



Ego v Kenya Agricultural & Livestock Research Organization (Employment and Labour Relations Petition E184 of 2023) [2024] KEELRC 465 (KLR) (28 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 465 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E184 OF 2023
AN MWAURE, J
FEBRUARY 28, 2024**

BETWEEN

WILLIAM EGO PETITIONER

AND

KENYA AGRICULTURAL & LIVESTOCK RESEARCH ORGANIZATION RESPONDENT

RULING

1. The Respondent filed a Notice of Motion dated 18th September 2023 seeking the following orders: -
 1. spent
 2. pending the hearing and determination of this Application inter parties, the Honourable Court be pleased to issue and hereby issues an order suspending the implementation of the surcharge letter dated 3rd May 2023 written by Dr Kepha Ombui, the Director General of the Respondent.
 3. pending the hearing and determination of this Application inter parties, the Honourable Court be pleased to grant a conservatory order prohibiting/restraining the Respondent, its servants, officials, representatives and/or agents from deducting the Applicant’s salaries and/or taking disciplinary action against the Applicant, or having so taken disciplinary action or deducted the Applicant’s salaries, be restrained from acting or otherwise in any other manner.

Upon inter parties hearing

4. pending the hearing and determination of this Petition, the Honourable Court be pleased to issue and hereby issues an order suspending the implementation of the surcharge letter dated 3rd May 2023 written by Dr Kepha Ombui, the Director General of the Respondent.



5. pending the hearing and determination of this Petition, the Honourable Court be pleased to grant a conservatory order prohibiting/restraining the Respondent, its servants, officials, representatives and/or agents from deducting the Applicant's salaries and/or taking disciplinary action against the Applicant, or having so taken disciplinary action or deducted the Applicant's salaries, be restrained from acting or otherwise in any other manner.
6. the costs of this Application be provided for.

Petitioner/ Applicant's Submissions

2. The Petitioner/Applicant avers that vide a letter dated 10.01.2020, the Applicant was interdicted on allegations of failing to complete his studies and required him to show cause why disciplinary action should not be taken against him.
3. The Applicant avers that he responded to the interdiction/show cause letter vide a letter dated 04.02.2020 offering an explanation.
4. The Applicant submitted that he was not subjected to any form of disciplinary process and instead the interdiction was lifted after 2 years vide a letter dated 14.04.2023. The Respondent then proceeded to issue him with a letter dated 03.05.2023 surcharging him the sum of Kshs 4,081,149.10.
5. The Applicant avers that Section 11.9.1 (h) of the Respondent's Human Resource Manual, 2017 provided that disciplinary cases shall be dealt with promptly and finalised within a period of 6 months, the Respondent unlawfully and un procedurally was interdicted for a prolonged period of 2 years.
6. The Applicant avers that the Respondent did not issue him with a show cause letter or put his defence as contemplated by the Respondent's Human Resource Manual before deciding to surcharge him.
7. The Applicant avers that the Respondent surcharged him without affording him a fair hearing and proceeded to illegally, unlawfully and arbitrarily deduct the Applicant's salary for the month of May, June, July and August 2023.
8. The Applicant avers that despite Section 11.20.4 of the Respondent's Human Resource Manual providing that surcharge cases should be implemented in monthly instalments that do not exceed one third of an employee's monthly basic salary, the Respondent proceeded to unlawfully and illegally deduct Kshs 99,375 of his salary which was way above the one third salary.
9. The Applicant avers the Respondent has never released the salaries withheld during his prolonged interdiction and proceeded to illegally and unlawfully surcharge him without according him due process.
10. The Applicant avers that the Respondent acted maliciously in making the impugned decision to interdict him, lift the interdiction and surcharge the Applicant and therefore violated his rights by condemning him unheard and based on unknown allegations.

Respondent's Case

11. In opposition to the Application, the Respondent filed a replying affidavit dated 23rd October 2023.
12. The Respondent avers that vide a letter dated 13.06.2012, the Petitioner applied for a PHD study leave as provided under Section 6.10 of the Respondent's Human Resource Manual, 2017.
13. The Respondent avers that it approved the Petitioner/Applicant's paid study leave vide a letter dated 04.09.2012. The study leave was to run from 3rd September 2012 to 31st August 2015.



14. The Respondent avers that the Petitioner was required to comply with its Human Resource Manual under section 6.10.2 which provides that upon completion of the study leave:
 - a. the Petitioner submits a written report of the activities undertaken during the leave in addition to the certificates attained. It was also mandatory to submit copies of the thesis written.
 - b. the Petitioner was required to formally inform the Director General of his resumption of duties.
 - c. while on study leave, the Petitioner was subject to the Respondent's rules and regulations.
15. The Respondent avers that the Petitioner resumed his duties on 01.10.2015 and he formally informed its Director General of the resumption of his duties and informed the Respondent he had completed his coursework but was still working on his project. The Petitioner further alleged that his transcripts had not been released by the university and promised to submit them as soon as possible.
16. The Respondent submitted that in breach of section 6.10.2 of the Human Resource Manual the Petitioner failed to submit a written report of the activities undertaken during the leave in addition to the certificates attained together with copies of thesis written in the course of his service.
17. The Respondent submitted that vide a letter dated 24th May 2017, it requested the Petitioner to update the Director General to the progress of his studies as soon as possible. The Petitioner remained silent for almost 2 years prompting the Respondent to send him a letter dated 24th May 2017 reminding him it had not received his certificate and thesis despite the fact that his study leave expired on 31.08.2015 and required a response within 21 days or disciplinary action be taken against him.
18. The Respondent avers that the Petitioner vide a letter dated 19.06.2017 claimed he was unable to pursue his thesis due to financial constraints. This did not justify his failure to avail the certificates and thesis as he must have calculated the fees for the entire 3 years and concluded he could afford his PHD studies.
19. The Respondent avers that it wrote to the Vice Chancellor, University of Eldoret on 24.05.2019 requesting for the status report of the Petitioner's PHD program. The VC responded vide a letter dated 28.06.2019 stating that the Petitioner deserted his studies after 3 weeks of admission.
20. The Respondent avers that it informed the Petitioner it was aware he deserted studies and it amounted to gross misconduct. Vide a letter dated 10.01.2020, the Petitioner was interdicted and required to show cause within 21 days.
21. The Respondent avers that it did not conclude the disciplinary process within 6 months as the Petitioner insisted he had completed his studies but was unable to get the transcripts, he was given more time to avail them. The Petitioner even thanked the Respondent vide a letter dated 18.04.2021 for according him the chance to submit the transcripts.
22. The Respondent avers that the Petitioner forwarded a transcript date 29.06.2022 which revealed his first academic year was 2020/2021 and he never completed his coursework between 2012-2015 despite taking paid study leave.
23. The Respondent avers that it lifted the interdiction vide a letter dated 14.04.2023 pending determination of his case and vide a letter dated 03.05.2023, the Petitioner was informed that KALRO Management Advisory Committee had decided to surcharge the gross salary paid to him during the period he was neither at the university nor his work station.



24. The Respondent avers that upon interrogation of section 11.20.4 of the Human Resource Manual, it limited a surcharge to a maximum of one third of the basic salary, it did not consider whether it was possible to recover the entire amount before the employee's retirement.
25. The Respondent avers that in considering its decision to surcharge upon conclusion that the Petitioner was 59 years old and would retire in 6 years and Kshs 4,081,149.10 would not have been recovered.

Petitioner/Applicant's Submissions

26. The Petitioner submits that the Respondent's action of subjecting him to a sham disciplinary process in violation of the Respondent's Human Resource Manual, 2017 was riddled with malice.
27. The Petitioner submits that the Respondent's action of implementing the surcharge decision against him and justifying their action based on his age is contrary to its Human Resource Manual, 2017 is discriminatory and in violation of Article 27 of *the Constitution* and Section 5 of the *Employment Act*.
28. It is the Petitioner's submission that prima facie and on the material before this court, there is all indication that the Respondent's imposition of a surcharge against the Petitioner in disregard to its Human Resource Manual, 2017 and the law was not justified and as such there is high likelihood that upon hearing of the main suit, the Applicant will be granted orders as sought.
29. The Petitioner/Applicant submitted that the Respondent is currently implementing the surcharge by deducting his salaries and without the injunction restraining the Respondent from implementing the surcharge letter, the Respondent will proceed to unlawfully and illegally deduct his salary which will render him destitute and occasion grave harm as he has been forced to live in servitude.
30. The Petitioner/Applicant submitted that the Respondent has acted ultra vires its powers and the court has the right to exercise its jurisdiction to intervene in such matters.

Respondent's Submissions

31. The Respondent submitted that despite all the time given to the Petitioner to prove that he had successfully completed his PHD studies, he was unable to do so to date since he has only one transcript but for a different study period unrelated to the sanctioned period of the study leave.
32. It is the Respondent's submission that the Petitioner had an obligation to establish his rights had been infringed necessitating rebuttal from the Respondent as found in *Mrao Limited v First American Bank of Kenya Ltd and others* [2003] KLR 125. From the evidence presented, the Petitioner has not established no right infringed by the Respondent. The evidence demonstrated the Petitioner's breach of the Human Resource Manual requiring him to prove he had successfully completed his PHD studies.
33. The Respondent submitted that as to the element of public interest, there exists no public interest warranting tilting the scales in favour of the Petitioner. The fact that the Respondent is a public institution which granted the Petitioner paid study leave but cannot in return benefit from the skills learnt, is perhaps the only aspect of public interest.
34. The Respondent submitted that the Giella tests should be surmounted sequentially and there exists no option to proceed to the second test having failed to overcome the prima facie test. The Petitioner cannot therefore prove irreparable harm having failed to prove the prima facie test.
35. It is the Respondent's submission that the amount in dispute is identified as Kshs.4,081,149.10 which the court can order to be paid to the Claimant in the event his Petition is successful. There is therefore



no irreparable loss that the Petitioner will suffer which cannot be adequately compensated for in monetary terms. It relied on *Elizabeth Agutu Odhiambo v Waumini Sacco Society* [2018] eKLR.

36. The Respondent submitted that despite the Petitioner's study leave expiring over 8 years ago, he has been unable to provide proof that he successfully completed his PHD studies. All he has to show is a single transcript for the year 2020/2021 showing that his first year of study was 2020/2021. The balance of convenience cannot be in favour of the Petitioner having remained in breach of Section 6.10.2 (viii) of the Human Resource Manual for over 8 years.

Analysis and Determination

37. Having considered the application, affidavits and submissions on record, the court is tasked to determine whether the Petitioner/Applicant is entitled to an interlocutory order suspending the implementation of the surcharge letter dated 3rd May 2023 written by the Respondent's Director General.
38. The threshold for grant of an injunction was aptly dealt with in *Wanjala v General & another* (Employment and Labour Relations Petition E033 of 2022) [2022] KEELRC 12722 (KLR) (12 May 2022) (Ruling) in which the court held: -

“.....whether the petitioner has met the threshold for the grant of restraining orders sought. the ingredients for granting an injunction as set out by the case of *Giella v Cassman Brown* [1973] EA 358; namely, demonstration of existence of a prima facie case with a probability of success; second, that if the injunction sought is not granted, the applicant will suffer irreparable harm; and thirdly, that where the court is in doubt as regards the applicability of ingredient (i) & (ii) above, then the matter should be decided on a balance of convenience. These conditions are aptly summarised in *Kenya Commercial Finance Company Limited v Afraha Education Society* [2001] where court stated;

“The sequence of granting an interlocutory injunction is firstly, that an Applicant must show a prima facie case with a probability of success if this discretionary remedy will endure(sic) in his favour; secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly, when the court is in doubt, it will decide the application on the balance of convenience – see *Giella v Cassman Brown and Co. Ltd* [1973] EA 358 at 360 letter E. These conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.”

39. Additionally, in *Unga Group PLC. v Maureen Wanjiru Wanyaga* [2021] eKLR the court held: -

“This court however takes note that its duty is not to delve into the merits of the case or to consider the evidence to be adduced at the trial, in order to determine whether a prima facie case exists. The Court of Appeal decision in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR states as follows: -

“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.”

In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR, the Court of Appeal observed that the equitable remedy of temporary injunction is issued



solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which the amount of compensation can be measured with reasonable accuracy or the injury or harm is in such a nature that monetary compensation, of whatever amount, will never be an adequate remedy.”

40. In the instant application, the Petitioner/Applicant’s complaint is the Respondent’s decision to surcharge his salary which he submitted it was reached without meeting the threshold of procedural and substantive fairness in terms of the Human Resource Manual, 2017 was unfair.
41. However, the Respondent in its submissions laid down a detailed summary of how since 14.10.2015 to date, the Petitioner has been given a chance to comply with Section 6.10.2 (viii) of the Human Resource Manual which required him to provide any documentary evidence to demonstrate that he had pursued and completed his studies within his paid study leave which ran from 03.09.2012 to 03.08.2015.
42. The Petitioner only forwarded a transcript dated 29.06.2022 vide a letter dated 24.08.2022 to the Respondent. The transcript revealed that the Petitioner’s first year of study was 2020/2021 whereas his study leave lapsed 6 years earlier. This led to the Respondent’s decision to surcharge his salary pending the determination of his disciplinary case.
43. The court is persuaded there is valid reason for the respondent’s decision to surcharge his salary for failure to comply with the provisions of the respondent’s human resource policy manual. According to section 11.1 of the said manual a surcharge can be justified for among others misuse of the respondent’s money.
44. The transcript the petitioner/applicant provided was only for the year 2020/2021 long after the period he was on study leave in 2012/2015.
45. The Vice-chancellor of the University of Eldoret where Petitioner had registered to undertake his PHD studies was asked by the respondent to confirm the study status of the petitioner. He wrote back on 28th June 2019 and said the Petitioner registered for his PHD in 2012 but deserted his studies after 3 weeks and never returned.
46. The court have considered that the aim of giving a lecturer paid study leave is to add capacity to the University when the lecturer undertakes to offer his services after his graduation.
47. In conclusion, considering the facts, law, pleadings and authorities cited in view of the foregoing, the Petitioner/Applicant has failed to establish a prima facie case as the Respondent’s decision was in line with the Human Resource Manual and fair labour practices.
48. Further, the Petitioner/ Applicant has not demonstrated that if he fails to be granted the said orders, he will suffer irreparable injury that cannot be adequately compensated by an award of damages should the petition be successful.
49. Against this background, the Petitioner/Applicant’s application dated 18th September 2023 is unmerited and is dismissed. Each party will meet its costs of the application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF FEBRUARY, 2024.

ANNA NGIBUINI MWAURE



JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159 (2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

