



**Universities Academic Staff Union (UASU) Moi University Chapter &
2 others v Moi University (Employment and Labour Relations Cause
E020 of 2023) [2024] KEELRC 2751 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2751 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS CAUSE E020 OF 2023
MA ONYANGO, J
NOVEMBER 7, 2024**

BETWEEN

**UNIVERSITIES ACADEMIC STAFF UNION (UASU) MOI UNIVERSITY
CHAPTER 1ST CLAIMANT
KENYA UNIVERSITIES STAFF UNION (KUSU) MOI UNIVERSITY
CHAPTER 2ND CLAIMANT
KUDHEIHA, MOI UNIVERSITY CHAPTER 3RD CLAIMANT

AND

MOI UNIVERSITY RESPONDENT**

RULING

1. Vide a Notice of Motion dated 3rd August 2023 brought under Articles 10, 19, 20, 21, 22, 23, 27, 28, 41, 43, 47, 48, 50 and 159 of the Constitution of Kenya, sections 5 and 87 of the Employment Act, 2007, section 23 of the Universities Act, 2012, Rule 3 of the High Court (Practice and Procedure) Rules, the Claimants seeks the following orders against the Respondents. -
 - i. Spent
 - ii. Spent
 - iii. Spent
 - iv. There be stay of clause 9 of Statute XXIX of Moi University Statutes, 2013 (Revised 2021) and the Retirement Notices issued to the Claimants’ members pursuant to the said provision pending the hearing and determination of this suit
 - v. Costs of this application be awarded to the Claimants



2. The application is supported by the sworn affidavit of Dr. Richard Okero, the Chapter Chairperson for the 1st Claimant dated 3rd August 2023.
3. The grounds upon which the application is made are contained in the affidavit and at the foot of the application. In brief the Claimants state that they are trade unions representing different cadres of the Respondent's employees; that the Claimants were dissatisfied with various governance decisions undertaken by the Respondent including but not limited to a purported revision of the Moi University Statutes, 2013 which revision has far-reaching implications on the rights of the Claimants' members.
4. It is averred that the Claimants lodged a Cross Petition in Eldoret ELRC No E016 of 2021 challenging the said revision by the University seeking nullification of the Revised Statutes. It is the case of the Claimants that the validity of the Revised Statutes is a live matter before this court which is yet to be determined.
5. According to the Claimants, the Moi University Statutes 2013 (Revised 2021) have not been gazetted as envisaged under section 23(2) of the Universities Act, 2012 but the Respondent has commenced implementation of the impugned Revised Statutes before gazettelement.
6. It is contended that the Respondent has issued Retirement Notices to the Claimants' members pursuant to the Revised Statutes and as such, the Claimants' members ought to retire on the 30th day of June following the date when the affected employee attains the age of retirement as envisaged under the Moi University Statutes, 2013, the terms of service and the Trust Deeds for the Moi University Provident Fund and the Moi University Pension Scheme.
7. It is further contended that the Revised Statutes seeks to alter the date of retirement from the 30th day of June following attainment of the retirement age to the specific date when the employee attained the retirement age. The Claimants aver that the alteration of the date of retirement is causing a lot of confusion and suffering to the Claimants' members noting that some of them were caught off-guard with preparation for retirement.
8. The Claimants state that the revision of the University Statutes is affecting the engagement between the members of the Claimants and other stakeholders including but not limited to the Moi University Pension Scheme and the Moi University Provident Fund as these shareholders are mandated under their respective Trust Deeds to pay off the retirement on the 30th day of June following the date when a specific contributor attains the retirement age.
9. It is also contended that the implementation of the revised Statutes and in particular the alteration of the date of retirement will have significant implications on the livelihood of the Claimants' members as they have legitimate expectations that they would retire on the 30th day following the date when they attain the retirement age.
10. It is therefore the contention of the Claimants that their members will be forced to retire early without any retirement benefits noting that the Pension Scheme and the Provident Fund is not bound to pay off the retirement benefits without a proper instrument to facilitate early payouts. That as a result of the early retirement coupled with inability to access retirement benefits, the members of the Claimants will be exposed to untold hardship and suffering which will eventually affect their health and possibly lead to premature deaths.
11. The Claimants aver that their members will suffer irreparably if the orders sought in the instant application are not granted.



12. In opposition to the application, the Respondent filed a Replying Affidavit sworn on 19th September 2023 by its Senior Legal Officer, Petrolina C. Chepkwony. The Respondent's reply is that the Claimants' application lacks merit and has been brought in bad faith.
13. According to the Respondent, the revision of the Moi University Statutes of 2013 was necessitated by the need to have the Respondent's Statutes align with Section 80 (1) (a) and (b) of the Public Service Commission Act No 10 of 2017 which provides that where a public officer has attained the mandatory retirement age as may be prescribed in the regulations, the public officer shall retire from the service with effect from the date of attaining the mandatory retirement age and the commission or other appointing authority shall not extend the service of such retired public officer beyond the mandatory retirement age.
14. The Respondent states that the Public Service Commission Regulations came into force in 2020. That under Section 70 (1) of the Public Service Commission Regulations the mandatory retirement age in the public service SHALL be: a) Sixty years b) Sixty-five years for persons with disability; and c) Such age as may be determined by the Commission for lecturers and research scientists.
15. Accordingly, the Respondent maintains that the revision of the Moi University Statutes of 2013 was undertaken in accordance with section 23 of the Universities Act No 42 of 2012, Section Moi University Charter (2013) and the Public Service Commission Act No 10 of 2017 and its Regulations
16. Further, the Respondent contends that the Claimants were invited to participate, and were directly involved, in the revision of the said Moi University Statutes of 2013 and that following consultative deliberations, the Respondent revised the Moi University Statutes, 2013 and included Clause 9 of Statute XXIX which harmonized the mandatory retirement age with the existing law.
17. It is the Respondent's case that the Moi Universities Statutes, 2013(Rev.2021) was submitted to the Cabinet Secretary for publication in the Gazette in line with Section 23 of the Universities Act of 2013 which was to commence on the date of approval by Council; that the same were approved by the University Council on 15th December, 2021 and an internal memo dated 25/4/2022 was issued to all the affected parties notifying them of the amendments made.
18. It is stated that the Respondent thereafter issued retirement notices to all the employees who were approaching retirement age which notices were issued more than one year to the date of retirement so as to give the affected parties enough time to arrange their affairs. That most of the employees who received the retirement notices complied and retired on the dates indicated in the notices and were paid their dues.
19. The Respondent therefore maintained that the instant application has been overtaken by events as the revised statutes have already been implemented.
20. The Respondent urged the court to dismiss the application dated 3rd August 2023 with costs.
21. Pursuant to the directions of the court made on 19th June 2024, the application was disposed of by way of written submissions. I have perused the court file and only found the submissions filed by the firm of Kenei & Associates Advocates LLP.

The Claimants' Submissions

22. In their submissions, the Claimants framed the issues for determination to be:
 - i. Whether University Statutes should have been gazette before implementation
 - ii. Whether the Claimant has established a *prima facie* case



- iii. Whether the Claimants will suffer irreparable injury which would not adequately be compensated by an award of damages
 - iv. What is the balance of convenience?
23. On the first issue for determination, the Claimants submitted that the Respondents by issuing retirement notices to the Claimant's members implemented the impugned statutes before gazette, which action is in total breach of the law. The Claimants urged this court to make a finding that university statutes should have been gazetted before implementation and that the failure to gazette the statutes renders the statutes as null and void. In support of this position, reliance was placed in the decided case of *Kenei v Egerton University & another* (2023) eKLR.
 24. As regards the second issue, the Claimants submit that they have demonstrated that the implementation of the revised statutes will infringe on the Constitutional rights of the Claimants' members.
 25. On whether they have established a *prima facie* case, the Claimants submitted that the implementation of the revised statutes and in particular the alteration of the date of retirement is in contravention of Article 10 of the *Constitution* and will have significant implications on the Claimants' members. In this regard, the cases in *Were Samuel & 14 others v Attorney General & 2 others* (2017) eKLR and *Universities Academic Staff Union (UASU) v University of Nairobi & another; Cabinet Secretary, Ministry of Education & 3 others (Interested Parties)* (2021) eKLR were cited.
 26. In denying the allegation made by the Respondent that the Claimants participated in the revision of the impugned statutes, the Claimants submit that they lodged a Cross-appeal in Eldoret ELRC Petition No E016 of 2021 challenging the revision of the University statutes and seeking a nullification of the Revised statutes.
 27. Consequently, the Claimants submitted that they have demonstrated a *prima facie* case warranting an intervention by this court by way of a temporary injunction orders.
 28. As to the issue whether the Claimants' members will suffer an irreparable injury which would not adequately be compensated by an award of damages, it is the Claimants submission that their members will be forced to retire early without any retirement benefit noting that the pension scheme and the provident fund is not bound to pay retirement benefits without a proper instrument to facilitate early pay outs.
 29. It is therefore the submission of the Claimants that the alteration of the retirement age will have significant implications on the livelihoods of their members and as such, they will suffer irreparable injury if the orders sought are not issued. The Claimants thus submit that there will be potential loss of lives, deterioration of health and disintegration of families which can never be adequately compensated by an award of damages.
 30. Lastly on the fourth issue for determination, the Claimants have submitted that the Respondent has not proffered any justifiable reason for failure to gazette the revised statutes and also, that they have failed to provide a justifiable reason for the alteration of the retirement age for its employees who are already in service in breach of their employment contracts.
 31. The Claimants therefore submit that the balance of convenience tilts in favor of the Claimants as they have demonstrated the net effect of the implementation of the Statutes to the Claimants' members. In this regard, it is submitted that the Claimants' members will continue working and paid for the work done hence there will be no loss to the Respondent. The Claimants placed reliance in the case of Paul



Gitonga Wanjau v Gathuthis Tea Factory Company Limited & 2 others (2016) eKLR in submitting that the implication of the orders on the Respondent will not cause any irreparable harm.

32. The court was urged to allow the application dated 3rd August 2023 with costs.

Determination

33. I have carefully considered the application, the grounds contained therein, the rival affidavits in support and opposition to the Application, the submissions on record. The issues for determination are whether the injunctive order sought should issue.

34. The conditions for consideration in applications for injunctions were settled in the celebrated case of *Giella v Cassman Brown & Company Limited* (1973) E A 358, where the Court expressed itself in the following terms:

“Firstly, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

35. As to what amounts to a *prima facie* case, in the case cited by the Claimants of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 123, the Court of Appeal held as follows:

“A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

36. In the instant case, it is the submission of the Claimants that the Respondent issued notices to the Claimants’ members pursuant to the Moi University Statutes 2013 (Revised 2021) and in doing so, the Respondent implemented the said statutes before they were gazetted as required by section 23(2) of the *Universities Act*.

37. Upon perusing the record, I note that the Claimants exhibited their members retirement notices marked as RO3 in the affidavit in support of their application. From a cursory look at the annexure marked 203 which is an internal memo dated 28th July 2022, all members of staff were informed at paragraph 2 that the Moi University Statutes, 2013 (Revised 2021) was implemented with effect from 1st July 2022 and that from 1st July 2023, the members of staff shall retire on the date they attain retirement age. Evidently, the Respondent gave its employees a notice period of one year before the alteration of the retirement age was to be implemented.

38. It is worth noting that the Respondent has argued that the Moi Universities Statutes, 2013 was submitted to the Cabinet Secretary for publication in the Gazette and was to commence on the date of approval by Council. According to the Respondent, the statutes were approved by the University Council on 15th December 2021.

39. The Respondent did not deny that the *Universities Act* provides for statutes to be gazetted. The Respondent did not deny the averment by the Applicants that the Statutes have not been gazetted.

40. Apart from deposing that the revised Statutes have been submitted to the Cabinet Secretary for gazettment, no evidence such as a forwarding letter was adduced to support the averment.



41. The Respondent did not adduce any evidence to support the implementation statutes before publication in the gazette.
42. Sections 34 and 35 of the *Universities Act* provide:
34. Instruments of governance
- Subject to the provisions of this Act, a university shall be governed in accordance with the provisions of its Charter granted under this Act and statutes made by its Council.
35. Governing organs of a university
- (1) In addition to the provisions of its Charter, a university shall establish the following organs of governance or their equivalent—
- (a) a Council, which shall—
- (i) employ staff;
- (ii) approve the statutes of the University and cause them to be published in the Kenya Gazette;
- (iii) approve the policies of the University; (iv) approve the budget;
- [Emphasis Added]
43. The Applicants have stated that their members stand to lose by being forced to retire before the date provided in their terms and conditions of service and their retirement benefits schemes. This has not been controverted by the Respondent.
44. From the foregoing I find that the Applicants have established a *prima facie* case. They have further established that their members would be negatively impacted should the orders sought not be granted.
45. Consequently, the Application dated 3rd August 2023 filed by the Claimant is hereby allowed in the following terms:
- i. There be and is hereby granted a stay of clause 9 of Statute XXIX of Moi University Statutes, 2013 (Revised 2021) and the Retirement Notices issued to the Claimants' members pursuant to the said provision pending the hearing and determination of this suit.
- ii. Costs of this application shall be in the cause.
- iii. For the avoidance of doubt, the terms of retirement prior to the impugned statutes shall continue in force pending further orders of the court.
- iv. Any employee who was retired in accordance with the new statutes, accepted the retirement and was paid retirement benefits as per notices issued by the Respondent shall not be affected by this order.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 7TH DAY OF NOVEMBER, 2024

MAUREEN ONYANGO

JUDGE

