



**Republic v Egerton University & 3 others; Kibue (Interested Party); Ngari & another (Exparte Applicants) (Judicial Review Miscellaneous Application E001 of 2023) [2024] KEELRC 314 (KLR) (21 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 314 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**  
**JUDICIAL REVIEW MISCELLANEOUS APPLICATION E001 OF 2023**  
**HS WASILWA, J**  
**FEBRUARY 21, 2024**

**INT THE MATTER OF ARTICLE 22(1) AND 23(1),(3) ON THE ENFORCEMENT OF BILL OF RIGHTS BY THE COURT AND THE AVAILABLE RELIEFS INCLUDING AN ORDER OF JUDICIAL REVIEW**  
**IN THE MATTER OF SECTIONS 7 (1) (2) (E, F, H, K, M, N, O) AND 8 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS FOR ORDERS OF PROHIBITION UNDER SECTION 7 AND 8 OF THE LAW ACT AND ORDER 53 OF THE CIVIL PROCEDURES RULES, 2010**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**EGERTON UNIVERSITY ..... 1<sup>ST</sup> RESPONDENT**

**THE COUNCIL, EGERTON UNIVERSITY ..... 2<sup>ND</sup> RESPONDENT**

**THE VICE-CHANCELLOR, EGERTON UNIVERSITY ..... 3<sup>RD</sup> RESPONDENT**

**UNIVERSITY ACADEMIC STAFF UNION ..... 4<sup>TH</sup> RESPONDENT**

**AND**

**DR. GRACE WANJIRU KIBUE ..... INTERESTED PARTY**

**AND**

**PROF. SILAS MWANIKI NGARI ..... EXPARTE APPLICANT**

**UNIVERSITIES ACADEMIC UNION STAFF UNION, EGERTON UNIVERSITY CHAPTER ..... EXPARTE APPLICANT**



## JUDGMENT

1. Before me for determination is the ex parte Applicants' Amended Notice of Motion dated 8<sup>th</sup> March, 2023. This Application was amended pursuant to leave granted by this Court on the 12<sup>th</sup> January, 2023. The Application is expressed under Order 52 Rule 1 and Order 53 Rule 3 of the Civil Procedure Rules, Section 8 & 9 of the Law Reforms Act, Section 3A of the Civil Procedure Act and all other enabling provisions of the law, seeking for the following Orders;-
  - a. That the Honourable Court be pleased to issue an Order of Prohibition restraining the Respondents from proceeding with or undertaking disciplinary proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> Ex parte Applicant's on account of grounds or charges contained in the letter dated 22<sup>nd</sup> December and referenced EUAPD/18915/1569 (with respect to the 2<sup>nd</sup> Ex parte Applicant) and 4<sup>th</sup> January, 2023 and reference number EU/APD 18915/156 (With respect to the 1<sup>st</sup> Ex parte Applicant).
  - b. That the costs of the Application be provided and the same be borne by the Respondents.
2. The basis of the Application is that the Interested party in consultation with the 3<sup>rd</sup> Ex parte Applicant issued a 7 days' strike Notice dated 11<sup>th</sup> October, 2022 declaring a strike based on the following disputes; -
  - i. None remittance by the Respondents of third party deductions especially to Banks, Sacco's and insurance companies, occasioning members pecuniary embarrassment, banks recovering loans from members' salary accounts, property and assets recovery, eviction by landlords and general inability to sustain basic livelihood needs.
  - ii. Unilateral and arbitral variation of employer's contributions to the established pension scheme by the Respondents.
  - iii. Lack of structured procedure of Academic staff reviews and promotions
  - iv. Reinstatement of Annual salary increment for all members of the Academic staff.
3. It is stated that the strike was launched by the interested party on 17<sup>th</sup> October, 2022 in the company of the 3<sup>rd</sup> Ex parte Applicant members who include the 1<sup>st</sup> and 2<sup>nd</sup> Ex parte Applicants who are officials of the Union at Branch level.
4. After the launch of the strike and before the commencement of the same, the 1<sup>st</sup> Respondent filed a suit in this Court on 18<sup>th</sup> October, 2022 serialized as ELRC Petition No. E012 of 2022; Egerton University Vs Universities Academic Staff Union and Another, seeking to stop the strike and asking the Court to compel the Union to attend a conciliatory process as directed by the County Labour Office and to be allowed to commence disciplinary action against all members of staff that participate in the said strike and to be allowed to continue implementing the resolutions arrived at in the previous meetings that were held by the parties.
5. The Application in ELRC Petition No. E012 of 2022 was heard inter partes on 24<sup>th</sup> October 2022 before this Court, where the Court ordered the parties to explore negotiation on the issues leading to the strike and in the meantime, the strike was suspended.
6. Based on Orders issued by this Court stopping the strike, the Interested party issued a press release to its members, calling off the strike and asking them to return back to work as the leadership explored



- the negotiations as directed by the Court. Subsequently, the conciliation meetings were held on the 16<sup>th</sup> November, 2022, 28<sup>th</sup> November, 2022, which the Ex parte Applicants, represented by the 1<sup>st</sup> and 3<sup>rd</sup> ex parte Applicants faithfully attended.
7. The Ex parte Applicants state that while the negotiations were going on, the Respondents served the 1<sup>st</sup> and 2<sup>nd</sup> Ex parte Applicants with Show cause letters dated 18<sup>th</sup> October, 2022, reference numbers EU/APD/19522/327 and EU/APD/18915/162 for Prof. Silas and Dr. Grace respectively, containing similar allegation which were listed as follows; -
    - i. That they participated in an illegal strike within the University premises when they called the members of the University Academic Staff Union to assemble at the Graduation Square adjacent to Kilimo Hall in contravention of section 76(c) and 80 (1) (a) of the *Labour Relations Act*, 2007, during working hours while the strike Notice had not lapsed.
    - ii. That they mobilized students who were undertaking online studies at the Graduation Square to participate in the union activities infringing on their rights and causing them to miss lectures. Further, that the noise at the Graduation Square disrupted lectures scheduled to take place at Kilimo Hall.
    - iii. That their actions further contravened Egerton University Code of Conduct and Ethics Policy section 5(vii), when they mobilized their members to cause disruption of university activities by marching to Physical Science Complex in an attempt to disrupt an international conference that had nothing to do with their grievances.
    - iv. That their actions further violate sections 7(i) of Egerton University Code of Conduct and Ethics Policy since the activities of the day were captured by the media and broadcasted in the televised news bringing the University into disrepute.
    - v. That their actions further violate sections 44 of the *Employment Act*, 2007 following the use of derogatory words against your employer during the said gathering at the Graduation Square.
  8. That the 1<sup>st</sup> and 2<sup>nd</sup> Ex parte Applicants denied the allegations in toto by their responses dated 23<sup>rd</sup> October, 2022 and 24<sup>th</sup> October, 2022 and stated that the Union issued the strike notice based on several issue as highlighted above and that the notice expressly stated that the strike was to be launched on the 17<sup>th</sup> October, 2022 and to commence on 18<sup>th</sup> October, 2022. He added that the 1<sup>st</sup> and 2<sup>nd</sup> Ex parte Applicants being Chairperson and Secretary of the Union respectively were expected to participate in Union activities including activities in anticipation of a strike such as the one that was undertaken on 17<sup>th</sup> October, 2022.
  9. The Ex parte Applicant however denied mobilizing students to participate in the Union activities, disrupting the international conference, using derogatory words against their employer or disrupting the university by involving the media during the launch of the strike.
  10. Having filed their responses to the show cause letters, the Respondent did not relent instead, the disciplinary proceedings went on and in fact that the 1<sup>st</sup> Ex parte Applicant has been invited for hearing on the 23<sup>rd</sup> January, 2023 and the 2<sup>nd</sup> Respondent on the 19<sup>th</sup> January, 2023.
  11. The ex parte Applicant want the disciplinary proceedings to be stopped for the following reasons; -
    - i. If the intended disciplinary proceedings are allowed to proceed, it shall be open transgression and affront to the Ex-parte applicants' and Interested Party's freedom and right to fair labour practices guaranteed under Article 41 of *the Constitution* of Kenya 2010, in particular the right to participate in the activities and programmes of a trade union and to go strike. The



disciplinary proceedings are founded on nothing more than a call by the Interested Party calling sections of members to go on strike over what is, on the face of it, legitimate and lawful trade dispute and due process, a seven days' notice having been given to the Respondents.

- ii. That the intended disciplinary proceeding is illegal for being a mockery and outright contempt to the orders of the court issued in ELRC Petition No. 012 of 2022, Egerton University Versus Universities' Academic Staff Union And Another on the 24<sup>th</sup> October 2022 and 1<sup>st</sup> December 2022. The legal principle underpinning the issuance of such orders, pursuant to section 77 of the *Labour Relations Act* No. 14 of 2007, is to promote and facilitate good faith in conciliation negotiations by the parties to the trade dispute. Therefore, that it is an abandonment good faith on the part of the Respondents by electing to proceed with the disciplinary proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> Ex-parte applicants yet the Respondents continue enjoying the orders prohibiting the strike.
- iii. The intended disciplinary proceedings are unlawful for being an affront to section 79(3) of the *Labour Relations Act* No. 14 of 2007 which states that an employer may not dismiss or take disciplinary actions against an employee for participating in a protected strike or for any conduct in contemplation or furtherance of a protected strike. In the present circumstances, launching the 'strike on the 17<sup>th</sup> October 2022 was a conduct in contemplation of the strike - that would be effective from the 18<sup>th</sup> of October 2022. The grounds of the strike are lawful reasons within the meaning of a protected strike, hence the launch of the strike cannot therefore, in view of section 79(3), be the basis for the disciplinary proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> Ex-parte applicants.
- iv. The intended disciplinary proceedings are unlawful and illegal for being an affront to the legal insulation given to union officials under section 49(e) and (j) of the *Employment Act* Cap 226 of the Laws of Kenya which states that amongst other reasons, it does not constitute a fair reason for dismissal or for imposition of a disciplinary penalty, an employee's seeking of office as, or acting or having acted in the capacity of, an officer of a trade union or worker's representative; or an employee's participation in a lawful strike. Thus the disciplinary proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> Ex-parte applicants are disciplinary proceedings against the secretary and chairperson of the 3<sup>rd</sup> Ex-parte applicant. It is therefore a disciplinary action against official of a trade union for acting in the Capacity as such.
- v. The decision to subject the 1<sup>st</sup> and 2<sup>nd</sup> Ex-parte applicant to a disciplinary hearing is an unfair administrative action by the Respondents and an affront to their right under Article 47 of *the Constitution*, more so and when juxtaposed in the context of fair labour practices as further espoused in section 7 of the *Fair Administrative Action Act* for the following reasons; -
  - a. That the decision is made with an ulterior motive seeking to punish the 1<sup>st</sup> and 2<sup>nd</sup> Ex-parte applicants whom the Respondents view as being the backbone supporting the union movement in the university.
  - b. That in making the decision to subject the 1<sup>st</sup> and 2<sup>nd</sup> Ex-parte applicant to a disciplinary hearing, the Respondent failed or ignored to consider that the issues of the trade dispute leading to the strike commencing 18<sup>th</sup> October 2022 are already the subject of conciliation proceeding on account of a court order that they sought themselves. It is expected therefore that they would be engaging in the said negotiations in good faith and subjecting the chairperson and secretary of the 3<sup>rd</sup> Ex-parte applicants to disciplinary hearing on related issues demonstrates lack of good faith on their part.



- c. Additionally, that taking a disciplinary action against the official of the 3<sup>rd</sup> Ex-parte applicant while the trade dispute is in conciliation proceedings amounts to burdening the officials of the 3<sup>rd</sup> Ex-parte applicants with grave personal challenges and consequences including dismissal from the employment thereby diminishing their capacity to effectively represent the union's interests in the negotiations.
  - d. That the decision to subject the 1<sup>st</sup> and 2<sup>nd</sup> Ex-parte applicant to a disciplinary hearing is unreasonable for one would legitimately expect them to participate in the activities of the union and advance its objectives more so when invited by the Interested Party. One would not, logically, expect a chairperson or a secretary of branch of union to be absent when the parent union is launching a strike on its behalf.
12. Based on the foregoing, the ex parte Applicants state that on the face of their disciplinary show cause letters, the invitation to appear for disciplinary hearing and the charges levelled against 1<sup>st</sup> and 2<sup>nd</sup> Ex-parte applicants being termed as act of gross misconduct, it is apparent that the ulterior intention of the respondents is to purge them from their employment on the guise of a disciplinary process. They thus urged this Court to check the intended abuse of power and process by the Respondents and therefore allow the prayers set out herein.
  13. The Application is opposed by the Respondents who filed a replying affidavit sworn on 6<sup>th</sup> June, 2023 by Prof. Isaac Kibwage, the vice chancellor of Egerton University.
  14. The affiant stated that the Application herein is incompetent because the substantive motion has been supported by affidavit in violation of Order 53 Rule 4.
  15. He stated that on 11<sup>th</sup> October, 2022, the interested party issued a strike Notice to the chairman of the 2<sup>nd</sup> Respondent informing him that the strike was to take place on 17<sup>th</sup> October, 2022 and withdrawal of labour was with effect from 18<sup>th</sup> October, 2022. Therefore, that by dint of the fact that the strike was starting on 17<sup>th</sup> October, 2022, the same was done on a working day before the lapse of the 7 days' notice period as such was unprotected.
  16. The affiant stated under the provisions of section 57 of the *Interpretation and General Provisions Act*, computation of the 7 days' notice period should have lapsed on 18<sup>th</sup> October, 2022 and the strike should have legally commenced on 19<sup>th</sup> October, 2022 as such the strike commenced before lapse of the Notice period as such was unprotected.
  17. The deponent maintained that the ex parte Applicants mobilized students to participate in the Union activities, attempted to disrupt the 2<sup>nd</sup> Africa-UniNet Assembly when the Australian ambassador to Kenya was addressing the conference, an incident that was reported by the Chief security officer.
  18. The affiant stated that the 1<sup>st</sup> and 2<sup>nd</sup> ex parte Applicants breached section 5(i),(viii) and 7(1) of the 1<sup>st</sup> Respondent code of conduct and Ethics Policy, Section 76(c) & 80(1)(a) of the *Labour Relations Act*, and section 44(d) of the *Employment Act*, causing it to issue the notice to show letters to be heard on 19<sup>th</sup> January, 2023 and 23<sup>rd</sup> January, 2023 respectively, in line with section 80 of the *Labour Relations Act*. He added that had the strike been launched after the lapse of the notice period, the same could have been legal and the 1<sup>st</sup> and 2<sup>nd</sup> Applicant could not have been subjected to any disciplinary action.
  19. The respondent maintained that the disciplinary action against the 1<sup>st</sup> and 2<sup>nd</sup> Ex parte Applicants is not instigated because of the Union positions the hold, but for breach of their employment terms as codified in the Respondent's Code of conduct and Ethics Policy among other laws and regulations.



20. He stated that the issues that have been subjected to the conciliator by the Labour office relate to the essence of the strike as stipulated in the strike notice dated 11<sup>th</sup> October, 2022 and nothing on the disciplinary proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> Ex parte Applicants.
21. He urges this Court to be slow in interfering with the 1<sup>st</sup> Respondent's internal disciplinary processes and wait until the same is concluded and all internal remedies exhausted.
22. The Application was canvassed by written submission, with the Ex parte Applicants filing on the 29<sup>th</sup> November, 2023 and the Respondents filing on the 20<sup>th</sup> December, 2023.

### **Ex parte Applicants Submissions.**

23. The Applicants herein submitted on two issues; whether the Ex-Parte Applicants are entitled to an order of prohibition as sought and whether costs should issue.
24. It was submitted with regard to the first issue that, the Ex parte Applicants denied committing any of the offenses levelled against them in the show cause letters. That they confirmed that they are officials of the 3<sup>rd</sup> Ex-parte applicant as the Chairperson and Secretary respectively and by virtue of their offices it would be reasonable and legitimately expected that they would be present during the union's activities including an activity in anticipation of a protected strike such as the launch that was undertaken on Monday the 17<sup>th</sup> of October 2022. Therefore, that they did not breach any laws and regulations in participating in the Union activities that would warrant disciplinary action.
25. The Ex parte Applicants stated the purpose of Judicial Review Proceedings is as defined in the case of *Municipal Council of Mombasa v Republic, Umoja Consultants Ltd*, Nairobi Civil Appeal No.185 of 2007[2002] eKLR, where the Court of Appeal held that:.

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who make the decision have the power i.e the jurisdiction to make it. Were the persons affected by the decision heard before it was made. In making the decision, did the decision maker take into account relevant matters or did they take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of judicial review is concerned with and such court is not entitled to act as a Court of Appeal over the decider. Acting as an appeal court over the decider would involve going into the merits of the decision itself - such as whether this was or there was no sufficient evidence to support the decision and that as we have said, is not the province of Judicial Review.”

26. Further, that circumstances under which orders of Judicial Review can be issued were elaborated by Justice Kasule in the Uganda case of *Pastoli v Kabale District Local Government Canal & Others* [2008] 2EA 300 at pages 300-304 stated as follows:

“In order to succeed in an application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. Illegality, is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provision of a law or its principles are instances of illegality----. Irrationality, is when there is such gross unreasonableness in the decision taken or act done that no reasonable authority, addressing itself to the facts ‘and the law before it would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards. Procedural impropriety, is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision.



The unfairness may be in non-observance of the Rules of Natural Justice to -act or to act with procedural fairness towards one to be affected by the decision — it may - also involve failure to adhere and observe procedural rules expressly laid down in a Statute or legislature instrument by which such authority exercises jurisdiction to make a decision.”

27. Similarly, that the ex parte Applicants are seeking for orders of prohibition for the reasons that the intended disciplinary proceedings are in contravention of the law and are an outright departure from the rules of natural justice. It is elaborated that the Respondents have singled out the 1<sup>st</sup> and 2<sup>nd</sup> Ex-Parte Applicants and intend on punishing them for acts that were done within their mandate as officials of the Universities Academic Staff Union, Egerton University Chapter. In support of this, they relied on the case of Kenya National Examination Council v Republic Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No.266 of 1896 cited with approval in the case of Esther Victoria Wanjiku Mahoro -vsMary Wambui Githinji & 3 others [2021] eKLR the court held that;

“That now brings us to the question we started with, namely the efficacy and scope of mandamus, prohibition and certiorari. These remedies are only available against public bodies such as the council in this case. What does an Order of Prohibition do and when will it issue” It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies not only for excess of jurisdiction or absence of it but also for a departure from the rules or natural justice.”

28. Accordingly, that the strike was held after Notice was issued and due procedures followed and when the Court directed parties do engage in negotiations, the said strike was called off. It is therefore unfair that after both parties agreed to settle the matter out of court that the Respondents herein decided to punish the 1<sup>st</sup> and 2<sup>nd</sup> Ex-Parte Applicants for participating in the said strike despite it being their constitutional right enshrined in Article 41 (2) (d) of *the Constitution* of Kenya 2010.

29. It was submitted that the intended disciplinary proceedings are illegal for being a mockery and outright contempt to the orders of the court issued in Elrc Petition No. 012 of 2022, Egerton Univesity Versus Universities’ Academic Staff Union And Another, on the 24<sup>th</sup> October 2022 and 1<sup>st</sup> December 2022. Further that it undermines the legal principle underpinning the issuance of such orders, pursuant to section 77 of the *Labour Relations Act* No. 14 of 2007, that is to promote and facilitate good faith in conciliation negotiations by the parties to the trade dispute. Also that the Respondents are not acting in good faith because they enjoy interim Orders of stay of strike and on the flip side instigate disciplinary proceedings against the union officials.

30. It was also submitted that the intended disciplinary proceedings are unlawful for being an affront to section 79(3) of the *Labour Relations Act* No. 14 of 2007 which states that ‘an employer may not dismiss or take disciplinary actions against an employee for participating in a protected strike or for any conduct in contemplation or furtherance of a protected strike.

31. Further that the intended disciplinary hearing will violate their rights under Article 47 of *the Constitution*, more so and when juxtaposed in the context of fair labour practices as further espoused in Section 7 of the *Fair Administrative Action Act* for the following reasons that; the decision is made with an ulterior motive seeking to punish the 1<sup>st</sup> and 2<sup>nd</sup> Ex-parte applicants whom the Respondents view as being the backbone supporting the strong union movement in the university. That the issues that led to the strike are now subject of conciliation proceeding on account of a court order that they sought themselves. Additionally, that taking a disciplinary action against the officials of the 3<sup>rd</sup> Ex-parte Applicants while the trade dispute is in conciliation proceedings amounts to burdening the officials of



the 3<sup>rd</sup> Ex-parte Applicants with grave consequences including dismissal from the employment thereby diminishing their capacity to effectively represent the union's interests in the negotiations. Finally, that being Union leaders, they are legitimately expected to participate in the Union activities.

32. Based on the foregoing, the Ex parte Applicants urged this Court to intervene and issue judicial review orders in the nature of prohibition stopping the Respondents from conducting any disciplinary proceedings against the Ex-Parte Applicants for exercising their constitutional right to participate in Union activities organized within the confine of the laws.
33. On costs, the Ex parte applicants referred this Court to Judicial Hints on Civil Procedure, 2nd Edition, (Nairobi) Law Africa 2011 at page 101 of the book, where Retired Justice Kuloba authoritatively states as follows;

“The law of costs as it is understood by courts in Kenya , is that where a plaintiff comes to enforce a legal right and there has been no misconduct on his part, no omission or neglect, and no vexatious or oppressive conduct is attributed to him, which would induce the court to deprive him of his costs the court has no discretion and cannot take away the Plaintiff's right to costs. If the Defendant, however innocently, has infringed a legal right of the Plaintiff is entitled to enforce his legal right and in the absence of any reason such as misconduct, is entitled to the costs of the suit as a matter of course.”

34. On that basis, the Applicants urged this Court to award them costs of this Judicial Review Application.

#### **Respondents' Submissions.**

35. The Respondents submitted also on two issues; whether the ex parte applicants have made out a case for the grant of the orders sought and who should bear the costs of this suit.
36. On the first issue, the Respondents submitted that the broad grounds on which this Court exercises its jurisdiction on judicial review were stated in the case of *Pastoli v Kabale District Local Government Council and Others* [2008] 2 EA 300 as follows:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”



37. Similarly, that the 1<sup>st</sup> and 2<sup>nd</sup> ex parte applicants are alleged to have contravened section 5 and 7 of the 1<sup>st</sup> Respondent's Code of Conduct and Ethics Policy and Section 76, and 81 of the [Labour Relations Act](#) and Section 44 of the [Employment Act](#). He expounded on these breaches and stated that on 11<sup>th</sup> October 2022, the secretary general of the interested party issued a seven-day strike notice of its intention to commence industrial action on 18<sup>th</sup> October 2022. That the 7 days' notice was to expire on 18<sup>th</sup> October, 2022 as such the strike should have commenced on 19<sup>th</sup> October, 2022, as such commencing the strike before lapse of the Notice period, made the strike unprotected and the launching of the same by the Ex parte Applicants was illegal. In support of this, they relied on the case of David Sirenge Kiganane v Mega Pack (Kenya) Limited [2019] eKLR, where this court considered the provisions of Section 76 of the [Labour Relations Act](#) and opined as follows:-

“An employee cannot assert the right to strike outside the law. Where the industrial action is not protected, an employee who absents himself from work commits work place misconduct classified as gross misconduct under section 44 of the Act and cannot justify such conduct under [the constitution](#) on the right to assemble...in Mohammed Yakub Athman & 18 others v Kenya Ports Authority [2017] eKLR, the Court of Appeal expressed itself as follows- It was against this background of unrest and belligerent behavior that a return to work formula was agreed upon. As correctly observed by the trial court, a return to work formula in itself is an acknowledgment that there was withdrawal of labour preceding the return to work formula. It is an admission that there was a Strike. It is unlikely that there would be a return to work formula without a preceding strike. With this kind of evidence, how could the concerned appellants claim that there was no strike?... The concerned appellants' participation in the illegal strike and incitement as well as disrespectful and violent behavior towards their line supervisors and managers constituted gross misconduct. As evident from the letters of summary dismissal served on each of them, they were all dismissed for gross misconduct, a ground available for summary dismissal contrary to their submissions. We are therefore in agreement with the trial court's conclusions that the 21<sup>st</sup> and 27<sup>th</sup> claimants were therefore summarily dismissed on justifiable grounds.”

38. The Respondents also relied on the case of Joash Alubale Jacob v Mega Pack Limited [2019] eKLR where the court opined as follows:

“A trade union must issue notice of not less than 7 days to the employer before engaging in a strike. without such notice the strike is unprotected. Further even where a notice is issued in accordance with section 76 of the [Labour Relations Act](#), before going on strike, the party relying on the notice must show efforts taken to engage in conciliation... an employee who takes part in strike or calls for a strike or incites others to take part in a strike which strike is not with notice and such matter has not undergone conciliation and upon such conciliation there is no reference to the court for approval, the strike being unprotected attracts disciplinary action”

39. Based on the facts laid out and the case laws above, the Respondents submitted that they have demonstrated that the ex parte applicants participated in an unprotected strike on 17<sup>th</sup> October 2022 and are thus liable to face disciplinary action. In any event that the outcome of the disciplinary action need not led to to dismissal as such the Respondent urged this Court to down its tools and allow them carry out the disciplinary action which is within their mandate. In this they relied on the case of Geoffrey Mworira v Water Resources Management Authority & 2 others [2015] eKLR the court



upheld its opinion in *Kenya Plantation and Agricultural Workers Union v James Finlay (K) Limited* [2013] e KLR where it was stated;-

“The court considers that the employer is entitled to undertake redundancy just like the other human resource functions like recruitment and selection, appointment and promotion, training and development and termination of the contract of service including dismissal on disciplinary grounds. The general principle is that the court shall not interfere in the employer’s entitlement to undertake these functions and interference by the court shall be exercised very sparingly.”

40. On that note, the Respondent implored this Court to find and hold that the ex parte applicants are not entitled to the orders sought and that they should allow the respondents to use their internal dispute resolution mechanisms to the end before they come to court. In any case that the ex parte applicants will have a chance to present their case during the disciplinary hearing.
41. On who bears costs of these Proceedings, the Respondents submitted that costs follow the event and that the court has discretion in awarding costs and prayed to be awarded costs of this litigation in line with the decision in supreme Court decision of *Sonko v Clerk, County Assembly of Nairobi City & 12 others* (Petition 14 (E021) of 2021) [2022] KESC 17 (KLR) (19 May 2022) (Ruling) where the apex Court opined as follows on the issue of costs:

“This court has inherent jurisdiction to make orders on costs with section 21(2) of the *Supreme Court Act* and rule 3(5) of the Supreme Court Rules, 2020 being instructive on this. The guiding principles applicable in costs were as stated in *Jasbir Singh Rai...*”

42. I have examined all the averments and submissions of the parties herein.
43. The issues for this court would determine are as follows;
1. Whether the respondents action against the applicants was merited.
  2. What orders to grant in the circumstances.

#### **Issue No. 1**

44. The 1<sup>st</sup> & 2<sup>nd</sup> applicant sought orders of JR to prohibit the respondents herein from proceeding or undertaking any disciplinary proceedings against them on account of issuing a 7<sup>th</sup> day strike notice dated 11<sup>th</sup> October 2022.
45. From the applicant’s disciplinary letters they are accused of contravening Section 76 © and 80 (i) (a) the Labour Relation Act of among other reasons.
46. In that on 17<sup>th</sup> October 2022 during normal working hours, they participated in an illegal strike and also disrupted lectures scheduled to take place at Kilimu Hall on the material day.
47. As per the reasons set out in the letter dated 4<sup>th</sup> January, 2023 and 22<sup>nd</sup> December, 2022, the accusations levelled against the applicants relate to activities which emanated from a strike action.
48. The respondents applicants responded to these letters denying any involvement in an illegal strike but indicate that as officials of UASU – Egerton Chapter they issued a strike notice. Strike was to commence in 7 days. That in anticipation of the strike they launched the strike on 17<sup>th</sup> October 2022, which strike was to be effective on 18<sup>th</sup> October 2022.



49. The respondents on their part indicate that the strike notice was given but the strike was to commence 18<sup>th</sup> October, 2022 as such any action prior to this day was illegal.
50. The applicants further indicate that before the said strike could proceed, the respondents filed ELRC Petition No. E012 of 2022 Egerton University VS Universities Academy Staff Union & Another seeking to stop the strike amongst other orders.
51. This court granted the interim orders staying the strike and asked the parties to continue exploring negotiations on the issues leading to the strike.
52. It is true that a strike notice had been issued by the applicants in their capacity as officials of the union.
53. This is as provided for under Section 76 of the LRA which states as follows;-
- “76. A person may participate in a strike or lock out if ;-
- (a) the trade dispute that forms the subject of the strike or lockout concerns terms and conditions of employment or the recognition of a trade union;
- (b) the trade dispute is unresolved after conciliation
- (i) under this Act; or
- (ii) as specified in a registered collective agreement that provides for the private conciliation of disputes; and
- (c) seven days written notice of the strike or lock out has been given to the other parties and to the Minister by the authorised representative of
- (i) the trade union, in the case of a strike;
- (ii) the employer, group of employers or employers’ organisation, in the case of a lockout.”
54. The notice having been issued on 11<sup>th</sup>, the 7 days notice was to end on 18<sup>th</sup> October 2022.
55. It was therefore expected that there was only going to be a strike from 18<sup>th</sup> October 2022 and not 17<sup>th</sup> October 2022.
56. The union had indicated that on 17<sup>th</sup> October 2022, all they did was to launch the strike which was to commence on 1<sup>st</sup> October, 2022. The law does not however provide for any launch of a strike prior to its commencement.
57. However Section 79 (3) of the LRA provides as follows;
- “79. (3)An employer may not dismiss or take disciplinary action against an employee for participating in a protected strike or for conduct in contemplation or furthering a protected strike.”
58. It is the Applicant’s position that any action they did on 17<sup>th</sup> October 2022 was a launch of the strike action anticipated to commence on 18<sup>th</sup> October 2022 which was legal.
59. Indeed, a union is indeed allowed some minimum “conduct” in contemplation or furtherance of a protected strike.
60. Since the applicants had actually issued a strike notice I would take it that the conduct of 17<sup>th</sup> October 2022 may have been in contemplation of the strike set to commence on 18<sup>th</sup> October 2022.



61. It is also true that when the respondents appeared in court on 18<sup>th</sup> October 2022 seeking to forestall the strike action the court was able to listen to them and on 24<sup>th</sup> October 2022, the court suspended the strike action and ordered the parties to try negotiations.
62. The applicants were served with disciplinary letters thereafter but this was during the pendency of the would be negotiations process.
63. It is apparent from the analysis herein that the applicants were being subjected to the disciplinary process due to their involvement in these union activities.
64. Section 46 (d) (e) & (i) of the Employment Act 2007 LOK states that;-

“The following do not constitute fair reasons for dismissal or for the imposition of disciplinary penalty;-

- a. ....
  - b. ....
  - c. ....
  - d. The participation or proposed participation of an employee in activities of a trade union outside working hours or with the consent of the employees within working hours.
  - e. An employee’s seeking of office as or acting or having acted in the capacity of an officer of a trade union or a worker representative
  - f. ....
  - g. ....
  - h. An employee’s participation in a lawful strike.”
65. Article 41 (2) of the constitution also provides that;-

“Every worker has a right

- a. ....
  - b. ....
  - c. To form, join or participate in the activities and programmes of a trade union and
  - d. To go on strike.....”
66. Issues of participation in activities of a trade union seem to be what the applicants herein were engaged in and for this reason cannot be punished for the same especially so if it is lawfully and procedurally within their mandate.
  67. This court in *Universities Academic Staff Union v Maseno University* [2013] eKLR when faced with a similar issue had this to say:-

“Under Article 5 of the Convention (in reference to Convention 158) the following inter alia shall not constitute valid reason for termination (a) union membership or participation in union activities outside working hours with the consent of the employer within



working hours (1) seeking office as or acting or having acted in the capacity of a worker's representative.....”

68. This court also cited the ILO Committee of Experts on Freedom of Association paragraph 837 which states as follows;-

“No one should be subjected to anti-union discrimination because of legitimate trade union activities and the remedy of reinstatement should be available to those who are victims of anti-union discrimination....”

69. Having looked at the national law, case law and international law as cited above and having found that the applicants herein were participating in union activities, subjecting them to a disciplinary process when the court had referred the parties to a conciliation process was not fair in the circumstances. Right to organize and collective bargaining convention. Convention 1949 (No. 878 which has already been ratified by Kenya also state as follows;-

1. “Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.
2. Such protection shall apply more particularly in respect of acts calculated to-
  - a. ....
  - b. Cause the dismissal of or otherwise prejudice a worker by reason of union membership or because of participation in union activities outside working hours or with the consent of the employer within working hours....”

70. It is apparent that the applicants being union officials were being subjected to the disciplinary process in a wrong manner and at a time when negotiations were expected to be on as ordered by court and therefore the action of the respondents was irregular and unmerited and I declare it so.

## **Issue No. 2**

71. Having found the action of the respondents unmerited and irregular I find the application by the applicants has merit.

72. I therefore find for the applicants and grant the following orders.

1. An order of prohibition do issue restraining the respondents from proceeding with or undertaking disciplinary proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> Exparte applicants on account of grounds or charges contained in the letter dated 22<sup>nd</sup> December 2022 and referenced EUAPD/18915/1569 with respect to the 2<sup>nd</sup> Exparte applicant and 4<sup>th</sup> January 2023 referenced No. EU/APD 18915/156 (with respect to the 1<sup>st</sup> Exparte Applicant).
2. There will be no order of costs.

**DATED AND DELIVERED IN OPEN COURT THIS 21ST DAY OF FEBRUARY, 2024.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of:

Kahiga for Applicant – present

No appearance for Respondents – absent



Court assistant - Fred

