Universities Academic Staff Union (UASU) v Kenyatta University (Employment and Labour Relations Petition E173 of 2022) [2024] KEELRC 2447 (KLR) (4 October 2024) (Ruling)

Neutral citation: [2024] KEELRC 2447 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS PETITION E173 OF 2022

AN MWAURE, J

OCTOBER 4, 2024

BETWEEN

UNIVERSITIES ACADEMIC STAFF UNION (UASU) ..... PETITIONER

AND

KENYATTA UNIVERSITY ..... RESPONDENT

RULING

1. The Petitioner/Applicant filed a Notice of Motion dated 6th October 2022 seeking orders That: -

    1. spent

    2. a conservatory order be issued against the Respondents whether by themselves, their servants and or agents or whomsoever is acting on their behalf from implementing the Memo KU/DVCACAD/CLR/VOL.7 dated 8/9/2022- Revised Academic Staff Workload Units without the inclusion of the Petitioner's input pending the hearing and determination of this Application.

    3. a conservatory order be issued against the Respondents whether by themselves, their servants and or agents or whomsoever is acting on their behalf from implementing the Memo KU/DVCACAD/CLR/VOL.7 dated 8/9/2022- Revised Academic Staff Workload Units without the inclusion of the Petitioner's input pending the hearing and determination of this Petition.

    4. the costs of the Application be borne by the Respondents.

Petitioner/ Applicant Case

2. The Petitioner/Applicant avers that it entered into a Collective Bargaining Agreement ('CBA') with the Public Universities which has been duly recognised and registered securing the terms and conditions of university academic staff in all public universities.

3. The Petitioner/Applicant avers that its exclusion on matters touching on university staff salaries, benefits and other terms and conditions of employment is an infringement of the CBA.

4. The Petitioner/Applicant avers that the Respondent's memo ref KU/DVCACAD/CLR/VOL.7 dated 8/9/2022- Revised Academic Staff Workload Units that advised that the university council had approved a revised additional workload to the lecturers effective 1st semester 2022/2023 academic year.

5. It is the Petitioner/Applicant's case that the Respondent did not involve it nor seek its input in preparation of this memo nor its content although it was bound to affect the staff's terms and conditions of service in respect to workload.

6. The Petitioner/Applicant aver that the memo will mean that lecturers will take up additional units compulsorily without room of negotiation or additional remuneration even though extra workload in all universities is an optional decision by respective lecturers at additional remuneration as agreed between the university and lecturer.

7. The Petitioner/Applicant avers that the Respondent did not consult it before coming up with the decision to compel the lecturers to compulsorily teach the extra workloads before agreeing on remuneration.

8. The Petitioner/Applicant avers that in protest to the memo, it wrote to the Respondent on 27/9/2022 and the Respondent is yet to respond to its concerns but insists on implementation of the memo unless restrained by the court.

9. It's the Petitioner/Applicant's case that the Respondent's action infringes on the academic staff's right to collective bargaining rights guaranteed under Article 41 of *the Constitution*. Further, it touches directly on the terms and conditions of academic staff contrary to Article 232 of *the constitution* that requires the involvement of people in policy making.

Respondent's Case

10. In opposition to the Application, the Respondent filed a replying affidavit dated 20th June 2024.

11. The Respondent avers that the impugned memo does not increase the lecturers' workload but it remains at 40 hours per week.

12. The Respondent avers that the Petitioner's complaints deals with allocation and re-allocation of duties to staff members by its management which are at the Respondent's discretion.

13. The Respondent avers that before issuing the subject memo, the university management consulted widely with stakeholders and members of staff.

14. The Respondent avers that UASU, Kenyatta University Chapter is not operational due to leadership wrangles and litigations hence it believes the Petitioner is under the mistaken belief there has been no stakeholder consultation as it has been engrossed in internal wrangles.

15. The Respondent avers that considering various orders given in Nairobi ELRC Petition No. E043 of 2021 (Frankline Kaburu Kinoti & Others V UASU Executive, Kenyatta University Chapter & 3 Others), the petitioner has no officials capable of authorizing the filing of the petition and application. Further, in ELRC Petition No 153 of 2022 (Dr. Wilfrida A. Itolodo V Kenyatta University) which was similar to the Application herein was heard on merit and dismissed.

16. The Respondent avers that it implemented the impugned memo with effect from 1st semester of 2022/2023 academic year. suspending the same would introduce unnecessary confusion into the Respondent's academic programmes and prejudice its students.

17. The Respondent avers that the application was filed prematurely as the Petitioner has not exhausted dispute resolution mechanisms provided for in the CBA.

Petitioner's Submissions

18. The Petitioner submitted that the Respondent intends to unilaterally change staff workload without consultation and if not stopped, the Respondent would continue to unilaterally alter the terms of service and conditions of work as against its members without further consultation. This ought to be halted by this court.

19. The Petitioner submitted that the implementation of the memo and the Respondent's actions would discriminate and remunerate differently staff of equal academic qualifications since the lecturers would take additional workload units per semester but earn equal salaries in breach of the Petitioner's members rights.

20. It's the Petitioner/Applicant submission that the Respondent's action are a gross violation of the Petitioner/Applicant's rights and its members. It has an arguable case and only remedy will issue conservatory orders.

21. The Petitioner/Applicant submitted that the conservatory order is necessary as it was not involved in deliberations concerning its implementation.

Respondent's Submissions

22. The Respondent submitted that the holding in Forum for Good Governance and Human Rights v Public Service Commission & 4 others; Central Organisation of Trade Unions (COTU-K) & 2 others (Interested Parties) (Employment and Labour Relations Petition E058 of 2023) [2024] KEELRC 723 (KLR) (20 March 2024) (Ruling) ought to persuade this court to disallow this Application as the issue stayed being the Memo restructuring work hours is similarly quantifiable in monetary terms and compensable in money damages.

23. The Respondent submitted that the Applicant failed to demonstrate any real, immediate or imminent prejudice it is likely to suffer if the conservatory orders are not issued and also did not demonstrate that public harm will occur if the Application is disallowed.

24. It's the Respondent's submission that the grant of conservatory orders sought would have far reaching effects crippling the university's operations at the detriment of innocent students, therefore, the application should not be allowed.

Analysis and Determination

25. The main issue for determination is whether the Petitioners/Applicants are entitled to the conservatory orders sought.

26. The nature of conservatory orders was discussed in the Supreme Court case of Civil Application No. 5 of 2014 Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR, as follows: -

> " Conservatory orders" bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory

authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as "the prospects of irreparable harm" occurring during the pendency of a case; or "high probability of success" in the Applicant's case for orders of stay.

27. Further, in Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd v MW (Minor suing thro' next friend and mother (HW) [2016] eKLR defined a conservatory order as follows: -

> " A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter."

28. The principlesfor grant of conservatory orders was summarised in Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others [2015] eKLR, 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."

29. On the applicability of the aforementioned principles, the court must establish whether the Petitioners/Applicant's have established a prima facie case.

30. What constitutes a prima-facie case was further dealt with by the Court of Appeal in *Mirugi Kariuki v Attorney General Civil Appeal No. 70 of 1991* [1990-1994] EA 156, [1992] KLR 8. The Court, in an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows: -

> " It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the nature of his complaint. If he fails to show..... that there has been a failure of public duty, this court would be in error if it granted leave. The case represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables this court to prevent abuse by busy-bodies, cranks and other mischief-makers... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of this Act was brought into question. Without a rebuttal to these allegations, this appellant certainly disclosed a prima-facie case. For that, he should have been granted leave to apply for the orders sought. (emphasis added)."

31. Further, in Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43, the Court while expounding on what a prima-facie case or arguable case is, stated that such a decision is not arrived at by tossing a

coin or waving a magic hand or raising a green flag, but instead a Court must undertake an intellectual exercise and consider without making any findings, the scope of the remedy sought and the grounds and the possible principles of law involved.

32. Having considered the above, the Petitioners/Applicants herein have not established a prima facie case as in the case of the Fidelis Omwamba Onsanga v Tailors & Textiles Workers Unionwhere the court observed

> " Irreparable harm is understood to mean damage or injury which cannot be computed or compensated in monetary terms."
>
> The court went further to state that a loss to be suffered is deduction of union dues and agency fees from salaries. It means injury is quantifiable into monetary term and capable of monetary compensation."

33. The court in this case holds no prima facie case has therefore been established to justify granting of the conservatory orders prayed.

34. The agency fee in any event has been in place since 2022 vide memo dated 8th September 2022. Therefore, there is no urgency to grant any conservatory orders since they have already been overtaken by events having been implemented since sometime in 2022.

35. The court therefore after considering the pleadings and submissions herein is not convinced the Petitioner has established convincing grounds to justify the grant of conservatory orders at this point and rather is of the view that the main Petition should be heard and determined. The application therefore dated October 6, 2022 is found unmerited and is dismissed accordingly.

36. Each party will meet their respective costs of this application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 4TH DAY OF OCTOBER, 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