



REPUBLIC OF KENYA

High Court at Eldoret

Miscellaneous Civil Application 38 of 2005

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26 LAWS
OF KENYA**

AND

IN THE MATTER OF THE MOI UNIVERSITY ACT AND STATUTES

AND

**IN THE MATTER OF THE PROCEEDINGS BEFORE THE MOI UNIVERSITY COUNCIL
(APPEALS BOARD)**

BETWEEN

REPUBLIC

EXPARTE

WILLIAM KIPSANG ROTICH.....APPLICANT

AND

THE MOI UNIVERSITYRESPONDENT

JUDGEMENT

The Notice of Motion dated 11th April 2005 was brought under Order LIII Rule 3(1) of the Civil Procedure Rules. The Applicant, William K. Rotich is seeking the following orders that:-

1. An Order of Certiorari to bring before this Honourable Court forthwith proceedings and decision of (Moi University Appeals Board) relating to the Applicant for scrutiny and that the said decision be squashed.
2. An Order of Mandamus compelling Moi University to reinstate and enforce the decision of the Senior Staff Disciplinary Committee regarding the Applicant.
3. That the Council of Moi University be condemned to pay the costs arising from and incidental to the proposed proceedings.

The Application is based on the following ground:

(a) Moi University Council (Appeal Board) in upholding the decision of Moi University Council (unlawfully and procedurally arrived at) without affording the Applicant an opportunity to be heard and directing the conversion of the penalty imposed by the Senior Staff Disciplinary Committee from one of the reinstatement on terms to termination the Board inadvertently or otherwise adoptively sanctioned the breach of Rules of Natural Justice, the provisions of Moi University Act, Statutes and Regulations and Consequently the decision is null and void.

The Motion is supported by an affidavit sworn by the Ex-parte Applicant and the Statement of facts.

The Application is vigorously opposed by the University. Dr. James K. Sang, Chief Administrative Officer of Moi University swore an Affidavit on 4th May 2005 which was filed in Court on 5th May 2005.

The Ex-parte Applicant travelled to Catholic University Nijmegen, Netherlands on 22nd May 2000 for the purpose of coordinating the improvement of transport and garage services at Moi University commonly referred to as the HMO Project which was funded by the Nijmegen University. He was accompanied by two assistants, namely Vincent Cheloti (transport officer) and Robert Ngetich (garage administrator). The trip was funded by the Nijmegen University.

The Ex-parte Applicant while in the Netherlands purchased a second hand tractor MF 265 Masey Ferguson using his own private funds at a cost of United States America Dollars \$4,966. The funds were transferred from Eldoret Branch of Barclays Bank to the Netherlands. Mr. Rotich returned to Kenya on 26th June 2000 while his two colleagues had returned two weeks earlier.

The Ex-parte Applicant further asserts that the University of Nijmegen donated an assortment of garage equipments to Moi University and shipped the consignment to Kenya. He further stated that he had requested Mr. Van Bamwel of University of Nijmegen, if they could ship the tractor in the container that was used to ship the donated items for Moi University. Dr. Van Bamwel agreed but this was subject to availability of space. Space was found and the tractor was shipped in the container containing the donations from University of Nijmegen to Moi University.

By delivery order dated 13.2.2002, the consignment arrived at port of Mombasa and was cleared by Diamond Shipping Services Limited, and collected by a purchasing officer on behalf of Moi University in February 2002.

On 5th and 6th March 2002, the tractor was taken out of the container and the Ex-parte Applicant drove it to his house within Moi University. He claims that he has informed the security personnel present during offloading that the tractor was his and that he was taking to his house.

Dr. Sang, the chief administrative officer, directed him to return the tractor as it was the university property. The Ex-parte Applicant differed with his boss over the ownership of the tractor. He saw it as a private property which was bought with privately sourced funds and was not part of the donations to Moi University.

On 28th March 2002, Dr Sang wrote an internal memo Ref MU/ADM/7/25 (“Exhibit D”) to Mr. Rotich:

“RE: CONSIGNMENT OF GOODS FROM UNIVERSITY OF NIJMEGEN

Refer to our conversation of 26th March, 2002 about the above mentioned goods. According to a letter dated 20th December 2001 J.A. Roeterdink certified that the goods were a gift from the University of Nijmegen to Moi University and were meant for the University Garage project.

However, the consignment received included a tractor which as far as we are concerned belongs to the University but has never been seen at the University Garage.

Can you give an explanation as to the whereabouts of the tractor? Also, explain why you have not written to the Vice Chancellor about the same. Your explanation should reach this office not later than 2nd April, 2002”.

The Ex-parte Applicant replied (“Exhibit F”) on the same date and read in part as follows:

“SUBJECT: CONSIGNMENT OF GOODS FROM UNIVERSITY OF NIJMEGEN

Kindly refer to your memo MU/ADM/7/25 of 28th March 2002 on the above subject matter. Find herewith the Act of donation from J. Roeterdink on the donated equipment. The tractor is not one of the items listed as a donation or gift as previously implied.

The tractor was sourced privately and outside the project premise and paid for, insurance inclusive, as shown on the ownership documents herewith attached (document 4). The Catholic University of Nijmegen allowed me free space in their container to transport the tractor on request”.

There were claims and counterclaims between Dr. Sang and the Ex-parte Applicant, Mr. Rotich. The University of Nijmegen wrote (“Exhibit H3”) in an attempt to clear the issue wrote that **“from the project documents and the financial budgets, it is clear that no tractor was a part of the project”**. It also made statement when it became clear that Moi University was claiming ownership. It wrote (“Exhibit H2”) thus **“this statement is to confirm that the small tractor which was on the Bill Lading for the 2nd project container....does not belong to the donated project goods and was not purchased out of project funds”**.

The matter then took a different turn. The Ex-parte Applicant was accused of insubordination and misconduct. He was suspended on half salary by a letter dated 28th May 2002 and signed by Dr. Sang. It read in part:

“Reference is made to our memos dated 28th march 2002 and 4th April 2002 from this office Ref. MU/ADM/7/25 and the matter raised therein.

In the said memos it was clearly noted that you imported personal items using Moi University name without express authority from the Vice Chancellor or the undersigned.

When the said items was discovered missing in the container, you were requested to give an explanation through the above mentioned memos which to date you have not adequately responded to.

Please note that the aforesaid amounts to abuse of office, professional misconduct and insubordination on your part as stated in clause 25 (1) (b) and (c) of the terms of service for Senior Academic, Senior Library and Administrative Grades.

It was therefore been decided that you be suspended from office with effect from the date of this letter, pending the hearing and determination of your case by Staff Disciplinary Committee on a date to be communicated to you”.

The Ex-parte Applicant contends that he was summoned before the Senior Staff Disciplinary Committee on 21st February 2003 in which Dr. Sang is the Secretary. Dr. Sang sat in the said Committee despite the Ex-parte Applicant’s protests. The Committee made its decision on 10th April 2003, but the decision was not made known or communicated to the Ex-parte Applicant until he appeared before the Appeals Board on 8th October 2004.

The decision of the Committee was that the Ex-parte Applicant should:-

(a) Pay the clearing and shipping costs and other expenses apportioned to him of Kshs. 28,227/=. He was given 14 days to come up with the fine.

- (b) *Apologize in writing to the University Management on the insubordination charge.*
- (c) *Bring the tractor back to the Garage to enable the University formalize its release.*
- (d) *Be served with final warning letter.*
- (e) *Apply to be paid ½ salary, which had been withheld during suspension period, if he fulfills the above conditions.*

As the secretary to the Disciplinary Committee, it was the responsibility of Dr. Sang to communicate the decision to the Ex-parte Applicant but that decision was never communicated.

The case against the Ex-parte Applicant by Moi University is that the University is involved in a project (HMO project) funded by the government of Netherlands through the Nijmegen University. In March 2002, Moi University received a consignment that included a tractor. That the Ex-parte Applicant in disregard of the Respondent University procedure removed from the delivery container, the tractor and took it away to his house. Despite several requests for return of the tractor, the Applicant refused to obey orders of a Superior officer. He was suspended from duty and was subjected to the Moi University disciplinary procedure which led to his suspension ultimately his dismissal.

In his affidavit dated 4th May 2005, Dr. Sang depones that the Applicant was suspended, and was then invited to attend the senior staff disciplinary committee of council meeting held on 27th February 2003. That he appeared before the Committee with an advocate. He further deponed that in accordance with the university statutes, all proceedings of council committees are subject to confirmation or variation by the full university council. He reiterated that the full council considered the report of the disciplinary committee and varied the decision of the committee to a termination of services with respect to the Ex-parte Applicant.

Clause 6 of the Statute XX of the Moi University states:

“There shall be Disciplinary Committee of Council which shall consider all disciplinary cases of members of staff provided that the council shall have the right to invoke the provisions of the Employment Act CAP 226 of the Laws of Kenya) as may be appropriate.”

The Ex-parte Applicant’s appeals the Appeal board within the university system failed and he was issued with a letter of termination dated on 13th January 2004 which read in part:

“The Senior Staff Disciplinary Committee meeting of council held on 12th February 2003 found guilty of subordination and gross misconduct for importing personal items using Moi University’s name without express authority from the Vice Chancellor or the Chief Administration Officer Contrary to Clause 25 (1) (b) and (c) of the Terms of Service for Academic, Senior Library and Administration Grades.

This was conduct that was considered scandalous and disgraceful by Council rendering you unfit to continue to hold office in Moi University. This decision was ratified by Council on 5th November 2003, your services with Moi University therefore have been terminated in accordance with Statute XX (4) (d) (iii). In order for you to clear with the University, Council recommended that you:-

- ***Pay Kshs. 28,227.00/= being clearing and shipping costs and other costs apportioned to you in the said importation within 14 days from the date hereof.***
- ***Bring back the tractor to the garage to enable the University to formalize the release of the same”***

It is the Ex-parte Applicant’s contention that he was not offered an opportunity to be heard and thus his

dismissal by the Appeal board was unprocedural. That is why the Ex-parte Applicant filed this motion seeking help from the court.

I have carefully read the pleadings, the affidavit and the submissions. I have also carefully perused exhibits before the Court.

The University knew that the tractor at the centre of contention was not theirs. It was communicated to them in several letters by the Catholic University of Nijmegen, Netherlands. But Dr. Sang was not satisfied because he wanted the tractor back in the University's garage for what the Moi University called 'formalize release,' whatever that entails.

In having Dr. Sang, whose office was in the epicenter of the Respondent's drive to have the tractor back, sit in the disciplinary hearings of the Applicant is one that gave the appearance that a lawful authority was abused by the unfair treatment of the Applicant.

Judicial review is about procedure and fairness of the process and whether an administrative body has acted within the principles of natural justice.

The minutes of the Senior Staff Disciplinary Committee dated 27th February 2003 clearly show that it recommended that the Ex-parte Applicant be reinstated. That decision was deliberately withheld from the Ex-parte Applicant and never communicated to him. The Ex-parte Applicant's appeal to the Appeals Board should therefore never have been there.

The Committee heard a complaint from the Chief Administrative Officer, Dr. Sang. The Committee sat and held a hearing, deliberated and ruled that Mr. Rotich be reinstated on some conditions.

I agree with Mr. Machio the learned Counsel for the Exparte Applicant that the decision was surreptitiously placed before the Appeals Board. It is not clear what process the Chief Administrative Officer placed the matter before the Appeals Board before communicating the decision of the Committee to the Ex-parte Applicant. Dr. Sang had all the reasons to withhold the favourable committee decision. Dr. Sang says in his affidavit that every decision is subject to ratification of the full council but how did the Ex-parte Applicant then appeal to the Appeals Board.

The Appeals Board's decision was a reversal of the decision of the committee and communicated in the letter of dismissal as a ratification of the previous decision favouring the Ex-parte Applicant. At the committee hearing, the Ex-parte Applicant was afforded the right to have his counsel or friend as provided under statute 20 present. He was not offered such opportunity to be heard fairly, reasonably and to be charged correctly.

In the case of **GENERAL MEDICAL COUNCIL V. SPACKMAN [1943] 2 ALLER 337**, Lord Wright at page 345 stated thus:-

“If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared no decision”.

It was further said in the case of **RIDGE V BALDWIN [1963] 2 ALLER 66** in which Lord Reid said at page 81 that:

“Time and again the cases I have cited it has been stated that a decision given without the principles of natural justice is void”.

The disciplinary bodies of the Moi University have failed to act judiciously, to be fair and just in their role to hear the Exparte Applicant's disciplinary matter. I am convinced that this failure was substantially brought about by the partisan role played by Dr. Sang. It appears that Dr. Sang's office is the complainant and he is the secretary to the disciplinary committees.

It is my humble opinion that the process leading to the termination of the Ex-parte Applicant's service was improper, oppressive and wrong.

I grant all the prayers sought in the Notice of Motion dated 11th April 2005 with costs.

DATED AND SIGNED AT NAIROBI ON THIS 23RD DAY OF AUGUST 2012

M. K. IBRAHIM
JUDGE

DATED AND DELIVERED AT ELDORET ON THIS 17TH DAY OF OCTOBER 2012

F. AZANGALALA
JUDGE

In the presence of: Mr. Yego holding brief for Mr. Songuk for Respondent