



**REPUBLIC OF KENYA**  
**INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 1200 OF 2012**

**PROFESSOR GITILE J. NAITULI .....CLAIMANT/APPLICANT**

**-VERSUS-**

**MULTI MEDIA UNIVERSITY COLLEGE ..... 1<sup>ST</sup> RESPONDENT**

**PROFESSOR WALTER OYAWA ..... 2<sup>ND</sup> RESPONDENT**

Dr. Kamau Kuria for Claimant/Applicant.

Mr. Ansare for Respondent.

**RULING**

The application was lodged by way of Notice of Motion dated 10<sup>th</sup> April, 2013. The Claimant/Applicant is seeking orders that:

- “1) That this Honourable Court be pleased to certify this application urgent.*
- 2) That the service of the application be dispensed with owing to the urgency of the matter.*
- 3) That the respondents be restrained by themselves, their servants and or agents from advertising in the media or in any other manner the claimant’s post of Deputy Principal (Finance and Administration) until trial or further orders of this Honourable Court.*
- 4) That the respondents be restrained by themselves, their servants and or agents from intimidating, harassing, frustrating the claimant until trial of further orders of this Honourable Court.*
- 5) That the respondents be restrained by themselves, their servants and or agents from interfering with the claimant’s discharge of his duties as Deputy Principal (Finance and Administration) pursuant to internal memorandum of the 1<sup>st</sup> Respondent dated 4<sup>th</sup> April, 2013 purporting to appoint Professor Charles Njoroje Acting Deputy Vice – Chancellor Administration & Finance until trial or further orders of this Honourable Court.*
- 6) That the respondents be restrained by themselves, their servants and or agents from interfering with the claimant’s discharge of his duties as Deputy Principal (Finance and Administration) under his five years contract of employment dated 8<sup>th</sup> February 2011 is*

*amended in July 2011 until trial or further orders of this Honourable Court.*

*7) That the respondents be restrained by themselves, their servants and or agents from interfering with the claimant's discharge of his duties as Associate Professor, Faculty of Business under his contract of employment dated 23<sup>rd</sup> June, 2010 until trial or further orders of this Honourable Court.*

*8) That the respondent be restrained by themselves, their servants and or agents from suspending the claimant or dismissing him until trial or further orders of this Honourable Court.*

*9) That the costs of this application be provide for.”*

Prayers 1 and 2 have been dispensed with.

The grounds on which the prayers are sought are found in the body of the application and may be summarized as follows:

- a. That the claimant was employed by the 1<sup>st</sup> Respondent in the position of Deputy Principal (Finance and Administration) under a five year contract of employment dated 8<sup>th</sup> February, 2011 as amended on 20<sup>th</sup> July, 2011.*
- b. That the claimant is also employed as an Associate Professor, Faculty of Business via a contract of employment dated 23<sup>rd</sup> June, 2010.*
- c. That his remuneration to serve in the two capacities was Kshs.780,183/= per month. This is reflected in annex JGN7 to the application.*
- d. By an internal memo dated 4<sup>th</sup> April, 2013 annexed to the application as annex 'JGN4' the 1<sup>st</sup> Respondent appointed one Professor Charles Njoroge – Ag. Deputy Vice Chancellor, Administration and Finance and one Professor Douglas Shitanda – Ag. Deputy Vice Chancellor Academic Affairs, Research, Production and Extension.*

*It was stated in the said memorandum that these were acting appointments and substantive Vice Chancellor and Deputy Vice Chancellors would be hired through a competitive process in line with the Universities Act and Charter.*

*The effect of these appointments was to replace the claimant as the Deputy Principal (Finance and Administration) and to leave him with the responsibility of Associate Professor Faculty of Business.*

- e. That the said act of 1<sup>st</sup> Respondent amounts to unlawful termination and a violation of the Claimants constitutional right to serve his full term of contract covering the full pay thereof.*

The respondent has responded to the Application by way of a replying affidavit deposed to by the 2<sup>nd</sup> Respondent **Professor Walter O. Oyawa** dated 23<sup>rd</sup> April, 2013 and filed on 24<sup>th</sup> April, 2013.

He states that he is the Vice Chancellor of the 1<sup>st</sup> Respondent and is well conversant and familiar with the facts giving rise to this dispute.

That the enactment of **Universities Act, 2012** and the granting of University Charter to **Multimedia University College** elevated the said college a fully fledged university distinct in law, structure and operations from the 1<sup>st</sup> Respondent (hereinafter the college).

That the institution sued by the Claimant no longer exists and the orders sought are mischievous, an abuse of the court process and in vain.

That the Universities Act, repealed the **Jomo Kenyatta University of Agriculture and Technology (JKUAT) Act** and the **Multimedia University College of Kenya Legal Order** that established the position of Deputy Principal (Finance and Administration) now repealed with the explicit result that the said position of Deputy Principal (Finance and Administration) then held by the Claimant ceased to exist anymore.

That this matter has been a subject of determination by Hon. Justice Rika in Cause No. 1200 of 2012 between the Claimant vs. the University Council, Multimedia University College of Kenya and Professor Walter O. Oyawa in a ruling dated 2<sup>nd</sup> November, 2012.

That an appeal dated 6<sup>th</sup> November, 2012 against the said decision is still pending before the Court of Appeal.

That in terms of Universities Act, 2012, and in particular **Section 76**, thereof, the 1<sup>st</sup> Respondent is obliged to appoint Vice Chancellors and Councils but does not provide for Deputy Principals which position no longer exist within the new university order.

That the action by the Claimant is only intended to embarrass the 1<sup>st</sup> Respondent and has not been brought in good faith.

That the remuneration of the Claimant has not been affected by the appointment of Acting Vice Chancellors pursuant to the new Act, and he continues to enjoy his full salary while doing his job as an Associate Professor.

That the Claimant's application be dismissed with costs.

The Claimant seeks several restraining orders against the Respondents. The issue for determination is therefore whether the Claimant/Applicant has satisfied the requirements for grant of an injunction.

In the case of **Giela v. Cassman Brown [1975] EA 358**, these were set out as follows:

- a. **The applicant must establish a prima facie case with a probability of success;**
- b. **The applicant must demonstrate that he will suffer irreparable harm which cannot be adequately compensated by an award of damages; and**
- c. **If the court is in doubt it should decide the application on the balance of convenience.**

The Court of Appeal in **Mrao v. First American Limited and 2 Others (2003) K.L.R.** defined a *prima facie* case to mean:

**“..... A case which on the material presented to court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.....”**

The grievance by the Claimant is that the Respondents have unlawfully by passed him by appointing **Professor Njoroge** as Acting Deputy Vice Chancellor (Finance and Administration) in that **Section 76 (2)** of the **University Act, 2012** provides that a Principal and Deputy Principal of a constituent college of a public university shall remain in office for the remaining period of his term. That the Claimant has three more years to serve. Respondents have not cast doubt on the ability of the Claimant to perform in the position of Deputy Vice Chancellor (Finance & Administration). Instead the Respondent states that the Claimant's position has become redundant by operation of the law.

**Section 76 (2)** however shows otherwise. The section has provided in mandatory terms that a person who held a position of principal of a constituent college of a public university shall remain in office for the remaining period of his or her term of office.

It is not contested that the Claimant held the position of Deputy Principal, Multimedia University College of Kenya for a period of five (5) years with effect from 8<sup>th</sup> February, 2011. The said contract is therefore due to expire on 7<sup>th</sup> February, 2016.

It is not in dispute that, by the time the University Act, 2012, became operational, the contract of the Claimant was still in place.

The Claimant has therefore established a *prima facie* case with a probability of success that there exists a right which has apparently been infringed by the Respondent as to call for an explanation or rebuttal by appointing Professor Njoroge as Acting Deputy Vice Chancellor (Finance and Administration) notwithstanding the protestation by the Claimant during the tenure of his contract of employment with the Respondent.

It is not enough for the Respondent to state that the Claimant's remuneration has not and will not be negatively affected by the change of his designation.

The fact of the matter is that he has been stripped of a leadership position and therefore has been effectively demoted. His career progression has been negatively affected in a manner that is not capable of correction by way of damages. The Claimant is a professor of long standing and repute. What is proffered to be an innocuous appointment is likely to stunt his career growth and development irrevocably.

The Claimant applicant has in the circumstance demonstrated that he will suffer irreparable harm if the application is not granted.

In the words of Justice Madan Ag. CJ, Aganyanya & Gicheru JJ. in **Githunguri v. Republic Criminal Appeal No. 271 of 1985 [1986] KLR** at page 16:

**“Anything which is the subject of perception or consciousness is a fact. The definition of fact (in the Evidence Act) does not restrict a fact to something which can be exhibited as a material object. The word proof seems to properly mean anything which serves, either immediately or immediately to convince the mind of the truth or falsehood of a fact or proposition. Absolute certainty amounting to demonstrations is seldom to be held in the affairs of life and we are frequently obliged to rely on degrees of probability which fall very short of it indeed.”**

I have no doubt in my mind that this degree of probability has been met by the Claimant in this case.

In this regard I have equally no doubt in my mind that prudence and convenience dictate that the Respondent await a bit longer to replace, if at all, the Claimant from the position he holds by virtue of his unspent contract and the provisions of the Universities Act, 2012.

Accordingly prayers 3 to 9 of the Notice of Motion dated 10<sup>th</sup> April, 2012 are granted.

***Dated and delivered at Nairobi this 13<sup>th</sup> day of August, 2013.***

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**

