



**Moi University v Universities Academic Staff Union (UASA) Moi
University Chapter & 2 others (Employment and Labour Relations Petition
E016 of 2021) [2024] KEELRC 13537 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13537 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS PETITION E016 OF 2021**

MA ONYANGO, J

DECEMBER 19, 2024

**IN THE MATTER OF CONTRAVENTION OF ARTICLE
43(1)(F) OF THE CONSTITUTION OF KENYA OF 2010**

AND

**IN THE MATTER OF CONTRAVENTION OF SECTION
76(B) AND (C) OF THE LABOUR RELATIONS ACT, 2007**

BETWEEN

MOI UNIVERSITY PETITIONER

AND

**UNIVERSITIES ACADEMIC STAFF UNION (UASA) MOI UNIVERSITY
CHAPTER 1ST RESPONDENT**

UNIVERSITIES NON-TEACHING STAFF UNION (KUSU) .. 2ND RESPONDENT

KUDHEIHA (UNIVERSITY CHAPTER 3RD RESPONDENT

JUDGMENT

1. The Petitioner is a statutory body governed by the *Universities Act* 2012. The 1st Respondent is a labour union representing academic staff at the Petitioner’s institution. The 2nd Respondent is also a registered labour union representing non-academic staff of the Petitioner of middle level from Grades 5 and above. The 3rd Respondent is a registered trade union mandated to represent employees engaged in sectors of Domestic, Hospitals, Hotels, Educational Institution either private or public owned (Universities, Polytechnics, Colleges, High and Secondary Schools, Primary and Academies and Clubs and Church owned Institutions.



2. The Petitioner filed the instant Petition dated 27th October 2021 on 28th October 2021 against the Respondents seeking for orders that:
 - i. A declaration that the industrial action as called for by the respondents is illegal as it fails to meet the requirements as set out by the Law;
 - ii. An injunction against any industrial action by the respondents until the Petitioner exhausts all means of implementing the judgement delivered on 15th January,2021.
 - iii. Any other or further relief that this Honourable Court may deem fit to grant.
3. The Petition is supported the affidavit of Dr. Peter K. Ruto sworn, its Registrar Administration, Planning and Development on 25th October 2021.
4. In the Petition, it is averred that the court in its ruling delivered on 15th January, 2021 directed the Salaries and Remuneration Commission (SRC) to work together with IPUCCF implementation Committee, the Ministry of Education and Ministry of Finance and National Treasury to make provision for the additional budgetary allocation necessary for implementation of the CBAs.
5. The Petitioner avers that it has been working with IPUCCF implementation Committee, the Ministry of Education and Ministry of Finance and National Treasury to make provision for the additional budgetary allocation necessary for implementation of the CBAs and is waiting for the Committee's direction towards implementation of the court ruling dated 15th January 2021.
6. It is the Petitioner's case that through the joint local implementation committee, it has been engaging the Respondents in deliberation meetings both physical and virtual with the sole objective of agreeing on how to break the impasse in the issues raised by the Respondents.
7. The Petitioner states that the Respondent issued an industrial action notice dated 15th October,2021 which notice was not served upon the Minister for Labor, contrary to section 76(c) of [Labour Relations Act](#) 2007.
8. The Petitioner objected the Respondents action on the basis that it was preemptive of the efforts that were being made by the Petitioner. It stated that should the court not grant orders stopping the industrial action the Petitioner would suffer economic loss and that there was imminent danger of damage to its property should its students strike by reason of the industrial action called for by the Respondents.
9. The Petitioner further avers that the students in the University who are not privy to these proceedings will be denied their right to education as enshrined in [the Constitution](#) under Article 43(1)(f).
10. The Petitioner stated that it had no objection to meeting the Respondents' reasonable demands as per the judgement, subject to concurrence of an implementation plan from other relevant arms of government which process was ongoing.

Response to Petition

11. In their response to the Petition, the Respondents filed an Answer to the Petition and a Cross Petition dated 24th April 2023. While opposing the Petition, the Respondents contended that the Petitioner had not taken any constructive steps towards implementation of the CBAs.
12. In response to the allegation made by the Petitioner that the Respondents issued an industrial action notice dated 15th October, 2021 without serving it upon the Minister for Labour contrary to section 76(c)of [Labour Relations Act](#) 2007, the Respondents maintained that they issued a proper notice of



industrial action as envisaged under the relevant laws. According to the Respondents, their notice of industrial action was founded on legitimate issues arising out of the conduct of the Petitioner hence the same was not pre-emptive.

13. The Respondents contended that the Petitioner's allegation that its students who are not privy to these proceedings will be denied their right to education is diversionary, intended to sensationalize the issues between the parties and in effect subjugate the rights of the Respondents' members.
14. According to the Respondents, the Petitioner has not demonstrated any attempt at addressing the Respondent's grievances. They aver that the Petition seeks to set a very dangerous precedent where an employer can abuse a court process to frustrate its employees thereby entrenching a culture of impunity in employment relations.
15. The Respondents further contended that the Petitioner had failed to demonstrate the reasons for its failure to engage the Respondents before resorting to the court process. That by the orders sought in the petition the Petitioner seeks to indefinitely suspend the Respondents' right to take industrial action and perpetually cushion the Petitioner against any industrial action by the Respondents contrary to the Constitutional and statutory edicts.
16. It is the Respondent's case that the right to participate in an industrial action is a fundamental right protected under *the Constitution* of Kenya and several International Human Rights Instruments hence the same should not be whimsically curtailed or hindered.

The Cross- Petition

17. In the Cross Petition, the Respondents aver that they notified the Petitioner of their grievances vide the Memoranda submitted and sought its intervention in resolving the grievances but the Petitioner engaged in unfair labour practices thereby infringing the Respondents' members' fundamental right to fair labour practices as envisaged under Article 41 of *the Constitution* of Kenya.
18. The Petitioner's unfair labour practices were particularized as follows:
 - a. The Petitioner has failed to remit third party deductions despite having deducted the same from the Respondents' members.
 - b. The Petitioner has failed to remit deductions due to the Welfare Groups despite having deducted the same from the Respondents' members.
 - c. The Petitioner has failed to remit the employee pension deductions despite having deducted from the Respondents' members.
 - d. The Petitioner has failed to remit the premiums for the Group Life Cover and the Medical Cover procured for the benefit of the Respondents' members as envisaged under the respective Collective Bargaining Agreements.
 - e. The Petitioner has failed to remit union dues to the Respondents despite having deducted the same from the Respondent's members.
 - f. The Petitioner has resorted to intimidation and victimization of the Respondents' leaders in its bid to frustrate union activities within the university.
 - g. The Petitioner has failed to pay Service Gratuity to the 1st Respondent's members for several years.



- h. The Petitioner amended/ revised the statutes of the University without the participation of the Respondents and their members.
 - i. The Petitioner proceeded to operationalize the revised statutes without the mandatory gazette.
 - j. The Petitioner has excluded the Respondents in the University decision-making organs thereby locking them out of the decision-making process within the University.
 - k. The Petitioner has failed to sign and implement the 2013/2017 Supplementary Collective Bargaining Agreement despite having been negotiated and agreed upon.
 - l. The Petitioner has failed to enter into negotiations with the Respondents with respect to the 2017/2021 and 2021/2025 Supplementary Collective Bargaining Agreements.
 - m. The Petitioner has failed to develop a Staff Promotion Criteria in consultation with the Respondents.
 - n. The Petitioner has failed to promote deserving members of staff.
19. In this regard, the Respondents contended that the Petitioner had caused immense harm and loss to the Respondents and their respective members.
20. The Respondents stated that the Petitioner had not demonstrated any genuine and legitimate reason for the failure to address the grievances by the Respondents hence the need for intervention by this court to compel it to do so.
21. The Respondents averred that the instant cross-petition was founded in good faith with the sole intention of seeking redress for the infractions by the Petitioner as against the Respondents and their members. The Respondent sought for the following reliefs;
- i. Dismissal of the Petitioner's Petition with costs to the Respondents.
 - ii. A Declaration that the Petitioner's actions amount to unfair labour practices.
 - iii. Remittance of all third party deductions within 30 days from the date of Judgment.
 - iv. Payment of all penalties accruing due to the non-remittance of third party deductions.
 - v. Remittance of all Welfare deductions to the respective Welfare groups within 30 days from the date of Judgment.
 - vi. Remittance of all Pension deductions and employer contributions within 30 days from the date of Judgment.
 - vii. Compensation for loss of benefit from the non-remitted Pension contribution to be computed by the parties with the assistance of the Retirement Benefits Authority.
 - viii. Remittance of the premiums for the Group Life Cover and the Group Medical Cover within 30 days from the date of Judgment.
 - ix. Remittance of Unions dues within 14 days from the date of Judgment.
 - x. A permanent injunction to restrain the Petitioner from victimizing or intimidating the Respondents' leaders due to their involvement in union activities
 - xi. A declaration that the revised Statutes 2013(rev.21) are a nullity.



- xii. The Petitioner to fully implement the 2013/2017 Collective Bargaining Agreement.
 - xiii. The Petitioner and the Respondents to enter into negotiations with respect to the 2017/2021 and 2021/2025 Supplementary Collective Bargaining Agreement within 30 days and report to this Honourable Court on the progress within 60 days from the date of this Judgment.
 - xiv. The Petitioner to develop a Staff Promotion Criteria in consultation with the Respondents within 60 days from the date of the Judgment.
 - xv. The Petitioner to effect promotion of the staff in strict compliance with the agreed and established Staff Promotion Criteria.
22. In its rejoinder to the Cross Petition, the Petitioner filed a Replying Affidavit sworn by Emily Veronica Kiboss, its Deputy Registrar Human Resource on 19th September 2023. The deponent avers that the issues raised in the cross-petition can only be resolved when the Petitioner gets its allocation from the National Treasury.
 23. According to the Petitioner, this had not been forthcoming despite several assurances by the Treasury. That it tabled its supplementary budget to the National Assembly for consideration and was given assurance during the last Parliament until its dissolution in 2022. That the current financial year is about to end without any meaningful allocation given to the public university.
 24. Regarding the governance issues particularly involving the implementation of its Statutes, the Charter and the Cross-Petitioners' representation in the administration, the deponent states that these are matters which are substantially in issue in another suit being Eldoret JR No. E004 of 2022 involving the same parties, and the Petitioner prayed that the same be consolidated with the instant Petition.
 25. Ms. Kiboss averred that much of what was raised in the cross-petition was also directly and substantially in issue in Nairobi ELRC Pet. No. E069 of 2022 between the Petitioner herein and the 1st Respondent herein-UASU. The Petitioner prayed that this Honourable Court directs that the said petition be transferred to this Honourable Court for consolidation.
 26. It was further deposed that there had been no victimization of the members of the cross-petitioners after their Notice of Motion herein was compromised by the Petitioner withdrawing show cause letters issued to the cross-petitioners' members for their involvement in an illegal strike giving rise to this petition.
 27. The deponent stated that all disciplinary processes for lecturers and union officials had been withdrawn.
 28. It was further averred that show cause, disciplinary and all related evidence had been revoked from individual files of the members and officials and no further reference will be made to them in the future.
 29. It was further deposed by Ms. Kiboss that compliance with the foregoing and particularly the monetary issues, are dependent on the budgetary allocations that the University gets from the National Treasury pursuant to National Assembly full or Supplementary Budget allocation and which is outside the control of the Petitioner.

The Petitioner's submissions

30. The Petition was disposed of by way of written submissions. The Petitioner's submissions are dated 9th October 2023 while the Respondents' submissions are dated 22nd November 2023.



31. In its submissions dated 9th October 2023 and filed in court on 16th October 2023, the Petitioner contended that the monetary issues attached to the Petition remain matters that the Petitioner can only surmount upon being facilitated by the National Treasury.
32. According to the Petitioner, the Petition was prompted by circumstances beyond its control being that matters financial with respect to the implementation of the 2017/2021 CBA and payment of arrears are matters that are subject to financial allocation by the National Treasury.
33. It is on this basis that the Petitioner submitted that the implementation of the CBA is substantially out of its hands. That as such, the Respondents should be permanently enjoined from invoking the provisions of sections 79 and 80 of the *Labour Relations Act*, 2007 to institute industrial action without engaging in dialogue to find a way out that is convenient to both social partners, and the effect of which does not put the students' studies into jeopardy.
34. In its submission on the Cross Petition, the Petitioner maintained that there had been several meetings between Moi University Council and Management and representatives from the Cross-Petitioners herein before the Ministry of Labour which meetings culminated into the Conciliation Report dated the 3rd June, 2022 which was attached as an exhibit in the Answer to the Cross-Petition.
35. According to the Petitioner, the dispute in the Cross-Petition can only be resolved when the Petitioner gets its allocation from the National Treasury.
36. The Petitioner submitted that the Cross-Petitioners failed to demonstrate that there was victimization of their members after their Notice of Motion was compromised by the Petitioner withdrawing show cause letters against their members involved in the illegal strike giving rise to this petition.
37. It was the Petitioner's submission that as a return to work was being crafted, the disciplinary processes for both lecturers and union officials had been withdrawn as a compromise. That as a result, the show causes, disciplinary and all related evidence had been expunged from the individual files and no further reference would be made to them in the future.
38. The Petitioner submitted that the cross-petition raised no cause of action and should be dismissed.

The Respondents' submissions

39. On their part, the Respondents identified the issues for determination to be:
 - i. Whether the Respondents' industrial action was founded on legitimate grievances.
 - ii. Whether the industrial action called by the Respondents was in breach of the law.
 - iii. Whether the Petitioner's actions amounted to an unfair labour practice.
 - iv. Who should bear the costs for the suit?
40. On the first issue, the Respondents submitted that the grievances that led to the picketing by the Respondents members were well laid out in the Cross-Petition and the Notices issued to the Petitioner. The Respondents submitted that the grievances related to the terms of service and the rights of the trade unions as envisaged under the various Recognition Agreements. It was contended that the grievances therefore formed a proper basis for a protected strike.
41. While citing Section 2 of the *Labour Relations Act*, the Respondents urged the court to make a finding that there was a legitimate basis for the industrial action taken by the Respondents against the Petitioner.



42. With regard to the issue whether the Industrial Action called by the Respondents was in breach of the law, the Respondents submitted that the Petitioner did not challenged the procedure adopted by the Respondents in calling for the industrial action and further, that it did not substantiate any procedural infractions on the part of the Respondents.
43. It was the Respondents submission that it issued various notices notifying the Petitioner of the dispute and setting out the specific grievances as envisaged under the *Labour Relations Act*, 2007, the Recognition Agreements and the Collective Bargaining Agreements.
44. In addition, the Respondents submitted that the picketing called by the Respondents was peaceful and did not result in any violence or breach of peace.
45. It was submitted that due process was followed by the Respondents in calling for the industrial action.
46. On the third issue, the Respondents submitted that they have placed before this Court sufficient evidence to prove the unfair labour practices on the part of the Petitioner. They urged the court to examine the documentary evidence annexed to the supporting Affidavit. Further, the Respondents submitted that the Petitioner's Answer to the Cross-Petition is generic and does not specifically rebut the claims by the Respondents.
47. On these grounds, the Respondents urged the court to make a finding that the Petitioner's actions and omissions amounted to unfair labour practices and as such, the Cross-Petition is merited there being a legitimate claim by the Respondents against the Petitioner.
48. Lastly, on the issue of costs, it was the Respondents submissions that from the material placed before court, the Petition is unmerited as the Petitioner had failed to proffer any justifiable reason for the failure to remit third party deductions, union dues and statutory deductions despite having deducted the same from the salaries of the Respondents members; that there was no proper explanation for the failure to engage the Respondents in the purported amendment/revision of the University Statutes contrary to the legitimate expectation on public participation proffered; that no justification was given for the removal of the Respondent's representation in the University Senate; that the Petitioner did not provide a justifiable reason for the review of the retirement age for its employees who are already in service and that no proof was tendered before court to confirm that the Petitioner had not received funds from the Exchequer to fund its operations.
49. On this basis, the court was urged to dismiss the petition, find the Cross-Petition to be merited and allow the Cross-Petition as prayed with cost to the Respondents.

Determination

50. After considering the Petition, the Cross-Petition, the Response thereto and the submissions filed by the parties, I find that the issues for determination are whether the strike called by the Respondents vide the strike notice dated 15th October, 2021 is unprotected and therefore illegal, whether the orders sought in the petition and cross-petition are merited.
51. The Respondents contended that the strike is lawful as notice was issued in compliance with the *Labour Relations Act*, 2007, the Recognition Agreements and the Collective Bargaining Agreements. According to the Respondents, they issued the requisite notices notifying the Petitioner of the dispute and setting out the specific grievances. That the parties attempted conciliation but the same did not bear fruits.



52. Article 41 (1), (2) (a) (b) (d) & (5) of *the constitution* provides as follows:

“

- “(1) Every person has right to fair labour practices.
 - (2) Every worker has the right to-
 - (a) to fair remuneration;
 - (b) to reasonable working conditions
 - (d) to go on strike.
 - (5) Every trade union... has a right to engage in collective bargaining.”
- Section 76(c) of the *Labour Relations Act* on the other hand provides that:

- “76. A person may participate in a strike or lockout if-
- (c) seven days written notice of the strike or lockout has been given to the other parties and the Minister by the authorized representative of -
 - (i) the trade union, in the case of a strike;
 - (ii) the employer... in the case of a lockout.”

53. Section 78(1) of the Act provides that:

“78

- (1) No person shall take part in a strike or lock-out or any conduct in contemplation of a strike or lockout if:-
 - (e) The trade dispute was not referred for conciliation in terms of-
 - (i) this Act; or
 - (ii) a collective agreement providing for conciliation;”

54. Further, section 76 and 78(1) (e) of the Act provide as follows:

- “76. A person may participate in strike or lockout if-
- (a) The trade dispute that forms the subject matter of strike or lockout concerns terms and conditions of employment or the recognition of a trade union;
 - (b) The trade dispute is unresolved after conciliation-
 - (i) under this Act; or
 - (ii) as specified in a registered collective agreement that provides for private conciliation of disputes; and



- (c) seven days written notice of the strike or lockout has been given to the other parties and the Minister by the authorized representative of -
 - (i) The trade union, in the case of a strike;
 - (ii) The employer... in the case of a lockout.”

55. The procedure laid down by the sections 76 and 78 (1)(e) of the Act are framed in mandatory terms and if not complied with, the strike is rendered unprotected and participants exposed to the consequences set out in section 80(1) of the Act, which provides that:

“ 80.

- (1) An employee who takes part in, call, instigates or incites others to take part in a strike that is not in compliance with this Act is deemed to have breached the employee's contract and-
 - (a) is liable for disciplinary action; and
 - (b) is not entitled to any payment or any other benefit under the *Employment Act* during the period the employee participated in the strike.”

56. Although the Respondents have alleged that they followed the due process and that the parties attempted conciliation before the calling for the strike, no evidence was tabled before court to prove that the trade dispute was referred to conciliation as contemplated by section 78 (1) (e) of the Act.

57. The Respondents however demonstrated that they had legitimate grievances which had been communicated to the Petitioner and which had not been resolved.

58. I consequently find that although there was valid reason to call out the members of Respondents to industrial action, the Respondents did not comply with the procedure set out in the relevant provisions of the law. The industrial action as called by the Respondents was therefore unprotected. I thus make orders in the following terms:

- i. A declaration be and is hereby made that the industrial action called by the Respondents was unprotected as the Respondents failed to comply with the requirements set out in the law.
- ii. In view of the fact that the Respondents have genuine grievances against the Petitioner as set out in their cross petition, the parties are directed to engage in conciliation to resolve the outstanding issues.
- iii. The issues in the cross petition being matters pending before the court in different suits, the parties are directed to pursue the same in the said suits.
- iv. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 19TH DAY OF DECEMBER, 2024

MAUREEN ONYANGO

JUDGE

