REPUBLIC OF KENYA

HIGH COURT AT NAKURU

Civil Suit 6 of 2007

JOSEPH G. NAITULI…….....…..……..PLAINTIFF

VERSUS

EGERTON UNIVERSITY……..……1ST DEFENDANT

JAMES K. TUITOEK…….....….2ND DEFENDANT

RULING

On the 11th January 2007 the plaintiff filed suit against the defendants seeking the following orders of this court:

(a) A declaration that the plaintiff's suspension was illegal and the purported final warning contained in the letter of his reinstatement to employment is null and void.

(b) The 1st defendant be ordered to lift the plaintiff's suspension unconditionally and pay him his salary and allowances arrears in full.

(c) The 2nd defendant be restrained from unlawfully, unilaterally and maliciously using his office to intimidate, harass, frustrate and/or in any other way interfere with the plaintiff's employment.

On the 5th February 2007, the plaintiff filed an application under the provisions of **Order XXXIX rule 1, 2, 3** and **9** of the **Civil Procedure Rules** and **Section 3A** and **63(e)** of the **Civil Procedure Act** seeking the following orders of this court, namely;

(i) That pending the hearing of the application inter partes, a temporary injunction do issue barring the defendants either by themselves, their agents, servants or otherwise howsoever from convening a Council Disciplinary Committee, discussing and or subjecting the plaintiff to a disciplinary action on the issues still pending before this court until further orders of the court.

(ii) That the defendant, either by themselves, their agents, servants or otherwise howsoever be

restrained from convening a Council Disciplinary Committee, discussing and or subjecting the plaintiff to a disciplinary action pending the hearing and determination of the suit.

The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the plaintiff, Dr. Joseph G. Naituli. The application is opposed. The 2nd defendant has sworn a replying affidavit in opposition to the application. The plaintiff swore a further affidavit in response to the replying affidavit sworn by the 2nd defendant.

At the hearing of the application, I heard the rival submissions made by Mr. Orina on behalf of the plaintiff and by Mr. Kisila on behalf of the defendants. I have read the pleadings filed by the parties to this application. I have further carefully considered the arguments made before me by the learned counsel for the plaintiff and for the defendants. I will set out the background and the facts leading to the filing of the suit as per the pleadings filed by the parties to this suit and thereafter I shall address the issues raised thereto for my determination. The plaintiff is employed as a lecturer by the 1st defendant. From the correspondences annexed to his application, the plaintiff was a lecturer at the Njoro campus of the 1st defendant before he was transferred to the Kisii campus college. Sometime in October 2006, lecturers of public universities who are members of the UASU, a union of academic staff of the said public universities called a strike in a bid to secure better terms and conditions of employment from the said public universities. The said strike was declared illegal by the said public universities. Some academic staff members of the 1st defendant participated in the said strike. From the affidavit of the 2nd defendant, it is apparent that the 1st defendant came to the conclusion that the plaintiff had participated in the said illegal strike due to the fact that allegations were made that the plaintiff had failed to teach the subject that he was assigned to teach during the material time that the industrial action had been called by the members of UASU. In his supporting affidavit, the plaintiff denied that he was a member of UASU. He further denied that he had failed to teach the subject that he was assigned to or that he had participated in the strike.

The 1st defendant suspended the plaintiff from duty on the 25th October 2006 for being absent from duty without authority. The plaintiff was summoned to appear before a Disciplinary Committee convened by the 1st defendant's University Council. The Disciplinary Committee meeting was convened on 27th November 2006. The plaintiff appeared before the said Disciplinary Committee and defended himself. On the 28th November 2006, the Council Disciplinary Committee rendered its decision. It lifted the suspension of the plaintiff but gave him a final warning. The plaintiff was warned that if he committed another offence he would be liable to be summarily dismissed from employment. The plaintiff was ordered to resume duty.

It is apparent from the correspondences that were exchanged between the 2nd defendant and the Principal of the Kisii College Campus of the 1st defendant that the plaintiff did not resume his duties as he was expected to on 4th December 2006. On the 22nd December 2006, the plaintiff was again suspended from employment for being absent from duty without lawful authority. The plaintiff was required to give a written response why he had failed to attend his duties without lawful authority. Another Council Disciplinary Committee meeting was to be convened on the 7th February 2007. The plaintiff was summoned to attend the said Council Disciplinary Committee. The plaintiff did however obtain *ex parte* orders of this court on the 6th February 2007 restraining the Council Disciplinary Committee from convening the said disciplinary meeting pending the hearing and determination of this application.

The plaintiff has complained in his affidavit in support of this application for injunction that the defendants, and particularly the 2nd defendant, had acted with malice during the entire saga. The plaintiff denied that he had absconded from duty at the material time or that he had participated in the illegal strike. He further deponed that although he had successfully defended himself when he was summoned to appear before the Council Disciplinary Committee, the minutes of the said Disciplinary Committee had been manipulated and changed to his detriment. He deponed that he was shocked to be informed that he had been given a final warning by the Council Disciplinary Committee when in fact according to the information that he had received from some members of the council he had been exonerated from the

charge of absenting himself from duty without due authority. He further deponed that he was apprehensive that the Council Disciplinary Committee would not reach a fair decision because he had a long standing '*misunderstanding'* with the 2nd defendant due to the fact that he had blown the whistle on the corrupt activities that were taking place at the university. The plaintiff argued that this court should restrain the Council Disciplinary Committee from convening the said Disciplinary hearing pending the hearing and determination of this suit. It is the plaintiff's further contention that by convening the Council Disciplinary meeting on the 7th February 2007, during the pendency of this suit, the defendants were in breach of the *sub judice* rule.

These are the brief facts of this case as can be gleaned from the pleadings filed by the parties to this application. The plaintiff has sought an order of this court to restrain the defendants by means of a temporary injunction from convening any Council Disciplinary Committee meetings to discipline him. The principles to be considered by this court in deciding whether or not to grant an order of injunction sought are well settled. The plaintiff must establish that he has a prima facie case with a likelihood of success when the case will finally be heard on merits. He must also establish that he would suffer irreparable loss or damage which may not likely to be compensated by an award of damages. And finally, if the court is in doubt, it may decide the application on a balance of convenience (*See* **Giella –vs- Cassman Brown [1973] E.A. 358)**.

In the present application, the subject matter of the suit and hence the application is the Disciplinary proceedings which have been commenced by the 1st defendant against the plaintiff. The plaintiff is of the opinion that he would not get a fair hearing should the said Disciplinary Committee proceedings take place. Can this court restrain the 1st defendant from convening the said Council Disciplinary Committee hearings?

The plaintiff is an employee of the 1st defendant. The contract that exists between the plaintiff and 1st defendant is basically a service contract. As was held by the Court of Appeal in the case of **Eric V. J. Makokha and Others –vs- Lawrence Sagini and Others CA Civil Application No. Nai 20 of 1994 (12/94 UR) (***unreported***),** an employment agreement is basically an agreement in the nature of personal service. Parties to an employment agreement cannot be forced to continue into an employment relationship when one party obviously does not desire to continue such a relationship. By its very nature, an employment agreement gives leeway to either party to terminate the relationship in the event that he desires to do so. The plaintiff was employed by the 1st defendant under the terms and conditions of service for the Senior Academic, Library and Administrative Staff. A copy of the said terms was annexed in the replying affidavit of the 2nd defendant and marked '*JKT 3'*. Paragraph 15 of the said terms and conditions of service provides for a disciplinary mechanism in the event that a staff member is found to have breached any of the terms of the employment agreement. The said terms and conditions of service of Senior Academic Staff were made pursuant to **Statute XIII** of the Egerton University. **Statute XIV** of the University sets up the University Council, which, *inter alia,* has the power and mandate to discipline members of the University academic staff who are found to have breached the terms and conditions of employment. It is therefore clear that the University Statutes provides for a disciplinary mechanism in the event that a member of staff is alleged to have breached the terms of his employment.

The plaintiff in this case does not wish to appear before the said Council Disciplinary Committee before ventilating his case before this court. The plaintiff has argued that if the said Disciplinary Committee is convened it would be in breach of the rules of *sub judice*. The question that this court asks itself is this; if the 1st defendant breaches its own statutes and terminates the plaintiff from employment, would this court order the 1st defendant to reinstate the plaintiff back to employment? I do not think so. As stated earlier in this ruling, the agreement that exists between the 1st defendant and the plaintiff is of personal service. This court cannot be called upon to enforce a contract in the nature of personal service. Similarly, this court cannot be asked to injunct an employer who desires to discipline its staff members. In any event, there is no other disciplinary mechanism provided under the statutes of the 1st defendant that the plaintiff can invoke other than the one that provides that he should appear before the Council Disciplinary Committee. As was held by Akiwumi J. in **Gitao & 5 others –vs- Kenya National**

Chamber of Commerce and Industry [1990] KLR 360, a court of law cannot issue an injunction whose effect would be to undermine the internal decision making process of a body established by statute.

In the present application, if this court issued the injunction to restrain the Council Disciplinary Committee from conducting the disciplinary hearing in respect of the alleged breach of terms and conditions of service by the plaintiff it would amount to the court's interfering with the internal management of the 1st defendant. As stated earlier in this ruling, the plaintiff and the 1st defendant entered into a contract for personal service which either party is at liberty to terminate at any time. This court cannot interfere with the disciplinary mechanism established under the statutes of the 1st defendant unless it is alleged that there would be breach of the rules of natural justice. In such circumstances, an aggrieved party would be at liberty to apply for judicial review and not seek an order of injunction to stop the said disciplinary proceedings from taking place.

In the premises therefore it is clear that the plaintiff has not established a prima facie case that he is entitled to the order of injunction sought. This court does not have jurisdiction to stop the Council of the 1st defendant from disciplining its employees. This court lacks any powers to direct or order parties who have entered into a service contract to perform the said service contract or to perform it in a particular manner. As was held by Akiwumi J., the Lord President of the COMESA Court of Justice in the case of **Muleya –vs- Common Market for Eastern and Southern Africa & Another (2) [2003] 2 EA 623** an employee cannot seek any declaration from a court of law against his employer. He stated at page 625 as follows:

"***An employee 'who is wrongfully dismissed will generally not be able to obtain a declaration except, perhaps, in special circumstances'*** *(See The Law of Termination of Employment by Robert Upex (5 ed.) Sweet & Maxwell [1997] at page 373 paragraph 10.82)* '***where mutual confidence, which is not the case here, continues to subsist between the parties'*** (*See Hill vs CA Parsons and Company Limited [1972] Ch.D 305*) ***I have considered the dictum of Lord Reid in*** *Ridge vs Baldwin [1964] AC 40* ***referred to in the summary of the points of law submitted by the applicant's advocate and have this to add that Lord Reid in the same judgment also said: 'there cannot be specific performance of a contract of service.'*** *Fry LJ in De Fransesco vs Barnum [1890] 45 Ch.D 430 at page 438 stated:*

'I should be very unwilling to extend decisions the effect of which is to compel persons who are not desirous of maintaining continuous personal relations … the courts are bound to be jealous lest they turn contracts of service into contracts of slavery; and … I should lean against the extension of the doctrine of specific performance and injunction in such a manner.'"

The upshot of the above reasons is that the application for injunction lacks merit and its hereby dismissed with costs. The interim orders which were earlier granted by this court are hereby vacated.

DATED at NAKURU this 11th day of May 2007

L. KIMARU

JUDGE