



**Universities Academic Staff Union v Murang’a University of Technology & another  
(Petition E068 of 2022) [2023] KEELRC 9 (KLR) (12 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 9 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E068 OF 2022  
AN MWAURE, J  
JANUARY 12, 2023**

**BETWEEN**  
**UNIVERSITIES ACADEMIC STAFF UNION ..... PETITIONER**  
**AND**  
**MURANG’A UNIVERSITY OF TECHNOLOGY ..... 1<sup>ST</sup> RESPONDENT**  
**COMMISSIONER FOR UNIVERSITY EDUCATION ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner is the Union representing members of the University Academic Staff in all public universities in Kenya
2. The 1<sup>st</sup> Respondent is a Public University established under the [Universities Act](#) No 42 of 2012 whose core mandate is to offer higher education
3. The 2<sup>nd</sup> Respondent is the regulator of University Education established under section 4 of [Universities Act](#) No 42 of 2012.

**Petitioner’s Case**

4. The Petitioner through the Petition dated May 9, 2022 and filed on the same date alleges violations of Articles 10, 14, 30(2) 41, 47 and 232 of the [Constitution](#) of Kenya 2010.
5. The Petitioner avers that it entered into a Collective Bargaining Agreement with the Public Universities which has been duly recognized and registered securing the terms and conditions of the University Staff in all public universities in Kenya.
6. The Petitioner states that the 2<sup>nd</sup> Respondent had issued a circular and guideline to all Public Universities that each lecturer is supposed to teach and research 40 hours per semester equivalent to 3 units per semester. Further the petitioner avers that the 2<sup>nd</sup> Respondent has kept quiet as the 1<sup>st</sup>



Respondent breaches and derogates from this guideline which will erode the quality of education and research work in public universities.

7. The Petitioner avers that the functions and roles of the 2<sup>nd</sup> Respondent has to be undertaken in compliance with the law and not to be inconsistent with the provisions of the Constitution and the Employment Act. The 1<sup>st</sup> Respondent prepared the 83<sup>rd</sup> Senate Committee resolution of April 6, 2022 which resolved that all the faculties at the University are expected to take two additional units for part times with intent to reduce part time costs effective semester II 2022 academic year.
8. It is said that the 1<sup>st</sup> Respondent did not involve the Petitioner nor seek its input during the meeting of April 6, 2022 culminating to the said resolution nor its contents even though it is bound to affect the terms and conditions of service in respect of workload policy.
9. The Petitioner says it is a necessary that stake holders on matters that touch on terms of service and remuneration of the academic staff of public universities be consulted. Also there is in existence a duly registered Collective Bargaining Agreement between members of the Petitioner and Public Universities including the 1<sup>st</sup> Respondent. The Petitioner further states that other than part time teachings being voluntary assignments, the 1<sup>st</sup> Respondent did not consult the Petitioner before coming up with the decision to compel the lecturers to compulsorily teach the part time students without additional remuneration and therefore is contrary to the Petitioner's legitimate expectation.
10. The Petitioner states that the resolution to be implemented also intends to violate the current and existing Collective Bargaining Agreement between itself and the Employer Federation IPUCCF. The Petitioner is of the view that the implementation of the Resolution will be unconstitutional as it violates Article 30 (2) of the Constitution which prohibits performance of forced labour and therefore ought to be restrained. It further says that the implementation of the resolution intends to do away with the Union rights of representation of the teaching staff of the Public Universities and deprive the union of its bargaining power and its members rights and freedom of association contrary to the express provisions of the Constitution.
11. The Petitioner prays for judgment as against the Respondent as follows;
  - a. That a permanent injunction be issued against the Respondents whether by themselves, their servants and or agents or whomsoever is acting on their behalf restraining them from implementing the 83<sup>rd</sup> resolution of the Senate Committee of April 6, 2022 which resolved that all faculties at the University are expected to take additional two units for part timers with intent to reduce part time costs effective semester II 2021/2022 academic year without the inclusion of the Petitioner's input.
  - b. A declaration that the Respondent have violated Articles 10, 30, 41, 47 and 232 of the Constitution of Kenya as against the Petitioner and thus the 83<sup>rd</sup> senate committee resolution is null and void *ab initio*.
  - c. An order directing the 2<sup>nd</sup> Respondent to enforce its guidelines to the Public Universities that lecturers to undertake teaching and research work for 40 hours per semester equivalent to 3 units per semester.
  - d. Any other order the Honourable court may deem fit to grant in the circumstances.
  - e. Interests at Court rates from the date of filing suit until settlement in full.
  - f. Costs of the suit.



### **1st Respondent's Case**

12. The 1<sup>st</sup> Respondent filed the grounds of opposition dated May 20, 2022 saying that the Petitioner has not demonstrated any grounds allowed in law to justify grant of the prayers sought and the applicants have not demonstrated any loss that may be suffered by themselves if the application dated May 9, 2022 is not allowed.

### **2nd Respondent's Case**

13. The 2<sup>nd</sup> Respondent through the Attorney General filed a replying affidavit which was sworn by its Chief Executive Officer, Professor Mwenda Ntarangwi.
14. The 2<sup>nd</sup> Respondent says that it does not engage in management affairs of universities and as a regulator is not privy to the 83<sup>rd</sup> decisions of the senate of the 1<sup>st</sup> Respondent and is not a party to such decisions. It further says that it has religiously performed its mandate in regard to the 1<sup>st</sup> Respondent and there are several dispute resolution mechanisms which have not been exhausted by the Petitioner.
15. It is contended by the 2<sup>nd</sup> Respondent that it is not its mandate to interfere with internal administration and management of universities. Universities are governed by the *Universities Act*, its Charter, Universities Statutes, and policies which documents spell out the internal management and administration procedures and rules that they use to run the day-to-day activities of the University.
16. The 2<sup>nd</sup> Respondent further avers that it has no power and control of internal procedures such as negotiation of Collective Bargaining Agreements (CBA) between the 1<sup>st</sup> Respondent and its members of staff. The universities according to the 2<sup>nd</sup> Respondent have the right and responsibility to preserve and promote the traditional principles of academic freedom in the conduct of their internal and external affairs.

### **Petitioner's Submissions**

17. The Petitioner submits that it has legitimate expectation that the 1<sup>st</sup> Respondent would contact it at an opportune time to present its views before a memo purporting to fundamentally alter the work load and remunerations of its members could be effected. They further submit that the Respondents failed to include the Petitioner who are key stakeholders from the very onset to pave way for consultations and their input contrary to the law and which is also a clear breach of the existing collective bargaining agreement between the 1<sup>st</sup> Respondent and the Petitioner on the same. It is contended that the 1<sup>st</sup> Respondent is continuing to enforce its resolutions as against the Petitioners' members and without consulting the Petitioner on the same.
18. The Petitioner has relied on the case of *Universities Academic Staff Union (UASU) Tum Chapter versus Technical University of Mombasa* 2019 eKLR where Lady Justice Linnet Ndolo held that 'I have already reached a finding that the impugned academic policy was brought on board without consultations of the Petitioner. I have further found that the implementation of the said policy amounts to unilateral and detrimental alteration of the terms of employment of the Petitioner's members. I must therefore find that the Petitioner has established a prima facie case. The Court is also persuaded that if the orders sought are not granted, the Petitioner's members will suffer irreparable harm. In making this particular finding, the court takes judicial notice that the Petitioner's members are employees who plan their economic and social lives based on their regular income. This would include part time payments on account of the 4<sup>th</sup> unit and to take away this income without consultations has potential to occasion financial ruin on the Petitioners members.



19. The Petitioner submitted that it is imperative that the 1<sup>st</sup> Respondent carries out its mandate consultatively by involving all the relevant stakeholders such as the Petitioner since the contents of the Resolution touches directly on the terms and conditions of service of academic staff.

## **2nd Respondents Submissions**

20. The 2<sup>nd</sup> Respondent submits that it lacks the mandate to review the contracts that are negotiated between lecturers and the university governing body under the doctrine of privity of contracts and neither does it have the power to control what the university pays staff. Employees of the University lies squarely under the management of the council and the Commission has no role on the same. It further argued that it is not privity to the 83<sup>rd</sup> decisions of the Senate of the 1<sup>st</sup> Respondent and is not a party to such decisions.
21. It further argued that the order to nullify the 83<sup>rd</sup> senate committee resolution is not justifiable in the circumstances as the process through which the decision was reached was legal and the Petitioner has not demonstrated otherwise. To nullify the resolution would mean the court would do so without jurisdiction as these are internal management affairs of universities which are best handled internally and not through court orders.
22. The 2<sup>nd</sup> Respondent relied on the case of *Anarita Karima Njeru versus the Attorney General* 1979 eKLR that the Petitioner should set out with reasonable degree of precision that of which he complains, the provision said to have been infringed, and the manner in which they are alleged to be infringed. It is argued that the court ought not grant the orders prayed for as they lack substance and are not well defined in terms of expressing the alleged constitutional violations.
23. The 1<sup>st</sup> Respondent did not file its submissions in the case.
24. Issues For Determination
- a. Whether the Respondents are in breach of the existing agreement between them and the Petitioner
  - b. Whether the Respondents have infringed and violated the members rights as guaranteed in the *Constitution*
  - c. Whether the Petitioner is entitled to the reliefs sought.

## **Determination**

25. The main legal question which falls for consideration is whether the process leading to the increase of the workload for university lecturers in order to cover more work and teach part time is unlawful by virtue of lack of participation of the Petitioner's members.
26. The petitioner avers that the Respondent increased the workload of their members without consulting them and they submit that was unconstitutional. They pray the 83<sup>rd</sup> resolutions of the Senate Committee of April 6, 2022 be nullified and the Respondent be restrained from adopting the same.
27. Section 10(5) of *Employment Act*, 2007 provide that an employer must consult with the employee where changes are to be made to certain employment particulars. Section 13 of the Act is also of similar effect and it provides that any changes of employee's particulars must be communicated to the employee in writing. It follows therefore that 1<sup>st</sup> Respondent breached this provision of *Employment Act*.



28. The court has considered whether the action of the 1<sup>st</sup> Respondent was improper of increasing the teaching hours of the applicant's members without any consultation and concedes it did not comply with article 232(1)(d) of the Constitution which provides involvement of people in policy making. The 83<sup>rd</sup> resolution refers to increment of teaching units and there is no commensurate remuneration for the increased workload.
29. Section 10 of the Constitution further provides for participations and inclusion of people in decision making that affect them. This again was flawed by the 1<sup>st</sup> Respondent.
30. The court has also considered fair labour practice and finds the 1<sup>st</sup> Respondent went against the aforesaid fair labour practice in increasing the teaching units without considering the participation and consultation of the applicant's members. Article 41 of the Constitution provide entitlement of every person to fair labour practice including fair remuneration and fair working conditions.
- If an employer changes the working conditions of an employee arbitrary that would not constitute fair labour practice.
31. The University and the Commission have not disputed there is in place a working recognition agreement which guides on how matters affecting the working conditions and terms of service of academic staff should be handled between the union and the management. This dispute is well covered within the preview of Section 2 of the Labour Relations Act as read alongside Section 57 of the said Act.
32. The Respondent was duty bound to involve the Petitioner directly as an association of lecturers in coming with the changes in the workload policy.
33. In the case of *Universities Academic Staff Union (UASU) Tum Chapter -vs- Technical University of Mombasa* (2019) eKLR where the court held:-
- “I have already reached a finding that the impugned academic policy was brought on board without consultations of the Petitioner. I have further found that the implementation of the said policy amounts to unilateral and detrimental alteration of the terms of employment of the Petitioner's members. I must therefore find that the Petitioner has established a *prima facie* case. The Court is also persuaded that if the orders sought are not granted, the Petitioner's members will suffer irreparable harm. In making this particular finding, the court takes judicial notice that the Petitioner's members are employees who plan their economic and social lives based on their regular income. This would include part time payments on account of the 4<sup>th</sup> unit and to take away this income without consultations has potential to occasion financial ruin on the Petitioners members.”
34. The 1<sup>st</sup> Respondent did not deny the Petitioner was not invited for any consultancy process. Indeed the 1<sup>st</sup> Respondent never filed a replying affidavit explaining its reason of the fact but only filed a generalised grounds of opposition.
35. The 2<sup>nd</sup> Respondent did file a replying affidavit and only maintained it complied with the law on the subject issues sticking to the fact that the lecturer's issues are handled by the University Council and the Senate. Therefore clearly the Petitioner were not involved by the first respondent in changing their teaching policy.
36. The Petitioner has prayed for an injunction to restrain the Respondents or their agents or servants from implementing the 83<sup>rd</sup> resolution of the Senate Committee of April 6, 2022 which resolved that all the facilities of the University are expected to take additional (two) (2) units for part times with the aim to reduce part time costs effective semester II 2021/22 without the input of Petitioner.



37. The court found the prayers in the application vide Notice of motion dated May 9, 2022 will be well covered by the prayers in the Judgement of the Petition of the even date and so proceeded to deliver this Judgement for the Petition instead of delivering a Ruling of the Notice of motion.

38. In cases of application for injunction, the court should consider the principles enunciated in the case of *Giella vs Cassman Brown & Co Ltd* (1972) 358.

The principles are basically an answer as to whether the suit has probability of success. In the case of *Mrao Ltd vs First American Bank of Kenya Limited and 2 others* (2003) eKLR where court held that 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 to call for an explanation or rebuttal from the latter. It was further held by court that the facts ought not to be so disputed as to warrant a full trial of the issues at hand as the same would amount to a miscarriage of justice if an injunction is granted in the interim.

39. The Petitioner must also establish a *prima facie* cause is proved which is defined in the same cause of *Mrao Ltd -vs- First American Bank of Kenya Limited* (*Supra*) where the court held that it is a civil case which on the material presented to the tribunal would conclude there exists a right which has been infringed.

40. It is trite law that in employment arena, consultation is paramount whether in issues of redundancy or as in this case refers to changes of terms of employment. The 1<sup>st</sup> Respondent did not discharge its burden by demonstrating it consulted the Petitioner in revising its workload for part time teaching. The Petitioner as a primary stakeholder was not afforded a reasonable opportunity to participate in the process within the principles set out by the Honourable Court in *R vs Cabinet Secretary Ministry of Agriculture, Livestock & Fisheries & 4 others Ex-Parte Council of Governors and another* (2017) eKLR and in reference to the case of *Robert N Gakuru & another -vs- Governor Kiambu County* (2014) eKLR. In this case, court ruled that Parliament and Provincial legislature must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public participation.

This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes.

41. The court went further to find that public participation did not mean consent flowing from where it is imperative, the people affected by such decision of public bodies are to be involved and consultations should take place.

In the absence of such consultation, the court must find the Petitioner's rights were infringed upon by the 1<sup>st</sup> Respondent in particular and so rules that the Petition filed on 9<sup>th</sup> May, 2022 succeeds in some aspects as follows:-

42. As against the 1<sup>st</sup> Respondent:-

- a. An injunction be issued against the 1<sup>st</sup> Respondent whether by themselves, their servants or agents or whomever is acting on their behalf restraining them from implementing the 83<sup>rd</sup> resolution of the Senate Committee of April 6, 2022 which resolved that all the faculties at the University are expected to take additional (two) 2 units for part times with intent to reduce part time costs effective semester II 2021/2022 Academic Year without the inclusion of the Petitioner's input.
- b. Prayers No 2 is also granted and thus the 83<sup>rd</sup> Senate Committee Resolution is null and void.



## **2nd Respondent**

43. The 2<sup>nd</sup> Respondent being the Commission for University Education is as it well states does not deal with administration issues affecting the Petitioner or the University staff, the 2<sup>nd</sup> Respondent being a body whose mandate does not revolve around administration of the actions that take place within Universities and therefore the court declines to grant the order directing the 2<sup>nd</sup> Respondent to enforce guidelines in the public universities that lecturers to undertake teaching and research work of 40 hours per semester equivalent to 3 units per semester.

These are issues that can be well handled by the various able bodies of the university including the senate and the council.

44. In spite of making the determination, the parties are encouraged to resolve their issues through the existing bodies including the University Council in order to harmonise the workings of the 1<sup>st</sup> Respondent and the petitioner.

This is a suggestion but otherwise the orders are as given accordingly.

45. Each party will bear their costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF JANUARY 2023**

**ANNA N 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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 Civil 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.

**ANNA N MWAURE**

**JUDGE**

