unpaid salary until 18.06.2013; and
 - c. annual leave allowance of Kshs.50,000.00 and passage and baggage allowance as per the terms and conditions of service

3. The petitioner to file and serve the respondents the computed money as per order 2 above by 26.09.2014 and the matter to be mentioned on a date convenient to the parties for recording the quantum.
4. The respondent to pay the petitioner the amount in orders 2 and 3 by 1.11.2014, in default, interest to be payable at court rates from 10.06.2013, the effective date of end of the service, till full and final payment.
5. The respondents to pay costs of the suit.

Signed, dated and delivered in court at Nakuru this Friday, 19th September, 2014.

BYRAM ONGAYA

JUDGE