REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1312 OF 2014

UNIVERSITY ACADEMIC

STAFF UNION ……...…….…….. CLAIMANT

VERSUS

MASINDE MULIRO UNIVERSITY OF

SCIENCE & TECHNOLOGY ……..….. RESPONDENT

Mr. Otieno for Claimant / Applicant

Mr. Moleje for Respondent

RULING

1. By a Notice of Motion dated 7th August 2014 and filed on 8th August 2014, the Claimant / Applicant sought inter-alia orders that;

Pending the hearing and determination of this Application, a temporary injunction do issue restraining the Respondent from undertaking disciplinary proceedings against one Robinson Oduma (a union official) for any acts or omissions arising from the strike that had been called by the union between 12th March 2014 and 19th March 2014.

A similar order was sought pending the hearing and determination of the main suit.

Interim orders were granted on 18th August 2011, pending the hearing of the Application inter-parties.

2. Simultaneously with the Application was filed a Statement of Claim seeking;

A permanent injunction restraining the Respondent from commencing and undertaking the intended disciplinary hearing against Robinson Oduma; and

A declaration that the action of the Respondent in communicating or undertaking disciplinary proceedings against Mr. Robinson Oduma is unlawful and in breach of the contract made on 19th March 2014.

3. **Reply**

The Application is opposed by a replying Affidavit of Professor Fredrick Otieno.

The nub of the opposition is that Mr. Oduma engaged in misconduct during the strike, which entitles the Respondent to commence disciplinary action against him individually notwithstanding the '*Return-to-work Formula'* concluded on 19th March 2014 which states inter-alia'

> *"6 There shall be no victimization on either party and no employee shall suffer loss of earnings over the period of work stoppage."*

4. A notice to show cause dated 17th July 2011 titled professional misconduct was written to Mr. Robinson Oduma the Grievant. It alleges that on 18th March 2014, he maliciously damaged food worth Kshs.24,884,80 being the property of the Respondent contrary to ***Section 44(4) (g)*** of the Employment Act, 2007 and part II ***Section 11(4)*** of the Code of Conduct and Ethics for Public Universities (2002).

5. Similar notices were sent to Fredrick C. Kaino, Peter O. Obonyo, Caleb Ndanyo on diverse dates but for the same offence, as seen from the Report of the Security Officer written to the Vice Chancellor on 18th March, 2014.

6. It is claimed that the alleged action of contaminating food was done by many employees in the course of the strike action when workers stormed the main catering unit (MCU).

From the report, the contamination was done by '*striking staff*' by pouring water, charcoal and detergent to the food which was almost ready to be served for lunch.

The cost of the damaged food was estimated to be 24,884.80.

7. The Grievant replied to the show cause letter denying the allegations in the show cause letter. The Reply is Appendix 6 to the Reply and is dated 19th May 2014.

8. **Grounds for the Application**

The main reason it is sought to stop intended disciplinary action, is that the alleged misconduct happened in the midst of the strike action and cannot be attributed to one individual.

9. The targeted Grievant is an official of the union and necessarily was in the cause of lawful duties at the time of the strike action.

That the intended action was simply aimed at intimidating the union officials, especially the Grievant.

10. That the alleged conduct was subject of conciliation by the parties as seen in Annex *'JMNI' 'The Return-to-work Formula'* in which the Claimant union and the Respondent University as a measure to forestall hostilities and bring the strike to an end inter-alia agreed that there *"shall be no victimization on either party"* arising from the strike action.

11. Though the document is couched in vague and general terms, its intention was;

i. to reconcile the parties and bring the strike action to an end;

ii. not to subject members of the union to any disciplinary action on matters arising from the resolved strike action;
iii. the University on its part to implement the matters that had led to the strike set out in items one (1) to six (6) in the *'Return-to-work Formula.'*

12. The Court notes that;

'Return-to-work Formula' documents are often signed in extra- ordinary circumstances when employees have withdrawn labour or employees have been locked out of employment.

One does not expect the documents to be elegantly drawn due to the pressure that appertains in the prevailing circumstances.

These are documents drawn and executed in utmost good faith and in majority of situations the *'Return-to-work Formula'*, have brought peace and industrial harmony at the workplace.

Accordingly, due to their proved efficacy, the Court does not take *'Return-to-work Formula'* documents lightly.

13. The Court holds the parties herein, are bound by the terms and conditions of the *'Return-to-work Formula'* and will construe the intent of the parties from the General purpose discerned on the face of the document, where the wording is vague as in this case.

14. The Claimant union called off the strike in good faith believing that the matters agreed upon shall be observed. The most key component of a *'Return-to-work Formula'* is to achieve an end to the strike and to protect those who called the strike (union members) from victimization for anything wrong they may have done during the hostilities.

15. A measure of relative forgiveness is always implied on the part of either party to *'A Return-to-work Formula.'*

The efficacy of the document is derived from this spirit of forgiveness and good faith.

16. Accordingly, the Applicant has established a *prima facie* case with a probability of success to warrant the Court to confirm the temporary injunction issued by the Court pending the hearing and determination of the suit.

17. Secondly, given the content of the *'Return-to-work Formula'*, while avoiding to make a decision on the merits of the main suit, the Court is satisfied that the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages if the injunction is not confirmed.

18. It is important to uphold and maintain the sanctity and efficacy of collective bargaining agreements especially in forestalling hostilities at the workplace.

Equally, the balance of convenience is in favour of the Applicant.

19. Given the nature of the remedy sought in the main suit it is up to the parties to decide whether to seek settlement of the matter in favour of the greater goal; peace and harmony at the workplace by resolving the issue in dispute; being whether or not to pursue the intended disciplinary action or not.

The Application succeeds.

Dated and Delivered at Nairobi this 8th day of May 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE