Otieno v University of Nairobi & another; Kenya Union of Domestic, Hotels, Educational Institutions Hospitals And Allied Workers (KUDHEIHA) University of Nairobi Chapter (Interested Party) (Miscellaneous Application E130 of 2023) [2024] KEELRC 970 (KLR) (8 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 970 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION E130 OF 2023

K OCHARO, J

APRIL 8, 2024

BETWEEN

DAN ONYANGO OTIENO ..... APPLICANT

AND

UNIVERSITY OF NAIROBI ..... 1ST DEFENDANT

AG REGISTRAR ADMINISTRATION ..... 2ND DEFENDANT

AND

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS HOSPITALS AND ALLIED WORKERS (KUDHEIHA) UNIVERSITY OF NAIROBI CHAPTER ..... INTERESTED PARTY

RULING

Background

1. The Applicant herein acting in person filed a Notice of Motion Application dated 16th June 2023 seeking an order directing the Respondent to furnish him with various documents, asserting that he had requested for the same from the latter, but the same were not supplied to him. Further, leave to enable him to appeal internally against the decision to terminate his employment.

2. The Application is expressed to be under the provisions of Articles 47, 50, 159 (2) (a) (b) and (e) of the *Constitution* of Kenya 2010; Sections 1A, 1B and 3A of the *Civil Procedure Act*; Orders 51 Rule 1 of the *Civil Procedure Rules* 2010.

3. The Respondent opposed the Application through a replying affidavit of one Harrison Shimanyi Akala sworn on 28th September 2023.

4. This Court directed that the Application be canvassed by way of written submissions. The parties herein obliged the directions. They both [the Applicant and the Respondent] filed their respective submissions. This ruling is, therefore, with the benefit of the submissions.

5. The Applicant states that he was first employed by the 1st Respondent as a cleaner, Grade 3 in 2004 and later promoted to the position of Audio-Visual Officer in 2019, a position which he held until his employment was terminated.

6. The Applicant further states that on 14th January 2023, the Director of Security and other officers of the 1st Respondent visited the Claimant's office and forcefully confiscated his phone, office desktop computer, official work equipment, work documents and personal effects. The Claimant was later suspended by the Respondents on 1st March 2023 for 30 days, a suspension period which was extended for a further 30 days vide a letter dated 29th March 2023.

7. On the 25th of May 2023, he was invited to a Staff Disciplinary meeting where he was charged with various counts of gross misconduct which it was alleged he committed in the course of his employment.

8. The Applicant asserts that during the disciplinary hearing, he was not supplied with the investigation report that the Committee relied on. He was not allowed to cross-examine the "Panel". Further, before the hearing, the Committee failed to supply him with witness statements and a copy of the investigation report.

9. He contends that after the decision of the Staff Disciplinary Committee, he requested documents requisite for an internal appeal but the Respondent failed to supply the same to him. He was referred from one office to the other, and at the end of the day, his efforts didn't bear fruit. The documents he asked for were; minutes of the Staff Disciplinary Committee proceedings; the investigation report that was relied upon by the Committee; Statutes of the 1st Respondent; witness statements that the 1st Respondent placed reliance on; and "proofs of originality and non-tempering of electronic evidence relied upon by the Staff Disciplinary Committee and confirmation of conditions of equipment used to produce them.

10. Without the documents he cannot be able to prepare an adequate internal appeal.

11. The Respondent states that the Applicant has filed Petition No. E 325 of 2023- Dan Onyango Otieno v University of Nairobi, dated 4th September 2023. In the petition, the Applicant has sought inter alia, a declaration that the termination of his employment was both unfair and unconstitutional; an order quashing the termination of his contract and setting aside the resolution of the Disciplinary Committee; and an order reinstating him to complete the full term of his contract of employment and for payment of his salary arrears or in the alternative compensation in the same of KShs. for breach of contract.

12. The Respondent asserts that to the stated petition, the Applicant has annexed various documents that were exchanged between him and the 1st Respondent and the Committee. He has further attached to the petition documents which were before the committee during the Disciplinary hearing, inclusive emails and the Respondent's report on his gross misconduct. In essence, therefore, the documents that he wants the Respondent compelled to furnish him, are documents that are in his possession already.

13. It is further contended that since the Applicant has already moved to court through the above-stated petition to challenge the termination of his employment, the purpose [internal appeal] for which he needs the documents has been defeated by the circumstance.

14. The demand that he be supplied with the Statutes of the Respondent, is unreasonable. Its Statutes are public documents which are readily available on the Respondent's website. No court order is required to access the website. Further, the document called the Code of Conduct of Public Universities of the Respondent does not exist.

15. In addition to the foregoing, the Respondent contends that under the invitation letter for the disciplinary hearing, dated 17th May 2023, it dispatched to the Applicant all the documents that were to be used at the hearing. This is evident from page 2 of the letter. On the 25th of May 2023, when the Applicant appeared before the disciplinary Committee, he didn't raise any protest that though the letter mentioned dispatched documents to him, he hadn't received any.

16. As a rejoinder to the Respondent's assertions, contentions and arguments, the Applicant filed a supplementary affidavit sworn on the 29th of September 2023. He contends that the replying affidavit filed by the Respondents was done out of time.

17. He asserts that he was only given a preliminary report before investigations by the Respondent could conduct its investigations. Therefore, he was not given any investigation report. The 1st Respondent refused to give him minutes of the disciplinary hearing to enable him to prepare and lodge an internal appeal.

18. Contrary to the Respondents' assertion, the 1st respondent has a *Code of Conduct and Ethics for Public Universities*,2003 [Revised in, 2009] which embodies the disciplinary process. Further, the subject matter of the instant application is the production of documents, whilst that of the petition is the unfair termination.

19. He further contends that the Statutes sought aren't on the Respondent's website and since he no longer has login rights to the website.

20. The Respondent besides filing an answering application to the Applicant's application, filed a notice of preliminary objection dated 15th September 2023, raising to grounds therein, thus; [a] The Applicant has moved the court prior to exhausting the alternative remedy prescribed under section 14 of *Access to Information Act*, and [b] The Applicant has moved the Court procedurally in that there is no suit before the court within which the Applicant's Notice of Motion has been premised.

Analysis and Determination

21. Imperative to state that the preliminary objection raised by the Respondents raises a jurisdictional issue. As a result, it is necessary that this Court renders itself first on the issue, and only move to consider the Applicant's application if it declines the objection. Therefore, I will render myself on the three issues that emerge for consideration from the preliminary objection and the application, thus, whether the preliminary objection has merit; whether this Court has jurisdiction to extend the time for filing of the internal appeal as sought by the Applicant; and whether the orders sought in the instant application can be availed to the Applicant, in a sequence that appreciates the above stated sequence.

Whether the Respondent's preliminary objection has merit.

22. Counsel for the Respondent submits that under Section 2 of the *Fair Administrative Action*, production and or refusal to produce documents by an entity is an administrative action. Further, Section 9[2] of the *said Act* provides that the High Court or Subordinate Court should not review an administrative action or decision unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

23. Counsel further submits that the Applicant should have made an application for review at the Commission on Administrative Justice before approaching this Court. Section 14[1] [a] of the *Access to Information Act* provides that an Applicant may apply to the Commission on Administrative Justice requesting a review of an entity's refusal to grant access to the information requested.

24. Citing the decision in *Savraj Singh v Diamond Trust [Kenya] Limited & another* [2020] eKLR, where the Court held;

> " It is appreciated that indeed the cited decision does not indeed recognize that the unlimited jurisdiction of the High Court of Kenya under Article 165[3][b] of the *Constitution* to determine the question on whether a right or fundamental freedom has been infringed or violated. Nevertheless, it must be appreciated that the High Court does not exercise its jurisdiction on a vacuum. Jurisdiction is exercised within the laid down principles of law. One of those principles is one which requires that where a statutory mechanism has been provided for the resolution of a dispute, the procedure should first be exhausted before the Courts can be approached for resolution of that dispute. Indeed, like any legal principle, this doctrine has exceptions. In my view, it is in the duty of a party who bypasses a statutory dispute resolution mechanism to demonstrate that there were reasons for avoiding the route. In the case before me, the petitioner has simply pointed to the jurisdiction of this Court. The exhaustion principle does not actually take away the jurisdiction of this Court. What it does is to provide the parties with a faster and more efficient mechanism for the resolution of their disputes. The courts will step in later if any of the party is aggrieved by the decision of the statutory body mandated to resolve the dispute.
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> The preamble of the *Access to Information Act*, 2016 clearly states that it is an "Act of Parliament specifically enacted to give effect to the right of access to information under Article 35 of the *Constitution*. The legislators in their wisdom, and that wisdom has not been challenged, deemed it necessary that any issue concerning denial of information should first be addressed by the Commission on Administrative Justice....."

25. The Respondent further places reliance on the cases of *Charles Apudo Obare & Another vs Clerk County Assembly of Siaya & Another*, [2020] eKLR, and *the Commission for Human Rights & Justice [CHRJ] & another v Chief Officer, Medical Services County Government of Mombasa & 3 others* [2022] KEHC 12994.

26. The Applicant's Notice of Motion is predicated on the provisions of the *Civil Procedure Act*, and the *Civil Procedure Rules*. The *Civil Procedure Rules* are only applicable to this Court in instances where there is a lacuna in the Rules of this Court. To support this point, Counsel places reliance on the case of *Micheal Adib Azzam v Zakhem Construction [K] Limited* [2022] eKLR. The *Employment and Labour Relations Court [Procedure], Rules*,2016, specifically, 27 of the *Employment and Labour Relations Court Act*, has provided a manner of instituting proceedings before the Court. As a result, no lacuna exists to justify the Applicant moving the Court under the *Civil Procedure Act* and *Rules*.

27. Under the above-stated Act, and the Rules of this Court, the institution of a suit by way of a Notice of Motion application is not recognized. A Notice of Motion Application is only recognized as a mode of presenting an interlocutory application before the Court. To support these submissions, the decisions in Jane Wambui Gathuru v Teachers Service Commission & Another [2020] eKLR, and Norah Ndunge Henry & another v Abednego Mutisya & another [2022] eKLR, were cited.

28. The Respondent concludes that there is no suit before this court in which the Notice of Motion is premised. The application is therefore without foundation. It should be struck out. Article 159 of the

Constitution cannot come in to aid the same, as the matter, of the mode of the institution of suits is not in nature a technicality.

29. In opposition to the Preliminary objection, the Applicant contends that the same is unnecessary. It is only intended to waste the time of this Court. The Respondents are only interested in procedural technicalities and not substantive justice.

30. I now turn to consider the applicability of the exhaustion doctrine or otherwise regarding the matter at hand. The doctrine simply insists that where the law provides for an alternative dispute resolution mechanism, parties must first engage the mechanism and only approach the Court where the engagement bears no fruit. In the case of *Speaker of the National Assembly v Karume*, [1992] eKLR, the Court of Appeal stated and I agree,

> "Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."

31. In the case of *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* [2015] eKLR, the Court stated;

> "It is imperative that where a dispute resolution mechanism exists outside courts, the same should be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be the last of last resort and not the first port of call the moment a storm brews..... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to which a party is first of all diligent in the protection of his own interest within the mechanism in place for resolution of outside the Courts ..... This with accords Article 159 of the *Constitution* to encourage alternative means of dispute resolution."

32. However, that is not to say that there are no exceptions to the doctrine. The exceptions that are now trite, exist in recognition of the fact that in some situations, insistence on applying the doctrine will lead to absurdity, hardship on a party or parties to the dispute or defeat the interest of justice generally. However, it becomes a duty upon the party or parties asserting that a matter is not fit for applicability of the doctrine, to sufficiently demonstrate that the circumstances of the matter are that the party or parties should be excused from the doctrine.

33. I have carefully considered the Applicant's application which as hereinabove stated was done in person, and note that besides the prayer for the supply of some particular documents to him by the Respondent, he has also sought for enlargement of time for filing of his appeal, internally. In my view, the part of the application for an extension of time does not fall under any of those matters contemplated in the *Access to Information Act*, and therefore one that could be handled by the Commissioner. Further, the application [for the leave] cannot be a review application contemplated under the *Fair Administrative Action Act*.

34. Counsel for the Applicant heavily and rightly submitted on the exhaustion doctrine but didn't address the Court on this point and how then the applicability of the doctrine can sit in the instant matter.

35. Having said as I have hereinabove that part of the Applicant's application is of matters that neither fall under the ambit of the *Access to Information Act* nor the *Fair Administrative Act*, this question then springs up, could the Applicant have severed the application for supply of documents from the one for leave, to avoid the exhaustion doctrine and have a separate application or the leave? In my view, such a

process was not necessary. It could not accord with the Constitutional spirit of expeditious disposal of disputes and unhindered access to justice. The Court has not lost sight of the fact that Section 14[1] is not couched in mandatory terms, and I think for good purpose.

36. By reason of the foregoing premises, I hold that the exhaustion principle cannot properly apply in the instant application. The Respondent cannot use it as a sword to slay the Applicant's application.

37. The Respondents argue in further support of their preliminary objection that the matter herein has been improperly and unprocedurally initiated. They state that the same has been clearly stated to be anchored on the provisions of the Civil and *Labour Relations Court Act*, and the Rules that flowed therefrom pursuant to the command under Section 27 thereof.

38. True, Parliament in its wisdom thought it fit to legislate that proceedings before the Employment and Labour Relations Court shall be governed by the Act and the Rules of practice flowing therefrom. The wisdom hasn't been challenged in any manner known in law. The provisions of the *Civil Procedure Act* and Civil Procedure rules can only apply to those matters specifically allowed by the Act, for instance, execution proceedings.

39. Having said this, it becomes imperative to state at this juncture that the Applicant's application is not solely premised on the provisions of the *Civil Procedure Act*, and Civil Procedure Rules, I note it is expressed to be also anchored on the provisions of the *Constitution*, Articles 47, 50, and 159. Further, on all the enabling provisions of the law. In the circumstances on the matter, I could say that the constitutional provisions are properly cited and are applicable. The 'all enabling provisions of the law' in my view suggests that the Applicant was not closed on the provisions, anchor of his application, the provisions of the Employment and *Labour Relations Act*, and the *Employment and Labour Relations Court [Procedure] Rules*, 2016, can be inferred as contemplated, and applicable under this banner.

40. Heed should be given by litigants and Advocates alike, that post the inauguration of the 2010 Constitution, there set in a radical shift on matters strict instance on the form of pleadings and more specifically in those disputes and or matters that touch on the constitutional provisions and or Bill of Rights and Fundamental Freedoms. The "Mutunga Rules" exemplifies this.

41. In the upshot, I am not persuaded that the Applicant's application can be shot down upon the premise that it invokes the Civil Procedure Rules and the provisions of the *Civil Procedure Act*. It was properly initiated, further considering that it is not on contentious matters that could require the rigorous evidence-taking process, that could involve oral testimonies.

42. As a result, I am convinced that the preliminary objection lacks merit and it is hereby dismissed.

43. I now turn to consider the two issues that I distilled for consideration on the Notice of Motion Application. The Applicant seeks inter alia enlargement of time as regards filing of his appeal internally. Does this Court have the power to enlarge the time in favour of a party as seeks the Applicant? A liberal interpretation of Section 12 of the *Employment and Labour Relations Court Act*, that speaks to the jurisdiction of this Court, will lead to an affirmative answer. Where an employer appears to stymie the expansive statutory protection and rights accorded for employees by his or her inactions, the Court cannot fold its hands and say "but there is no specific mention of the complained of inaction or action in the catalogue under section 12 of *the Act*". For good purpose, the catalogue in the section was left open-ended.

44. Is the Applicant entitled to the orders sought? Respondents contend and submit that most of the documents that the Applicant has sought, are those that are in his possession as he has annexed the same to his Petition that has been alluded to hereinabove. I have carefully looked at the annextures to

the Petition, and I am convinced that they aren't the same as those, the subject matter of the instant application.

45. The documents the Applicant seeks to be supplied with are documents that a reasonable employer could readily provide to his or her employer to enable his or her employer to enable him prefer an internal appeal. In exercise of its duty to act in good faith, the employer should absent of any sufficient reason, appear not to be by acts or omissions to be impeding an employee's right of internal appeal. I see no sufficient reason why the 1st Respondent's cannot furnish the documents. There is no prejudice that it can suffer for so doing, and in any event, it has not asserted that it will suffer any.

46. Procedural fairness in matters termination of employment, extends to post -termination events like an internally initiated appeal in assailment of the decision to terminate. On this note, it becomes imperative for employers to provide employees with all necessary and relevant documents in their possession, to facilitate a proper preparation of an internal appeal, and prosecution of the same. I hold that the documents sought by the Applicant are in the possession of the 1st Respondent, and necessary and relevant for this stated purpose.

47. Anchored on the foregoing premises, I come to an inescapable conclusion that the justice of this matter require that the Notice of Motion dated 16th June 2023 to be allowed in the following terms;

    a. The documents sought by the Applicant be furnished to him within 21 days of today.

    b. The time for purposes of the Applicant's right to appeal internally shall start running from the date of supply of the documents sought to him by the 1st Respondent.

    c. The 1st Respondent to bear the costs of this application.

READ, DELIVERED AND SIGNED THIS 8th DAY OF APRIL, 2024.

OCHARO KEBIRA

JUDGE

In the presence of:

Ms. Nyagah for the Respondent

Mr. Onyango for the Applicant

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.

OCHARO KEBIRA

JUDGE