



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. E103 OF 2020**

**UNIVERSITIES ACADEMIC STAFF UNION.....APPLICANT/PLAINTIFF**

**-VERSUS-**

**REGISTERED TRUSTEES OF MULTIMEDIA**

**UNIVERSITY COLLEGE PENSION SCHEME.....1ST DEFENDANT/RESPONDENT**

**JUBILEE INSURANCE COMPANY.....2<sup>ND</sup> DEFENDANT /RESPONDENT**

**THE KENYA ALLIANCE INSURANCE COMPANY.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**AND**

**RETIREMENT BENEFITS AUTHORITY.....INTERESTED PARTY**

**RULING**

1) The plaintiff/applicant took out the motion dated 7<sup>th</sup> September 2020 whereof it sought for the following orders:

*i. THAT this matter be certified as extremely urgent and service be dispensed with at this stage.*

*ii. THAT pending the hearing and determination of this application, an order of temporary injunction do issue, restraining the 2<sup>nd</sup> defendant/respondent by themselves, their servants, agents, workmen and/or any other person whomsoever and whatsoever from transferring the scheme funds or handing over any related documents and/ materials to the 3<sup>rd</sup> defendant/respondent.*

*iii. THAT pending the arbitration proceedings on the subject matter and determination, an order of temporary injunction do issue, restraining the 2<sup>nd</sup> defendant/ respondent by themselves, their servants, agents, workmen and/or any other person whomsoever and whatsoever from transferring the scheme funds of handing over any related guaranteed fund management documents and/materials to the 3<sup>rd</sup> defendant/respondent.*

*iv. THAT the award of the tender for provision of guaranteed fund management services under Ref: no. MMU/SPS/RFP/01/2020 and the subsequent appointment of the 3<sup>rd</sup> defendant/respondent as the new investment manager be stayed pending the hearing and determination of this application.*

*v. THAT the award of tender for provision of guaranteed fund management services under Ref: no. MMU/SPS/RFP/01/2020 and the subsequent appointment of the 3<sup>rd</sup> defendant/respondent as the new investment manager be stayed pending the hearing and determination of the Arbitration proceedings and award.*

*vi. THAT the 1<sup>st</sup> defendants/respondents be ordered to urgently convene an Annual General meeting of the members of Multimedia University Pension Scheme.*

*vii. THAT the instant dispute be referred to arbitration in terms of the trust Deed and Rules of Multimedia University Pension Scheme.*

*viii. THAT the costs be provided for.*

- 2) The applicant filed the affidavit sworn by Onesmus Maluki Mutio in support of the motion. When served with the aforesaid motion, the 1st defendant filed the replying affidavit sworn by Charles Wambugu to oppose the same. The 3rd defendant filed the replying affidavit sworn by Antony Kariuki to oppose the application. In response to the replying affidavits, the plaintiff/applicant filed a supplementary affidavit.
- 3) Mr. Mbaluto, learned advocate for the 2<sup>nd</sup> defendant indicated to this court that 2nd defendant would not participate in the hearing of the motion.
- 4) When the motion came up for hearing, learned counsels appearing herein were given time to make oral submissions.
- 5) I have considered the grounds stated on the face of the motion dated 7/9/2020. I have further considered the facts deponed in the affidavits filed in support and against the motion. I have also considered the rival oral submissions made by the 1st and 3rd defendants. It is the submission of Mrs. Rotich, learned advocate for the plaintiff/applicant that on or about the month of July 2020, members of Multimedia University Pension Scheme discovered that the defendants had issued a request for proposal for provision of guaranteed fund management services ref. no. MMU/SPS/RFP/ D1/2020 to specific firms and companies without advertising the same in flagrant violation of the public procurement laws.
- 6) The plaintiff further pointed out that the **Trust Deed** and **Rules of Multimedia University Pension Scheme** as well as the **Retirement Benefits Act** require trustees to inform members of the scheme about all crucial affairs of the scheme that are beneficial to members.
- 7) The plaintiff stated that upon discovering that this step had not been taken, it wrote to the chairman, Board of Trustees Multimedia University Pension Scheme demanding for the tendering process to be stopped and or an AGM to be convened within three (3) months so that members could deliberate on the issues at hand but the 1st defendant ignored the plaintiff's demand and continued with the tendering process amidst the Covid 19 pandemic.
- 8) The plaintiff stated that it was therefore prompted to write a letter to complaint to the Retirement Benefits Authority, the Interested Party herein, raising similar issues vide its letter dated 27.7.2020. It is said that the Interested Party responded to the 1st defendant vide its letters dated 13th August 2020.
- 9) The plaintiff further stated that it discovered that the 1<sup>st</sup> defendant appointed the 3rd defendant as the new manager of the scheme effective from 1st September 2020, but so far no funds have been released to the 2nd defendant.
- 10) It is stated that members of Multimedia University Pension Scheme are highly apprehensive that, the 2nd defendant is likely to transfer the scheme funds to the 3rd defendant unless an order is issued to halt such a move. It is argued that the members funds risk being mismanaged and or embezzled by the trustees without consultation with members and in violation of the public procurement laws.
- 11) The plaintiff further stated that it has declared a dispute before the chairman of Chartered Institute of Arbitrators for the dispute to be handled by an arbitrator as provided for under the Trust Deed and Rules governing Multimedia University College Pension Scheme.
- 12) It is further the submission of the plaintiff that unless this court intervenes to stop the 2nd defendant from transferring funds to the 3rd defendant, this suit together with the anticipated arbitration proceedings shall be rendered nugatory.
- 13) The 1<sup>st</sup> defendant opposed the plaintiff's motion by filing the replying affidavit of Charles Wambugu where it argued that the application is premature, misconceived, frivolous, devoid of merit and amounts to an abuse of the court process. It is pointed out that under PART IV of the Retirement Benefits Act, a dispute resolution mechanism is provided to adjudicate on disputes relating to any decisions taken by the 1st defendant in relation to management and administration of Multimedia University Pension Scheme.

14) The 1<sup>st</sup> defendant further pointed out that any member who is dissatisfied by the decision of the 1<sup>st</sup> defendant may request in writing for a review of the said decision by the Chief Executive officer of the Retirement Benefits Authority under Section 46 of Retirement Benefits Act and that an appellate process is provided for under Section 48 of the same Act against the decision of the C.E.O, Retirement Benefit Act to the appeals Tribunal within 30 days from the date of the decision.

15) The 1<sup>st</sup> defendant argued that the plaintiff became impatient and went ahead to file this suit yet it had already filed a complaint before Retirement Benefit Authority and the same is still pending determination hence this suit is premature.

16) It is also the submission of the 1<sup>st</sup> defendant that it is bound to discharge its mandate in the management of the Multimedia University Pension Scheme in accordance with the provision of the Retirement Benefits Act, the Trust Deed and Rules.

17) The 1<sup>st</sup> defendant argued that the Trust Deed does not provide that the 1<sup>st</sup> defendant is required to consult, involve or seek approval from the members of Multimedia University Staff Pension Scheme in the appointment and removal of the administrator of the scheme.

18) The 1<sup>st</sup> defendant also denied that it breached any public procurement laws. It is stated that under Section 102 of the Public Procurement and Asset Disposal Act (2015), restricted tendering is allowed and that is the provision the 1<sup>st</sup> defendant said it used in the tendering process for the guaranteed fund management services.

19) The 3<sup>rd</sup> defendant on its part filed the replying affidavit of Antony Kariuki to oppose the applicant's motion. The 3<sup>rd</sup> defendant pointed out that the plaintiff does not represent non-academic staff members of Multimedia university therefore this suit should not be used to hold those members at ransom. It also argued that the plaintiff does not deserve the orders sought because it did not exhaust the available dispute resolution mechanism provided under Retirement Benefits Act.

20) In response to the respondents arguments, the plaintiff admitted that it lodged its complaints to three different bodies namely: **Chairman, Chartered Institute of Arbitrators, Nairobi Chapter, Public Procurement Oversight Authority** and **the Retirement Benefits Authority**. Mrs. Rotich argued that the fact that a complaint is pending for determination before the Retirement Benefits Authority did not bar the plaintiff from approaching this court to refer the dispute to arbitration.

21) Having considered the material placed before this court and having taken into account the rival oral submissions of learned counsels, it is apparent that the 1<sup>st</sup> defendant admits that it did not undertake any consultation in the tendering process. The 1<sup>st</sup> defendant further admits that it undertook the tendering process by restricted tender. It is also not in dispute that the plaintiff filed a complaint before the **Retirement Benefits Authority** and that the same is still pending determination. The question is whether the pendency of the dispute before the **Retirement Benefits Authority** is a bar to the plaintiff from approaching this court to issue conservatory orders and thereafter refer the dispute to arbitration.

22) With respect, I am persuaded by the submission of Mrs. Rotich that the plaintiff is not barred from approaching this court by the pendency of a complaint before the Retirement Benefits Authority. This suit is therefore not premature but is properly before this court.

23) A careful perusal of the procurement laws will reveal that the 1<sup>st</sup> defendant is bound to carry out proper consultation in the procurement process. I am satisfied that the Trust Deed stipulates that such disputes be referred to arbitration and the defendants did not contest this assertion.

24) In the end, I am convinced that the plaintiff has shown that it has a prima facie case with probability of success. The motion dated 7th September 2020 is found to be meritorious. Consequently, it is allowed giving rise to issuance of the following orders:

a) **An order of temporary injunction is hereby issued restraining the 2<sup>nd</sup> defendant/respondent by itself, its servants, agents,**

workmen and/or any other person whomsoever and whatsoever from transferring the scheme funds or handing over any related guaranteed fund management documents and/materials to the 3<sup>rd</sup> defendant/respondent pending the hearing and determination of arbitration proceedings on the subject matter.

b) The award of tender for provision of guaranteed fund management services under Ref: no. MMU/SPS/RFP/01/2020 and the subsequent appointment of the 3<sup>rd</sup> defendant/respondent as the new investment manager be stayed pending the hearing and determination of the Arbitration proceedings and award.

c) The instant dispute is hereby referred to arbitration in terms of the Trust Deed and Rules of Multimedia University Pension Scheme

d) In the circumstances of this case a fair order on costs is to order which I hereby do that each party bears its own costs.

Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 27<sup>th</sup> day of November, 2020.

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Applicant

..... for the Respondent