



**Komu v Management University of Africa (Employment and Labour Relations Cause E479 of 2024) [2025] KEELRC 189 (KLR) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 189 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E479 OF 2024**

**BOM MANANI, J  
JANUARY 30, 2025**

**BETWEEN**

**DANIEL MAINA KOMU ..... CLAIMANT**

**AND**

**MANAGEMENT UNIVERSITY OF AFRICA ..... RESPONDENT**

**RULING**

**Background**

1. The Claimant has instituted the instant case to challenge the Respondent's attempts to recruit another person to take the position of Registrar Academic & Student Affairs which he believes he is legitimately occupying. Further, he challenges the Respondent's attempts to take disciplinary action against him on the basis of the notice to show cause letter dated 5<sup>th</sup> June 2024 as he believes that the intended disciplinary process is a kneejerk reaction to his decision to challenge the Respondent's attempts to fill the aforesaid position whilst it is not vacant.
2. The Claimant avers that the Respondent employed him in the position of Registrar Academic & Student Affairs on a five year contract from 1<sup>st</sup> January 2021. He contends that his term is to run until 31<sup>st</sup> December 2025.
3. The Claimant avers that on 3<sup>rd</sup> June 2024, he was surprised to see an advertisement by the Respondent for the same position of Registrar Academic & Student Affairs. He contends that the Respondent advertised the position whilst knowing that it was not vacant. He further avers that the Respondent did not inform him of the decision to advertise the position.
4. The Claimant avers that when he learned of the impugned advertisement, he wrote to the Respondent's Vice Chancellor on 5<sup>th</sup> June 2024 seeking clarification on why the Respondent had advertised a position which he was still occupying. He contends that in response to the inquiry, the



Respondent's Vice Chancellor informed him that positions in the University were transient and that he was free to apply for the position if he considered he was qualified for it.

5. The Claimant further avers that when the Respondent received his letter of 5<sup>th</sup> June 2024, it promptly wrote to him on even date purporting to demand that he shows cause why disciplinary action should not be taken against him for various alleged infractions. He contends that he responded to the show cause as had been demanded.
6. The Claimant believes that the show cause letter was contrived to throw him out of employment. As such, he considers the entire process as irregular and intended to achieve a predetermined outcome.
7. Upon being served with the pleadings and application for conservatory orders, the Respondent filed a replying affidavit dated 5<sup>th</sup> July 2024. Through it, the Respondent contends that the position of Registrar Academic & Student Affairs which the Claimant purports to be holding fell vacant after the Claimant was promoted to the position of lecturer. As such, it required to be filled.
8. In a rejoinder, the Claimant avers that the position taken by the Respondent on the matter is intended to mislead the court. He contends that whilst it is true that he was appointed as a lecturer, he still holds the position of Registrar Academic & Student Affairs.
9. The Claimant contends that it is not uncommon for personnel in the Respondent institution to simultaneously hold teaching and administrative positions. He contends that given that his position as Registrar Academic & Student Affairs is time bound, there was nothing wrong in his appointment as lecturer since this was intended to ensure smooth transition from his current position to the position of lecturer once his contract as Registrar Academic & Student Affairs came to a close.
10. The Claimant has attached a workload schedule for the Respondent which demonstrates that individuals who hold administrative positions in the University are also engaged as teaching staff. These include the deponent to the replying affidavit who, in addition to being the Respondent's Human Resource Manager also serves as a lecturer in the same institution.

## **Analysis**

11. The main reason why the Respondent advertised the position of Registrar Academic & Student Affairs which the Claimant contends that he is currently holding is that the Claimant had been appointed as a lecturer thus rendering the position vacant. The Respondent contends that the positions of lecturer and Registrar Academic & Student Affairs are both quite demanding. As such, they cannot be held by one individual at the same time.
12. The court has considered the position expressed by the Respondent against the content of its letter to the Claimant dated 5<sup>th</sup> June 2024. It is apparent that the Claimant was appointed to the position of lecturer on 1<sup>st</sup> April 2023. However, despite this appointment, he appears to have continued to serve in the position of Registrar Academic & Student Affairs.
13. This appears to be the case because the aforesaid letter indicts the Claimant for infractions which are associated with the position of Registrar Academic & Student Affairs. A majority of these infractions are said to have been committed in the year 2024 after the Claimant had been appointed as a lecturer. As such and on the basis of this prima facie evidence, the court is convinced that the Respondent may have allowed the Claimant to serve as both lecturer and Registrar Academic & Student Affairs.
14. The foregoing is bolstered by the fact that the Respondent appears to have been using its administrative staff to also serve as lecturers. This is self-evident from the faculty workload that is attached to the Claimant's further affidavit.



15. Having regard to the foregoing and without making any conclusive findings on the subject, the court is of the preliminary view that it would be improper for the Respondent to advertise the position of Registrar Academic & Student Affairs by purporting that it is vacant when it was not. The fact that the Respondent was aware that the Claimant was serving in this position is self-evident from the notice to show cause letter which it issued to him on 5<sup>th</sup> June 2024.
16. It is curious that the Respondent has sought to justify its decision to fill the impugned position on the ground that it was vacant whilst simultaneously taking out disciplinary proceedings against the Claimant which seek to remove him from the same position. This is prima facie, irregular.
17. Taking the foregoing into account, I am satisfied that the Claimant has demonstrated that he has a prima facie case against the Respondent with a likelihood of success. He has demonstrated that the Respondent's actions threaten to violate his entitlement to fair labour practices.
18. The Respondent contends that conservatory orders cannot issue in labour disputes because they are concerned with rights in personam. I do not think that this contention is correct.
19. Section 12 of the *Employment and Labour Relations Court Act* empowers the court to issue interim preservation orders. The Respondent concedes that conservatory orders are intended to preserve the status quo pending the disposal of a dispute. As such, the preservation orders which the court is entitled to issue under the aforesaid section and which are granted in the context of employment disputes are in the nature of conservatory orders.
20. The dichotomy which the Respondent seeks to create between private and public law rights is of little significance under the current constitutional dispensation. It is worth of note that labour rights which were hitherto considered as private law rights have since been elevated to a constitutional pedestal by dint of article 41 of *the Constitution* 2010. As such, they enjoy the same protection as public law rights.
21. Having said thus, I note that the Court of Appeal has set a fairly high threshold for issuance of conservatory orders. It is not sufficient that an applicant for the orders has established that he has a prima facie case with a probability of success. In addition, he must satisfy the other conditions for the grant of orders of interim injunction set out in the case of *Giella vs. Cassman Brown & Co. LTD* [1973] EA 358 and as well meet the public interest threshold that was prescribed in the case of *Gatirau Peter Munya vs. Dickon Mwenda Kithinji & 2 Others* [2014] eKLR.
22. In laying down the foregoing requirement, the Court of Appeal in *Muturi v Havi & 21 others* (Civil Application E435 of 2021) [2022] KECA 938 (KLR) (19 August 2022) (Judgment), expressed itself on the matter as follows:-

“It is evident that the orders sought by the appellant were conservatory orders to preserve her position as the Deputy Secretary and Director of the Compliance and Ethics Directorate at the LSK. In order for the appellant to lay a proper basis for the issuance of conservatory orders, she had to first meet the threshold set in *Giella vs. Cassman Brown*, that is the three sequential requirements of first establishing a prima facie case with a probability of success; secondly, showing that damages would not be an adequate remedy; and, thirdly, demonstrating that the balance of convenience tilts in her favour. Thereafter, she had to go further and meet the further threshold set in the *Munya* decision by showing that the public interest element was also in her favour.”
23. Taking into account that the Claimant's term under the contested fixed term contract of service is meant to lapse on 31<sup>st</sup> December 2025, approximately eleven months from the date of this ruling, the court acknowledges that the damage he would suffer in the event the court does not issue the orders he seeks in the application is the emolument he expects over this duration. The court further notes



that section 49 of the Employment Act empowers it to award an employee compensation for unfair termination of his contract which is equivalent to his gross salary for twelve months. As such, the aforesaid potential loss of emoluments which the Claimant may suffer if the orders sought are not granted is adequately covered by the remedies under section 49 of the aforesaid Act.

### **Determination**

24. Having regard to the foregoing, I find that although the Claimant has demonstrated that he has a prima facie case with a probability of success, he has nevertheless not satisfied the threshold for issuance of conservatory orders as prescribed by the Court of Appeal in the case of Muturi v Havi & 21 others (Civil Application E435 of 2021) [2022] KECA 938 (KLR) (19 August 2022) (Judgment).
25. For the above reason, the court declines to issue the interim conservatory orders sought.
26. Costs of the application shall abide the outcome of the case.

**DATED, SIGNED AND DELIVERED ON THE 30<sup>TH</sup> DAY OF JANUARY, 2025**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant/Applicant

.....for the Respondent

### **ORDER**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

