IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OUKO (P), MUSINGA & GATEMBU JJ.A.)

CIVIL APPEAL NO. 146 OF 2019

BETWEEN

TECHNICAL UNIVERSITY OF MOMBASA.....APPELLANT

AND

THE UNIVERSITIES ACADEMIC STAFF UNION

(UASU) TUM-CHAPTER.....RESPONDENT

(Being an appeal from the Ruling of the Employment and Labour Relations Court at Mombasa (L. Ndolo, J.) delivered on 9th October, 2019 in Constitutional Petition No. 6 of 2019)

****

JUDGEMENT OF THE COURT

1. This appeal arises from an interlocutory ruling delivered by the Employment and Labour Relations Court (ELRC) (***L. Ndolo, J***.) on 9th October 2019 suspending implementation of the appellant's new academic policy that required members of the respondent union to teach 4, instead of the regular 3 units per semester pending further orders of the court.

2. The background, in brief, is as follows: In a circular dated 11th January 2019 addressed to all its heads of departments, Technical University of Mombasa, the appellant, through the office of the Vice Chancellor communicated that following resolutions of the full Council meeting held on 18th October 2018, cost cutting measures, which included among other things, revision of lecturers' workload to 4 units per semester instead of the regular 3 units, would be implemented with effect from November 2018. Immediately following that circular, the Universities' Academic Staff Union of the Technical University of Mombasa Chapter, the respondent, protested and on 16th January 2019 petitioned the appellant to withdraw that circular and proposed that a stakeholders meeting be convened to discuss the emerging issues. Further efforts to have the circular withdrawn do not appear to have borne fruit.

3. On 10th September 2019, the respondent filed a petition before the Employment and Labour Relations Court at Mombasa praying for: the suspension of the new academic policy revising the number units per semester from 3 to 4: an order that the old academic policy should continue to run; and an injunction to restrain the appellant from implementing the new academic policy requiring staff to teach 4, instead of the regular 3 units per semester. The petition was based on the ground that the respondent was denied a hearing in the implementation of the new academic policy and that the appellant was bulldozing the new policy; that implementation of the new policy would result in loss of income or earnings as the appellant was not going to pay members of the respondent for the additional workload of the additional one unit per semester.

4. Alongside the petition the respondent filed an originating notice of motion dated 10th September 2019 seeking an interim order of injunction to restrain the appellant from implementing the new policy pending the hearing and determination of the dispute.

5. In response to the petition and the application, the appellant's legal officer, Serah Okumu, swore a lengthy replying affidavit justifying the cost cutting measures implemented and explaining the circumstances that informed the decision to review the academic policy and that the entire process was consultative. She concluded that affidavit by deposing that the application, as well as the petition, "are *frivolous, vexatious, have no legal and factual basis and is an abuse of the court process*" and urged the court to dismiss the same.

6. After considering the application, the affidavits and the submissions tendered before her by learned counsel, the learned Judge concluded that the respondent had established a *prima facie* case which warranted the suspension of the implementation of the new academic policy pending further orders.

7. Dissatisfied, the appellant lodged this appeal which was prosecuted before us by Mr. Mutugi, learned counsel, instructed by the firm of Oluga & Company advocates for the appellant. He relied on the grounds set out in the memorandum of appeal and his written submissions which he highlighted. For the respondent, the firm of Makasembo Advocates filed written submissions but did not appear during the hearing.

8. Based on the memorandum of appeal and submissions by counsel for the appellant, the complaint, overall, is that the learned Judge erred in making final conclusions and findings at an interlocutory stage. In that regard the appellant asserts that the Judge wrongly concluded: that the new academic policy was brought on board without consultation with the respondent; that the respondent did not consent to increase of teaching units from 3 to 4; and that the implementation of the new academic policy was unilateral and detrimental to members of the respondent.

9. In their written submissions, which with respect do not address the pertinent issue in this appeal, the advocates for the respondent, dealt at length on their appreciation of the totality of the evidence and maintained that the Judge did not err.

10. We have considered the record of appeal and the submissions. The grant or refusal of an interlocutory injunction or conservatory orders entails exercise of discretion by the lower court. As an appellate court, we can only interfere with the exercise of discretion if satisfied that the judge misdirected herself in law or that she misapprehended the facts or that she took into account extraneous considerations or that she failed to take into account relevant considerations or that her decision is plainly wrong. Sir Charles Newbold P. in ***Mbogo & Another vs. Shah [1968] E.A. 93*** at page 96, stated:

> ***"…a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice…."***

11. We bear those principles in mind. We are also aware that this is an interlocutory appeal, and that the petition before the lower court is yet to be heard and determined. We must therefore be guarded in our pronouncements to avoid embarrassing the trial court which will ultimately determine the petition.

12. Based on our review of the impugned ruling, the learned Judge was clearly aware that she was dealing with the interlocutory application as opposed to the petition even though the replying affidavit placed before her by the appellant, dealt to a larger extent, with the petition and to a lesser extent with the application. The Judge was conscious that the legal test that the respondent was required to meet for purposes of the application was to establish a *prima facie* case and that she was not required, at that stage, to make definite findings. In that regard, the Judge stated:

> ***"The court was invited to make a finding on whether the petitioner had established a prima facie case to warrant grant of the Conservatory orders sought. In Kevin K. Mwiti & others vs. Kenya School of Law & others [2015] eKLR Odunga J stated the following:***
>
> ***"A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words the petitioner has to show that he or she has a case which discloses arguable issues…It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition."***

13. The Judge then went on to conclude that the respondent had established a *prima facie* case for the grant of the conservatory orders based on her findings that the impugned academic policy was brought on board without consultation with the respondent, and having further found that the implementation of the policy amounted to unilateral and detrimental alteration of the terms of employment of the respondent's members. Evidently, those *"findings"* were in the context of the inquiry as to whether the threshold for the grant of interlocutory relief had been met. Perhaps the learned Judge would have been more tempered in language in the way in which she expressed herself to avoid the impression that she was expressing a concluded view. We do not however discern any error within the parameters in ***Mbogo & Another vs. Shah*** (above) that would justify interference by this Court in the way the learned Judge exercised her discretion.

14. Consequently, the appeal fails and is hereby dismissed with costs.

Dated and delivered at Nairobi this 19th day of May, 2021.

W. OUKO, (P)

…….

JUDGE OF APPEAL

D.K. MUSINGA

……..…….

JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

…….……..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR