



Gumbe v Vice Chancellor, The Technical University of Kenya & another (Employment and Labour Relations Petition E010 of 2024) [2024] KEELRC 741 (KLR) (5 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 741 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E010 OF 2024**

AN MWAURE, J

APRIL 5, 2024

BETWEEN

LAWRENCE OTWENYO MIGIRE GUMBE PETITIONER

AND

**VICE CHANCELLOR, THE TECHNICAL UNIVERSITY OF
KENYA 1ST RESPONDENT**

**CHAIRMAN OF COUNCIL, THE TECHNICAL UNIVERSITY OF
KENYA 2ND RESPONDENT**

RULING

1. The Petitioner filed a Notice of Motion dated 26th January 2024 seeking the following orders That: -
 - a. spent
 - b. interim conservatory orders do issue stopping and/or halting and/or staying the further implementation of the decision contained in the letter dated 5th January 2024 and referenced TUK/GUS/CE/UMB/127/VOL XIII whose effect is the unlawful and illegal recovery of a sum of Kshs 4,140,232.80/= from the salary of the Applicant, pending the inter-parties hearing and determine of the instant application.
 - c. interim conservatory orders do issue stopping and/or halting and/or staying the further implementation of the decision contained in the letter dated 5th January 2024 and referenced TUK/GUS/CE/UMB/127/VOL XIII whose effect is the unlawful and illegal recovery of a sum of Kshs 4,140,232.80/= from the salary of the Applicant, pending the inter-parties hearing and determine of the instant Petition.



- d. an order does issue reinstating all such benefits, allowances, privileges and entitlements of Prof. Lawrence Otweyo Gumbe as were enjoyed by him by virtue of his position as a professor at the Technical University of Kenya.
- e. the costs of this Application be borne by the Respondents.
- f. any other remedy that the Court deems fit and just.

Petitioner/ Applicant's Case

2. The Petitioner avers that the Technical University of Kenya decided to illegally and unconstitutionally deduct Kshs 4,140,232.80/= from his salary on 05.01.2024.
3. The Petitioner avers that the no notice was ever issued prior to the abrupt, arbitrary decision and neither was he afforded an opportunity to be heard over the said illegal and unlawful deductions.
4. The Petitioner avers that the Respondent's action has occasioned great prejudice and an infringement of his fundamental and freedoms.
5. The Petitioner avers that he has made out a prima facie case and has satisfied the principles in regard to the grant of conservatory orders.
6. The Petitioner avers that the Respondents acted in direct contravention of *the Constitution* and constitutional principles on upholding the rule of law, democracy, human dignity, social justice, good governance, public participation and involvement and values of public service as enshrined in Article 10 and 232 of *the Constitution*.
7. The Petitioner avers that no prejudice shall be suffered by the Respondents should the orders sought be granted and, in any event, the Applicant stands to suffer greater prejudice and harm and continues to be greatly prejudiced as a result of the Respondents' action.

Respondents' Case

8. In opposition to the Application, the Respondents filed a replying affidavit dated 19th February 2024.
9. The Respondents avers that the Petitioner was employed by the Technical University of Kenya as a Professor vide a 2-year renewable contract dated 19.12.2014, therefore, he was not employed in the year 2008 as alleged. There are no records of his engagement then.
10. The Respondents aver that according to the terms of service, the Petitioner was required to give such courses of lectures and demonstrations and conduct tutorials, practical classes and field courses as may be determined by the Head of Department.
11. The Respondents aver that the Petitioner delivered responsibly from 2014 to 2016, however, it was unveiled that sometime in 2023 despite continuing to receive his pay, the Petitioner had not been teaching in respective semesters running from 1st, 2nd and 3rd semesters of 2017/2018, 2018/2019 2020/2021 and 2022/2023 academic years.
12. The Respondents aver that the Petitioner did not provide any reason as to why he did not teach the relevant course units for the aforementioned periods and as such it cannot be justified why he was entitled to the payments made for those periods.
13. The Respondents aver that the purported minutes of the meeting held on 17.01.2020 reflects that units and students assigned to the Petitioner were to be re-allocated due to his unavailability in that semester. Further, no reason was provided on his unavailability.



14. The Respondents aver that the Petitioner's allegation that he was unavailable for teaching to concentrate on curriculum development is a fabrication since it is not reflected in the unsigned minutes or any letter to the relevant department.
15. The Respondents aver that upon realizing that the Petitioner had been receiving pay for the above periods which he did not teach, the institution through the office of the Vice Chancellor embarked on recovering the funds to the tune of Kshs 4,140,232.80/-.
16. The Respondents aver that it is insensible for the Petitioner to allege that he was not notified and/or given a chance to be heard before the decision to recover the said funds from his salary was reached upon. The Petitioner never notified the concerned departments of the fault of paying him without teaching, nevertheless, the 1st Respondent vide the letter dated 05.01.2024 notified the Petitioner of the recovery of funds, expounding on the events leading to the same.
17. The Respondents aver that the Petitioner in his response dated 08.01.2024 did not deny that he never taught for the highlighted periods but he in turn tries to justify why the funds should not be recovered.
18. The Respondents aver that the Applicant has not made a prima facie case and the balance of inconvenience tilts to the Respondents on grounds that deterrence of the implementation of the decision contained in the letter dated 05.01.2024 that the Petitioner will continue to receive his full pay.
19. The Respondents aver that the Petitioner's salary is public funds which institution shall have lost in case its barred from deducting the same. The Respondent are apprehensive that since the Applicant's contract will lapse by end of this year and without proximity of when determination will be made, the Respondent's stand to suffer prejudice if the orders sought are granted.

Petitioner/Applicant's Submissions

20. The Vice-Chancellor wrote two letters reference TUK/GUS/CE/UMB/127/VOL.XIII dated 04.01.2024 expressing intention of Technical University of Kenya to deduct Kshs. 3,613,294.08/- with effect from December 2023 on ground that he did not teach; and a second letter dated 05.01.2024 reference TUK/GUS/CE/UMB/127/VOL.XIII threatening to deduct Kshs. 4,140,232.80/- on grounds that he did not teach.
21. It is the Petitioner's submission that the amounts to be deducted are not similar but confusing and misleading.
22. The Petitioner submitted that he worked under a Director of Department whose one of the duties is to allocate and assign work to members of staff including the Applicant.
23. It is the Petitioner's submission that the Vice-Chancellor claim that he has not taught since 2016 to 2023. The Respondents want the court to believe that the Directors were not aware that he was not teaching and the students were passive and supported management to pay his salary without teaching.
24. The Petitioner submitted that during the Period 2019-2023, he was supervising a PhD candidate, supervision is the highest form of teaching.
25. The Petitioner submitted that during this period he has published 10 articles and attended international conferences which have gone a long way in enhancing the image and profile of the University.
26. The Petitioner submitted that the Respondents have not given any cogent reasons why they want to deduct his salary and he has spent a lot of energy and intellect to help the university.



Respondent's Submissions

27. The Respondents submitted that conservatory orders are aimed at preserving the substratum of the matter pending the determination of the main issues in dispute. The subject matter herein is salary to be paid to him during the remainder of his contract. Once paid in full and the court reaches a finding that the Applicant is indeed culpable to the offence of not teaching and supervising students, the subject matter to be preserved shall be spent with no avenue to recover it.
28. It is the Respondents' submission that the stay of further implementation of the decision in the letter dated 05.01.2024 which means that the Petitioner will continue to receive full pay during the pendency of the matter without proximity of when the matter will be determined. Since the Petitioner is apprehensive of not renewing his future contracts with the institution, the Respondent stands to suffer prejudice if the conservatory orders are granted.
29. The Respondents submitted that the Petitioner has not demonstrated that he has an arguable prima facie case. In response to the letter dated 05.01.2024, the Petitioner does not deny payment was done for periods he did not teach, he concentrates on justifying what he was allegedly doing over that period.
30. The Respondents submitted that to recover the funds owed is to be done gradual deductions from the Petitioner's salary until recovery in full. If the Respondents are barred from deducting the said amounts then the substratum will not exist as at the time of determination of the Petition it shall be exhausted by the Applicant/Petitioner.
31. It is the Respondents' submission that the grant of conservatory order will result in loss of public funds. Should the Applicant be successful, the Respondents will release the deducted salary and remit to him.

Analysis and Determination

32. Having considered the application, affidavits and submissions on record, the court is tasked to determine whether the Petitioner/Applicant is entitled to conservatory orders sought.
33. Justice A.C Mrima in *Katiba Institute v Judicial Service Commission & 2 others; Kenya Magistrates and Judges Association & 2 others (Interested Parties) (Constitutional Petition E128 of 2022) [2022] KEHC 438 (KLR) (Constitutional and Human Rights) (3 June 2022) (Ruling)* held: -

“the principles for consideration by a court in exercising its discretion on whether to grant conservatory orders have been developed by courts over time. They are now well settled.

The locus classicus is the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others* case (supra) where at paragraph 86 the court stated as follows: -

..... Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.

In *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] eKLR*, the court summarized the principles for grant of conservatory orders as: -

- i. The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.



- ii. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
 - iii. Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
 - iv. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.
34. In *Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board & Others* Nairobi High Court Constitutional Petition No 154 of 2016 (2016) eKLR the court summarized three main principles for consideration on whether to grant conservatory orders as follows: -
- a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.
 - b. Whether, if a conservatory order is not granted, the petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
 - c. The public interest must be considered before grant of a conservatory order.”
35. The Petitioner/Applicant has raised a reasonable legal question which can only be delved by this court during the hearing of the main Petition. The issue on whether the Respondents have the right to deduct the Petitioner’s salary to recover Kshs 4,140,232.80/ and whether the Petitioner was indeed teaching and supervising students during the said period can be addressed during the hearing and determination of the main suit.
35. Considering the petitioner used to work for the respondent as a professor from 2014 to 2023 he used to have his contracts renewed by the Vice Chancellor of the University in 2017, 2018, 2020, 2022 and continued to receive his salary which was gross salary of kshs 385,525.
35. It is puzzling that all those years neither the University nor the students or the Director who supervised the petitioner noted he was not working for the university all those years. That sounds very unbelievable.
35. The court finds there is a prima facie case proved by the petitioner. It is prudent to note he was not given a hearing before the University communicated their decision to start deducting his salary. This was against *the Constitution* and right to *fair Administrative Action Act*. At least he should have been given an opportunity to explain what he was upto for all that period.
35. The court is mandated to avail justice to all the parties. The court therefore grants prayer No. C of the notice of motion dated 26th January 2024 which specifically states as follows:
- (c) that interim conservatory orders do issue stopping and/or halting and/or staying the further implementation of the decision contained in the letter dated 5th January, 2024 and referenced TUKI/GUS/CE/UMB/127/VOL. XIII whose effect is the unlawful and illegal recovery of kshs 4,140,232.80/- from the salary of the applicant, pending the inter parties hearing and determination of the instant petition.
35. The other prayers d and e will be handled alongside the main petition. At the same time the costs of this application will be in the cause.



35. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 5TH DAY OF APRIL, 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

