



Omach v Universities Academic Staff Union (UASU) & another (Employment and Labour Relations Cause E137 of 2024) [2024] KEELRC 2255 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2255 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E137 OF 2024
BOM MANANI, J
SEPTEMBER 19, 2024**

BETWEEN

SAMUEL OTIENO OMACH CLAIMANT

AND

UNIVERSITIES ACADEMIC STAFF UNION (UASU) 1ST RESPONDENT

**UNIVERSITIES ACADEMIC STAFF UNION, UNIVERSITY OF NAIROBI
CHAPTER 2ND RESPONDENT**

RULING

Background

1. The Claimant was employed by the 2nd Respondent to the position of Office Administrator starting from 1st August 2003. He worked in the said position until 4th January 2024 when the 2nd Respondent suspended him from duty pending disciplinary action against him. Prior to suspension of the Claimant from duty, the 2nd Respondent had served him with a notice to show cause letter dated 19th December 2023 to which the Claimant responded through his letter of 20th December 2023.
2. It would appear that the 2nd Respondent decided to withhold the Claimant's salary after it suspended him from duty. The Claimant contends that this state of affairs persisted up to the time that he instituted these proceedings.
3. Together with the main claim, the Claimant filed an application seeking a number of interim reliefs including the following:-
 - a. An order suspending the 2nd Respondent's decision to suspend him from duty without pay.
 - b. An order directing the 2nd Respondent to release his withheld salary.



- c. An order forbidding the 2nd Respondent from advertising or recruiting an officer to fill his position.
4. The 2nd Respondent filed a replying affidavit in opposition to application. The affidavit is dated 7th May 2024.
5. In the affidavit, the 2nd Respondent contends that after suspending the Claimant from duty, it issued him with a letter dated 2nd April 2024 inviting him for a disciplinary hearing on 9th April 2024. However, he wrote back on 8th April 2024 declining to attend the hearing.
6. The 2nd Respondent contends that following the Claimant's refusal to attend the disciplinary session, it considered that he was not interested in submitting to its disciplinary process. As such, it proceeded with the disciplinary session in his absence and dismissed him from its employment.
7. The 2nd Respondent further contends that it proceeded to hire a new employee to take up the Claimant's role. As such, the instant application has been overtaken by events.

Submissions on the Application

8. The court gave directions for the application to be canvassed through written submissions. In compliance with these directions, the parties have filed their submissions.
9. In his submissions, counsel for the Claimant argues that the application is merited and ought to be granted. He contests the 2nd Respondent's view that the application has been rendered moot by reason of the events that took place after it was filed.
10. Counsel for the Claimant argues that the Claimant has met the conditions for grant of the orders sought. He relies on the decision of *Giella v Cassman Brown* (1973) E.A 358 to support his argument. He contends that the Claimant has demonstrated that:-
 - a. He has a prima facie case with a chance for success.
 - b. If the orders sought are not granted, he will suffer irreparable damage.
 - c. The balance of convenience tilts in his favour.
11. Counsel contends that the Claimant has demonstrated that the 2nd Respondent's decision to suspend him (the Claimant) from duty without pay was ill advised and without legal basis. He contends that despite the pendency in court of the dispute regarding the legitimacy of the suspension, the 2nd Respondent hurriedly and maliciously convened a disciplinary session at which it purported to summarily terminate the Claimant's services.
12. By this, counsel implies that the disciplinary process ought to have awaited the outcome of this case. As such, he contends that the 2nd Respondent's actions constitute an unfair labour practise against the Claimant meriting the issuance of the orders sought.
13. The Claimant's advocate argues that failure to issue the orders sought will occasion the Claimant irreparable damage. He contends that the Claimant has served the 2nd Respondent for more than twenty years without blemish. He avers that at fifty years of age, the Claimant remains with only few years to retire from service. As such, allowing the suspension and subsequent dismissal to stand will occasion him damage that cannot be redressed by damages.
14. He contends that if the orders sought are not granted, the Claimant will be the most inconvenienced. As such the balance of convenience tilts in favour of issuing the orders.



15. The Claimant's advocate argues that the issues in controversy have not been rendered moot as a result of the events that happened after filing of the case. He points out that the individual who was appointed to replace the Claimant was appointed in acting capacity. Therefore and in law, the Claimant's substantive position remains.
16. Further he contends that after the 2nd Respondent dismissed the Claimant from employment, the latter appealed the decision. Since the appeal is pending determination, the alleged summary dismissal has been rendered inoperative. As such, the matters in dispute remain alive.
17. On their part, the 2nd Respondent's advocates contend that on 2nd April 2024, the Claimant was invited for a disciplinary hearing scheduled for 9th April 2024. However, he wrote to the 2nd Respondent on 8th April 2024 expressing his choice not to attend the proceedings. As such, the Disciplinary Committee convened and determined the disciplinary cause in his absence.
18. Based on the foregoing, the 2nd Respondent's advocates contend that the Claimant's request for lifting of his suspension from duty has been overtaken by events and the matter rendered moot. It is their case that the question of suspension of the Claimant is no longer a live issue, the decision to dismiss him from employment having been rendered on 9th April 2024.
19. As regards payment of salary arrears, the 2nd Respondent contends that this is a request that is in the nature of a mandatory injunction which seldom issues at interlocutory stage of a case without the applicant demonstrating that there are special circumstances to warrant issuance of the order. The 2nd Respondent contends that the Claimant has not pleaded any special circumstances that warrant issuance of the orders before he undertakes the clearance process with it.
20. The 2nd Respondent contends that it has already invited the Claimant to clear with it to enable the release of his terminal dues including the salary arrears. However, the Claimant has allegedly remained adamant in his refusal to undertake this exercise.
21. As regards the prayer to bar the 2nd Respondent from advertising the Claimant's position, it is counsel's position that this request ought to be considered in the context of the pleadings on record and the events that have taken place. According to counsel, this order was sought pending resolution of the dispute on suspension of the Claimant from duty. It was not intended to bar his replacement once his contract was terminated. As such, the request for the order is no longer tenable given that the question of the Claimant's suspension from duty is no longer live before the court.
22. In any event, the 2nd Respondent argues that it has already appointed someone else to take up the Claimant's position. As such orders to bar it from filling the position cannot issue.

Analysis

23. I have considered the contrasting positions taken by the parties on the matters at hand. It is not in dispute that after the Claimant was suspended from duty, he filed the present application seeking an order to lift the suspension. It is also not in dispute that before the order to lift the suspension could issue, the 2nd Respondent convened a disciplinary session during which a decision was taken to terminate the Claimant's service.
24. In my view, this development obliterated the Claimant's action founded on his suspension from duty. The request to lift the suspension was overtaken by events the moment the 2nd Respondent terminated the Claimant's services (*Nyaga v County Sacco Society Ltd (Cause E006 of 2022) [2023] KEELRC 1060 (KLR) (27 April 2023) (Ruling)*).



25. The Claimant's advocate has contended that the Claimant has appealed the decision. Therefore, the process of his dismissal from employment is not complete with the consequence that the matter relating to his suspension remains a live issue before court.
26. However, the Claimant has not placed on the court record the letter of appeal. As such, the court cannot ascertain whether such appeal indeed exists.
27. In any event, even if the Claimant had demonstrated that he has challenged the decision on appeal, this would not have changed the fact that his contract of service stands terminated. Once the decision to terminate his contract was rendered on 9th April 2024, it crystalized. The fact that he may have appealed the decision does not suspend its effectiveness. It remains effective unless and until it is upset on appeal. As such, the correct legal position is that the Claimant's contract stood terminated on 9th April 2024 thus rendering the dispute on his suspension otiose.
28. In my view, it would have been better if the Claimant had considered amending his pleadings to reflect the subsequent events instead of pressing on with the application in its original form. As such and having regard to the fact that his contract was terminated on 9th April 2024, the application to lift the impugned suspension has been rendered moot.
29. As regards the request to compel the 2nd Respondent to pay the Claimant's withheld salary, I agree with the 2nd Respondent's counsel's view that this is a request for orders that are in the nature of a mandatory injunction. I also agree with the 2nd Respondent's counsel that such order seldom issues at interlocutory stage in a trial except for exceptional reasons (*Kenya Breweries Limited & another v Washington O. Okeyo* [2002] eKLR).
30. I have considered the pleadings and submissions by the Claimant on the request for payment of salary arrears. I have not seen any exceptional circumstances which he has highlighted to justify the request for the mandatory orders sought.
31. The 2nd Respondent avers that it has not declined to pay the Claimant these amounts. However, it requires him to undertake the clearing process to enable release of the money since the contract between them has come to a close.
32. Until an employee successfully challenges an employer's decision to terminate his contract of service, the law considers the termination as legitimate. Once the decision to terminate the contract has been arrived at, the next logical thing in the process is usually for the parties to undertake the process of clearance. This entails the employee returning the assets of the employer which may be in his custody in return for his terminal dues.
33. The foregoing being the case, the 2nd Respondent's position that it is awaiting the Claimant to clear in order to release his dues appears reasonable. Absent a decision to reverse the 2nd Respondent's decision to terminate the Claimant's contract, the next logical thing that is expected of the parties is to wind up their relation by undertaking the clearance process.
34. As regards the request to bar the 2nd Respondent from filling the position left by the Claimant, this would have been a legitimate request if the pleadings had been amended to include a prayer for reinstatement since the Claimant's contract has already been terminated. However and as the record shows, the Claimant has yet to amend his pleadings to capture the prevailing state of affairs. He is still litigating on the premise that he is on suspension which is not the case. As such, this order cannot issue. The court cannot issue an order to stop the 2nd Respondent from filling the vacancy that has been left through the Claimant's departure if the legitimacy of the departure is not an issue for determination by it.



35. As I pen off, it is perhaps appropriate to commend on the Claimant's insinuation that the 2nd Respondent ought to have awaited finalization of the court case before it could process the disciplinary case against him. This is incorrect.
36. Disciplinary processes at the workplace and court proceedings are mutually exclusive of each other. As such, the two can be processed concurrently (*Gladys J Cheron v Board of Trustees Nssf & another* [2021] eKLR). Absent a restraining order, the employer has no obligation to await the results of a court case between him and an employee before he can subject the employee to a disciplinary process.

Determination

37. The upshot is that the application dated 20th February 2024 is devoid of merit.
38. Accordingly, it is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED ON THE 19TH DAY OF SEPTEMBER, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant/Applicant

.....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

