



Kenya University Staff Union (KUSU) v Co-operative University of Kenya (Employment and Labour Relations Cause E560 of 2023) [2024] KEELRC 642 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 642 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E560 OF 2023**

**BOM MANANI, J
MARCH 20, 2024**

**BETWEEN
KENYA UNIVERSITY STAFF UNION (KUSU) CLAIMANT
AND
CO-OPERATIVE UNIVERSITY OF KENYA RESPONDENT**

RULING

1. The dispute before me relates to whether the Respondent is obligated to consider its serving members of staff to fill available job opportunities within its rank and file before seeking to fill them externally.
2. The Claimant is a Trade Union that represents unionisable employees in Universities. It has a Recognition Agreement with the Respondent.
3. On 23rd June 2023, the Respondent published an advertisement in one of the local dailies for the following positions:-
 - a. Senior Lecturer, Communication;
 - b. Senior Procurement Officer;
 - c. Senior Assistant Procurement Officer;
 - d. ICT Officer (Software Development).
4. The advertisement called for applications for the positions from suitable external applicants. Further details of the requirements for the advertised positions were posted on the Respondent's website.
5. Aggrieved by this development, the Claimant filed the instant suit challenging the Respondent's decision. The crux of the Claimant's grievance is that the Respondent called for external applications for the advertised positions without first considering whether its serving members of staff could fill them in contravention of its Human Resource Manual.



6. The Claimant contends that the parties have been having a series of engagements to address welfare issues for unionisable members of staff. However, the negotiations have yet to bear fruit.
7. The Claimant avers that as the negotiations were underway, the Respondent advertised the above positions externally without considering its members of staff to fill them. The Claimant contends that the aforesaid decision violates the internal regulations that govern the labour relations between the parties.
8. Accompanying the Statement of Claim, is the application dated 14th July 2023. In the application the Claimant seeks for, inter alia, the following orders:-
 - a. That the court issues an injunction to stop the Respondent from processing the applications in the impugned advertisement of 23rd June 2023 pending hearing and determination of this suit.
 - b. That the court directs the Respondent to exhaust internal negotiations on the positions and other welfare matters and tables a report in court.
9. The application is opposed by the Respondent. The Respondent has filed an elaborate replying affidavit in response to the motion.
10. In essence, the Respondent's position is that after it conducted a Skills Gap assessment, it emerged that a substantial number of its staff did not qualify for the vacancies within its establishment. Consequently, it resorted to external advertisement in a bid to get personnel with the requisite skills.
11. The Respondent contends that the decision to advertise externally was in tandem with its Human Resource policies. Further, the decision did not disadvantage serving members of staff as it did not preclude them from applying for the positions as long as they met the minimum requirements.
12. As the application dated 14th July 2023 was pending resolution, the Claimant filed yet another application dated 6th November 2023. In the latter application, the Claimant seeks the following orders:-
 - a. That the Respondent be compelled to table before the court the evaluation report undertaken towards staff establishment of the applicant's members.
 - b. That the Respondent be compelled to undertake internal advertisement for the positions of the applicant's members as they have done with UASU and KUDHEIHA.
 - c. That the court finds that the Respondent's officers are liable for abuse of office.
 - d. That the Respondent be restrained from discriminating and intimidating the Claimant's officials.
13. This latter application has also been opposed by the Respondent through its affidavit dated 24th November 2023.
14. The court directed that the two applications be heard together. Further, it was directed that the applications be canvassed through written submissions.

Analysis

15. The grievance by the Claimant is whether it is proper for the Respondent to attempt to fill the impugned positions without first undertaking internal advertisement for them. The answer to this question lies in the Respondent's Human Resource Manual that was published in July 2017.



16. Chapter two of the Manual deals with the issue of recruitment of staff to serve the Respondent. Clause 2.7 of the Manual sets out in a hierarchical manner the sources of manpower for the Respondent. It provides that the University shall consider the following ways to fill vacant positions within its rank and file:-
 - a. Promotions;
 - b. Transfer of an employee;
 - c. Internal recruitment;
 - d. External recruitment.
17. It is noteworthy, that the regulations permit the Respondent to source human resource both externally and internally. However, external recruitment ranks last in the possible sources for manpower.
18. The above reality is made even clearer when chapter six of the Manual is taken into account. This chapter deals with the issue of staff promotions.
19. It provides as follows:-

“ As far as it shall be practicable, and suitable to the University all job openings in the University shall be expeditiously filled by promotion of serving employees unless no suitable candidate is found. The outcome of performance appraisals shall form the basis for promotions.”
20. Clause 6.3 of the Manual stipulates that vacant positions within the University establishment will be advertised internally. In my view and based on the preliminary evidence before me, it is only if the University fails to get suitable staff through this process that it can resort to external advertisement.
21. The Respondent contends that it undertook a Skills Gap analysis of its existing members of staff and was unable to get suitable candidates for the advertised positions. It allegedly undertook this exercise by reviewing the curricula vitae of serving members of staff. Consequently, it was forced to place an external advertisement for the positions.
22. Chapter six of the Manual requires the Respondent to undertake performance appraisal of employees proposed for promotion. The regulations do not confine the process of promotions to a review of the affected members of staff curricula vitae. To the extent that the Respondent confined the impugned exercise to reviewing staff curricula vitae without more, this appears to have been irregular.
23. Importantly, staff appraisal must be with the full participation of the affected employees. The members of staff must be given the appraisal results and informed why they have not met the threshold set by the employer for promotion. The preliminary material before me does not disclose that this was the case in the instant case. In effect, it is clear to me that the Claimant has a prima facie case against the Respondent.
24. Prima facie, the manner in which the Respondent has undertaken the impugned exercise appears to violate its own Human Resource Manual. In such case, the court should be able to issue an injunction to prevent further violation of the law or internal regulations notwithstanding that the grievant can be compensated by an award of damages should he succeed. Affirming this position, the court in *Banis Africa Ventures Limited v National Land Commission* [2021] eKLR quoting with approval the decision in *Said Almed vs. Mannasseh Benga & Another* [2019] eKLR expressed itself as follows:-

Where it is clear that the defendant’s act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for



consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it.”

25. The term irreparable injury ought not to be understood to mean injury that cannot possibly be repaired. It simply means injury which is substantial in nature. As is observed in Halsbury’s Laws of England, Third Edition, Volume 21, paragraph 739, page 352, “even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”.
26. In the instant suit, once the Respondent fills the contested positions through the impugned process, the Claimant’s members will be completely locked out of the said positions. In effect, the subject matter of the dispute would have been obliterated. Consequently, I find that this is a deserving case for the grant of injunctive orders.
27. As regards, the application dated 6th November 2023, it is my view that most of the issues that are raised therein can be addressed during the trial of this action. As such, I will not grant the orders sought in the said application.

Determination

28. The upshot is that:-
 - i. The application dated 6th November 2023 is disallowed with costs to the Respondent.
 - ii. The application dated 14th July 2023 is allowed in the following terms:-
 - a. The court hereby issues an order of injunction restraining the Respondent from processing the applications and proceeding with interviews for the advertised positions pursuant to the Daily Nation of Friday, June 23, 2023 and the Respondent’s website reference CUK/EXTADVERT/3/23(1) for June 2023 pending the hearing and final resolution of this suit.
 - b. Costs of the application are granted to the Claimant.

DATED, SIGNED AND DELIVERED ON THE 20TH DAY OF MARCH, 2024

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

ORDER

In light of the directions issued on 12th 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.

B. O. M MANANI

