REPUBLIC OF KENYA

COURT OF APPEAL AT KISUMU

CIVIL APPEAL 182 OF 2004

THE STAFF, DISCIPLINARY COMMITTEE

OF MASENO UNIVERSITY…..........................…....……1ST APPELLANT

THE COUNCIL OF MASENO UNIVERSITY…......... 2ND APPELLANT

THE VICE CHANCELLOR, MASENO UNIVERSITY..3RD APPELLANT

AND

REPUBLIC

(EXPARTE) PROF. OCHONG' OKELLO……….....…. RESPONDENT

*(Being an appeal from the decision of the High Court of Kenya at Kisumu (**Hon. Warsame, Ag. J.**) dated 10th June, 2004 in*

H.C.MISC. APPL. NO. 227 OF 2003)

**************** *******

JUDGMENT OF VISRAM, JA.

1. This appeal arises from a ruling delivered by the High Court (Warsame, Ag. J. as he then was). The ruling concerned a judicial review application brought by Prof. Ochong' Okello (Prof. Ochong') as the exparte applicant. The orders sought were: an order of certiorari to bring into the Court and quash the decision of the Staff, Disciplinary Committee of Maseno University (hereinafter referred to as the 1st appellant), communicated to Prof. Ochong' by a letter dated 20th June, 2003; an order prohibiting the 1st respondent, the Council Maseno University, and the Vice Chancellor, Maseno University (hereinafter referred to as the 2nd and 3rd appellants respectively), from taking adverse proceedings against Prof. Ochong' in connection with the sum of Kshs.1,238,698 alleged to have been paid to Fahari Contractors; and an order of mandamus compelling the 2nd and 3rd appellants to constitute the council of the university in accordance with section 14(1) of the Maseno University Act.

2. The background to the application is that Prof. Ochong' who was employed by Maseno University as a lecturer, was at some time appointed Acting Deputy Principal of Planning, Development and Student Affairs department when an issue arose regarding the loss of a sum of Kshs.1,238,698 erroneously paid by Maseno University to Fahari & Civil Engineering Contractors and Urban Construction, on recommendations made by Prof. Ochong'. Investigations were carried out by the Efficiency Monitoring Unit department. Thereafter, the Office of the President directed that the recovery of the money be made from the salary of Prof. Ochong'. By a letter dated 26th March, 2003 the Vice Chancellor of the university directed the university's finance officer to recover the amount from Prof. Ochong' in twenty four months. Prof. Ochong' moved to the Court to stop the deductions. In retaliation, the university referred the matter to the 1st appellant who summoned Prof. Ochong' to appear before it on 19th June, 2003 to answer charges of abuse of office and behaving in a scandalous manner in relation to the loss of Kshs.1,238,698. Prof. Ochong' did not appear before the board but wrote a letter explaining that he would be attending a court case in Nairobi on the same day. The 1st appellant nevertheless proceeded with its proceedings and condemned the professor in absentia finding him guilty of the allegations made against him and summarily dismissing him from his employment. This decision was communicated to Prof. Ochong' by a letter dated 20th June, 2003.

3. Prof. Ochong' sought judicial review of the appellants' actions on the following grounds:

(i) The decision made on 19th June 2003 was made in violation of the rules of natural justice.

(ii) The said decision was unreasonable, in bad faith, arbitrary, capricious, in contempt of court, untenable and ultra vires the Maseno University Act, 2000.

(iii) The committee as constituted was irregular and its proceedings null and void.

(iv) The report of the Efficiency Monitoring Unit of the office of the President was simulated and offended the rules of natural justice.

(v) The law requires that the council of Maseno University comprises inter alia two elected non senate members of the academic staff.

4. After hearing arguments by learned counselfor Prof. Ochong' and learned counsel for the appellants, the trial Judge noted *inter alia* that the professor was seeking the intervention of the supervisory jurisdiction of the court; that the power was discretionary; that the remedy of judicial review is only available where there is an issue of public law involved in the matter for determination before the Court, and that the issue to be resolved is whether the applicant's employment was underpinned by an Act of Parliament. The trial Judge found that Prof. Ochong' was employed by the University pursuant to the University's mandate under **section 4(1)(e)** of Maseno University Act; that his contract of employment was not underpinned by any specific statute; and that Prof. Ochong's employment is a public right capable of protection under the supervisory jurisdiction of the court.

5. Granting the prayers of certiorari and prohibition, the trial Judge further found that although the University had powers to terminate the services of the applicant, the rules of natural justice had to be complied with; that Prof. Ochong' was given a letter dated 16th June, 2003 summoning him to appear before the 1st appellant on 19th June, 2003 for disciplinary proceedings; that upon receipt of the letter Prof. Ochong' immediately by a letter dated 17th June 2003 responded that he would not be available on the 19th June, 2003; that the appellants did not give Prof. Ochong' reasonable time within which to prepare and appear before it for the disciplinary proceedings; that the charges which were subject of the disciplinary proceedings were ridiculous and extraneous matters which did not lie within the jurisdiction of the 1st appellant; that Prof. Ochong' was being accused for exercising his constitutional right in seeking appropriate remedy against the appellants' actions; and that there was breach of the rules of natural justice.

6. Further that the decision of the head of the Public Service directing recovery from Prof. Ochong' was in contempt of an earlier decision made by the previous head of Public Service, and was therefore a violation of the concept of good governance and the expectation that decisions made by persons endowed with authority should be certain, reasonable and predictable; that the second directive was made in excess of the jurisdiction of the holder of the office of head of Public Service and contravenes the principles of natural justice.

7. The trial Judge rejected the prayer for mandamus, noting that the reasons given against the two representatives in the University council were mediocre, that Prof. Ochong' having benefitted from the authority of the council in which the two senate representatives were members, his plea that the council was wrongly constituted is misconceived and an attempt to bite the hand that feeds him, and that the plea for mandamus has no substance and attracts no public law duty or obligation on the part of the appellants.

8. Being aggrieved by the ruling of the trial Judge, the appellants have now lodged this appeal urging the court to set aside the judgment of the High Court. In their memorandum of appeal, the appellants have raised eight grounds. Learned counsel for the appellants **Mr. Wasuna**, argued that the trial Judge was wrong in granting the order of certiorari as the order had the effect of granting specific performance of the contract for employment; that having agreed with the appellants' submission that there was no statutory underpinning of Prof. Ochong's contract, it was not open to the trial Judge to find and hold that the respondent had a public law expectation capable of protection under the supervisory jurisdiction of the Court.

9. Mr. Wasuna further submitted that the terms of service of Prof. Ochong' included a clause for summary dismissal and also provided for delegation of the powers of the University council in disciplinary matters; that the remedy of judicial review is an equitable remedy which is not available to compel reinstatement of a dismissed employee; that the Judge confused contractual rights with legal rights; that Prof. Ochong' did not complain about the notice period but gave a reason for his inability to attend the disciplinary proceedings, which reason was not genuine; that the court erred in granting the order of prohibition against the appellants, as the disciplinary committee never ordered the recovery of the money, but the order came from the office of the President and the Ministry of Education.

10. Mr. Ouma, learned counsel for Prof. Ochong' urged us to uphold the ruling of the trial Judge contending that the two grounds upon which Prof. Ochong's services were terminated did not fall within the regulations of the appellants; that Maseno University is a creature of statute whose authority emanates from the statute and rules made thereunder, and therefore the rules of natural justice including the right to fair hearing had to be observed; that Prof. Ochong' having given a good reason as to why he was not able to attend the disciplinary proceedings, the proceedings ought to have been adjourned to another date; that Prof. Ochong' did not have adequate notice of the disciplinary proceedings as he was only given two days' notice, and that the appeal had no merit.

11. It transpired during the hearing of the appeal that Prof. Ochong' has now retired from Maseno University. He is however still pursuing the orders of judicial review as they would have an impact on the payment of his benefits. I have given careful consideration to the proceedings before the trial Judge and the submissions made by the learned counsel. Prof. Ochong' sought to invoke the supervisory jurisdiction of this Court. Therefore, the trial Judge properly directed himself that he had first to establish whether Prof. Ochong' who was aggrieved by the decision of the University had a public law right capable of protection under the supervisory jurisdiction of the Court. This was important in establishing the Court's jurisdiction to grant the orders sought.

12. Thus the main issue which now arises in this appeal is whether the High Court was right in exercising its supervisory jurisdiction. i.e.

whether there was some recognizable public law wrong committed by the appellants such as would justify the intervention of the Court by way of judicial review.

13. In ruling that the respondent was entitled to the remedy of certiorari and prohibition the trial Judge stated as follows:

> ***"Maseno University is a Public University and the private employer of the applicant and many others. And the public may not have an interest in the relation between the applicant and the University but it must be understood that the applicant holds office in one of our Public University, therefore the concern of the public is limited that the University acts towards him is lawful and fair [sic]. The concern of the public is the treatment accorded to the applicant who is a senior citizen and a senior lecturer who has dedicated his service to the public by imparting knowledge to us and to our children. As a result of that expectation the contract of employment between the applicant and the respondents ceases to be private but a matter of public interest. The public law requirement is that the public authorities must comply with the public law expectation. It is my view public bodies are required to act judicially towards parties affected or interested in their decision."***

14. The above opinion by the trial Judge is an emotive statement which opens a window for lecturers whose services are not statutory underpinned to obtain orders of judicial review having the effect similar to an order of injunction or specific performance of their contract of employment. However, orders of judicial review are orders used by the Court in its supervisory jurisdiction to review the lawfulness of an act or decision in relation to the exercise of a public act or duty. In this case, the contract of employment between the respondent and Maseno University was a contractual relationship governed by private law. The dispute between the respondent and the appellants arose from the performance of the respondent's contract of employment. While it is true that the public has a general interest in the University being run properly, that interest does not give the public any rights over contractual matters involving the University and other parties.

15. The trial Judge appears to have been moved by the fact that the respondent is "a *senior citizen and a senior lecturer who has dedicated his service to the public by imparting knowledge to us and to our children"*. This may well be so. Nonetheless, that fact does not make the contractual relationship between the respondent and the applicant which is governed by terms and conditions agreed by the parties a matter of public duty or matter governed by public law. Moreover, if one were to accept the reasoning of the trial Judge that the treatment of the respondent becomes a matter of public law because of the public expectation that the University would act lawfully and fairly towards the respondent, then it is not the respondent but the public who would have a right of action for orders of judicial review based on breach of their expectation.

16. A parallel may be drawn from ***Civil Appeal No.20 of 1994 Erick D. J. Makokha & others versus Lawrence Sagini & others*** in which a question arose whether the breach of contract of personal service of lecturers from a public University could be remedied by equitable remedies of injunction and specific performance. In a unanimous judgment, a five judge bench of this court had this to say:

> ***"In our opinion the well settled rule that a breach of contract of personal service cannot be redressed by the equitable remedies of injunction and specific performance remains good law. The comparatively few cases in which declarations were made and injunctions were granted to restrain a breach of contract of personal services are exceptions to the general run of the common law. In our opinion the common law rule that damages are the generally accepted remedy for redressing breaches of contracts of personal service is too firmly established to be overthrown by side wind. While we note the emerging changed attitudes and remedial changes they are bringing about, we cannot help feeling that the common law and the doctrine of equity which Section 3 of the Judicature Act obliges us to apply is the established and well known common law. It is on the faith of this that the transactions are entered into."***

17. I concur with the above proposition and find that the breach or threatened breach of the appellants' contract of employment was not a public act or matter of public law but was a matter of contractual relationship between the respondent and the appellants, governed by private law. It was not therefore an appropriate action justifying the granting of orders of judicial review. The respondent may well have had a genuine grievance. His remedy however, lies under private law which covers disputes relating to contractual relationships. Therefore, the High Court erred in granting the orders of judicial review as Prof. Ochong' did not have public law right capable of protection under the supervisory jurisdiction of the Court.

18. For the above reasons, I would allow this appeal and set aside the judgment of the trial Judge granting the orders of certiorari and prohibition. Although the appellants have succeeded in this appeal, given the nature of the dispute, I would find it appropriate that each party should bear their own costs in this appeal and in the High Court.

Dated and delivered at Kisumu on this 10th day of October, 2012.

ALNASHIR VISRAM

………………..…………
JUDGE OF APPEAL

JUDGMENT OF NAMBUYE, JA.

I have read in draft the Judgment of Visram, JA and agree with him entirely. The orders shall be as proposed by Visram, JA.

Dated and delivered at Kisumu on this 10th day of October, 2012.

R. N. NAMBUYE

…………………...…………
JUDGE OF APPEAL
I certify that this is a true copy of the original

DEPUTY REGISTRAR
APPEAL