



REPUBLIC OF KENYA



KENYA LAW
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Kenya Universities Union MMUST Branch v Masinde Muliro University of Science and Technology (Cause 36 of 2022) [2023] KEELRC 276 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 276 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 36 OF 2022
JW KELI, J
FEBRUARY 2, 2023

BETWEEN
KENYA UNIVERSITIES UNION MMUST BRANCH CLAIMANT
AND
MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY RESPONDENT

RULING

1. The Claimant vide Application by way of Notice of Motion dated December 8, 2022 brought under certificate of urgency on even date sought the following orders:-
 - a. That this Application be certified as urgent, service be dispensed with in the first instance and same be dealt with ex-parte in the first instance.
 - b. That this Honourable court do issue an order of injunction restraining the Respondent, its agents, servants, trustees, purported Council and/or employees or any other person acting through it from continuing with the process of recruiting and appointing officers in the positions of Chief Internal Auditor-Grade xv, Legal Officer-Grade XII, Registrar (Administration) Grade XV, Medical Officer-Grade XII, Registrar(Academic Affairs) -Grade XV publicized on 25/11/2022 in Daily Nation advert pending the hearing and determination of this application interpartes.
 - c. That upon interpartes hearing the orders in (2) above be confirmed pending the hearing and determination the claim herein.
 - d. Costs of this application be provided.
2. The application filed under certificate of service was placed before Justice Radido who directed the union to appear before the presiding judge on the December 20, 2022.



3. On December 21, 2022 the matter was placed before me under certificate of urgency to consider the exparte order. The Court heard the union orally in open court and granted exparte interim order. The Respondent was absent. The court issued the following orders:-
 - a. An interim temporary injunction be and is hereby issued against the recruitment of staff under advertisement dated November 25, 2022 in Daily Nation Newspaper pending the hearing and determination of this application.
 - b. The Respondent has 21 days to file response.
 - c. The Application to be heard inter-partes on January 24, 2023.
4. The Respondent on receipt of said order of December 21, 2022 filed under certificate of urgency during the court recess Notice of Motion Application dated January 3, 2023 and received in court on the January 9, 2023 seeking the following orders:-
 - a. That the Application be certified as urgent and service of the same be dispensed with in the first instance.
 - b. That this honourable court be pleased to review, vary and or set aside its orders made on the December 21, 2022.
 - c. That costs of this application be provided for.
5. The Application under certificate of urgency was placed before the duty Judge Justice Radido Stephen who ordered the application be served and for further directions on January 19, 2022 before the presiding judge.
6. On the January 19, 2022, on receipt of affidavit of service upon the claimant, the court heard the application orally and scheduled a ruling date.
7. While the ruling was pending delivery the Claimant appeared before the court on the January 24, 2022 and informed the court it had not been served with the hearing date of January 19, 2023. On that date the matter had not been listed. The court directed the claimant to appear before the court on the January 26, 2023 when the ruling on application to vary or set aside the interim order was scheduled to be delivered.
8. On the January 26, 2023 the court being persuaded that the claimant had not been served with the hearing date of January 19, 2023 arrested the scheduled delivery of ruling on the instant application and admitted the response by the claimant being replying affidavit of Gregory Mukoto Lidzanga sworn on the January 16, 2023.
9. The court then proceeds to consider on merit the Notice of Motion application dated 3rd January 2023.
10. The Application for review is brought under Order 45 rule 1 of the *Civil Procedure Rules* and section 1A,1B and 3A of the *Civil Procedure Act*. Order 45 Rule 1 states:- “1. Application for review of decree or order [Order 45, rule 1.] (1) Any person considering himself aggrieved.
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record,



or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

- (c) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.”

11. The grounds for review stated under the Notice of Motion dated January 3, 2023 were as follows:-
- a. That the suit came for interpartes hearing of the Applicant/Petitioner application dated December 8, 2022 on December 21, 2022.
 - b. That the Respondent had not been served with the application dated December 8, 2022 before the orders were issued and were only served with the application together with the orders of injunction.
 - c. That currently there is a vacancy in the advertised positions as the holder of the positions being represented by the applicant were holding the said positions in acting capacity pending the advertisement of the said position.
 - d. That the respondent’s position will be greatly hampered if the orders issued are not reviewed and or set aside as the term of the current holders of the advertised positions have expired.
 - e. That had the respondent been given a chance to respond to the application then the court will not have issued the interim orders of injunction.
 - f. That owing to the genesis of this matter and the circumstances surrounding it, it would be in greater interest of justice that this application is granted.
12. The application for review was supported by the affidavit of Prof Solomon Shibairo sworn on January 3, 2023 which in summary stated:-That the applicant did not serve the respondent with the instant application before the orders were issued and the respondent was not aware of the same and was only served with the orders of injunction together with the application. That the applicant misled the court that the council of the respondent were quashed by the court vide Bungoma ELRC Petition No 6 of 2020 despite the fact that the said judgment was set aside and later withdrawn by the petitioner (JKT 1,2 and 3 being copies of the Order of withdraw, setting aside and order endorsing the withdraw). That there were no substantive holders of the advertised positions, that is, chief librarian, registrar of academics, chief internal auditor, registrar administration and registrar planning. That there is a vacancy in the position of chief librarian and the purported holder of the acting position term ended and that he does not meet the requirements of a chief librarian as required by the Commission of University Education which require the holder of such position should be a PhD holder. That all the persons being represented by the applicant who were in acting positions were holding the said positions in acting capacity and were required to hold the said positions pending the filling of the said vacancy through competitive recruitment (JKT5 copies of the appointment letters to acting positions) That currently the respondent does not have a substantive holders of the positions of legal officers ad medical officer hence the need to fill the same.
13. The Respondent filed a further replying affidavit by Prof. Solomon Shibairo dated January 12, 2023 stating that the members of the university council were regularly in office, that the external advert was made in accordance with the University internal policy and fair employment practices, that the claimant lacks locus to institute the said proceedings in relation to the positions which are being filled



and lastly that the university stands to suffer great prejudice if the application is allowed and the orders sought granted.

14. That further clause 2.14.4 of the respondent's human resources policy and procedures manual senior posts job grade 15 and above are required to be advertised externally in an open, competitive fair and merit based process(SS5 copy of the manual). That the advertised job grade 15 positions had no substantive holders. The persons occupying the positions were in acting capacity. That as for medical officer grade 12 and legal officer grade 12 there were no employees of the respondent holding such qualifications for internal advert to apply hence open labour market was applied pursuant to clause 2.14.7 of the manual.
15. That the persons in acting capacity for the advertised grade15 jobs were aware that they acted subject to substantive holder appointment and they were free to also apply.
16. On locus of the Claimant to bring the claim, the respondent states that grade 15 positions are non unionisable hence the union has no locus to institute proceedings in relation to the said positions.
17. The Respondent asserted that there was no prima facie case with high chance of success as the advert was made in compliance with the Respondent's human resources manual. That the respondent will be prejudiced as the interim orders issued interfere with smooth management of the respondent. That no prejudice will be suffered by the claimant as the advertised positions are not unionisable hence not occupied by the claimant's members.

The response by the claimant.

18. The Claimant filed response to the instant application vide replying affidavit by Gregory Mukoto Lidzanga sworn on the January 16, 2023. The deponent asserted that their application was filed under certificate of urgency thus was not required to be served. That service was dispensed with in the first instance and in any case the Application could only be served pursuant to a court order.
19. That the instant application is ill motivated as the application dated December 8, 2022 had not been heard on merit and if the review orders are granted their Application shall be rendered nugatory and a mere academic exercise as the said council shall proceed with the recruitment exercise and the substratum of the case shall cease to exist.
20. That whether the council is properly constituted and whether the human resources manual has been complied with is an issue under their application and not the review. That it is impractical for the issues under their application to be dealt with under the review.
21. That the Respondent had admitted that the positions of the legal officer and medical officer required internal advertisement which it never did.
22. That the Claimant was aware of the decision rendering the current council null and void and not the subsequent orders that followed the judgment including the withdraw of the petition hence they did not intentionally mislead the court.
23. That their Application was not only based and or anchored on the validity of the council but there are other underlying grounds of discrimination in promotion.

Court decision

24. Review of orders of the court is limited under section 45(1) b) of the *Civil Procedure Rules* as follows:-
'Adecree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge



or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”(emphasis given)

25. The Applicant in seeking the review of the interim order relied on new evidence being the Judgment quashing the council having been set aside and the suit withdrawn all together. That the positions, other than medical officer and the legal officer were under grade 15 which were required to be advertised externally and merit based recruitment to follow under the human resources manual. That with respect to the medical officer and legal officer under grade 12, they had no employee holding such qualification in their employment hence the advert done as authorized under the manual.
26. On the issue of the interim order granted without the service of the application on the respondent, the respondent’s case was that there was lack of fair hearing. The Court finds that the said application was filed under certificate of urgency and placed before the duty judge Justice Radido sitting at Kisumu. The presiding judge Bungoma was on annual leave. The duty Judge gave the following order dated December 19, 2022:-

‘It is hereby ordered that the cause of action herein is within the territorial jurisdiction of the court sitting in Bungoma the file is transferred to Bungoma and be placed before the Judge in Bungoma on December 20, 2022. The deputy Registrar to notify the union accordingly.’
27. The union appeared before the presiding judge *ex parte* on December 21, 2022 where the matter was considered *ex parte* in the first instance. The court finds that there was no requirement for service at that stage for the order sought was to apply pending the hearing of the application *inter-partes*.
28. On the ground of new evidence. The claimant states that it was not aware of the setting aside of the order quashing the respondent’s council. When the union appeared *ex parte* this was the main ground relied on (grounds a,b and c)for the interim order to be issued. The court finds it hard to believe that the union was not aware that the Council was legally in office. That would be a sign of high level of laxity on its part as the council handles the affairs of its members. The court finds that there was material non- disclosure of evidence by the union.
29. On whether the Claimant had locus to bring a dispute on the positions under grade 15 I find that is an issue which would require submissions under the substantive application.
30. On the prejudice to be suffered if order is not reviewed, the respondent states that the order is disruptive of the smooth operation of the university and there was full compliance with the human resources manual and further no prejudice to be suffered by the Claimant as jobs under grade 15 are not unionisable.
31. On prima facie basis the court notes that senior posts grade 15 and above are to be advertised externally in an open, competitive, fair and merit based process. That means that the positions of Chief Internal Auditor Grade 15, Registrar administration grade 15, Registrar academic affairs grade 15, University librarian grade 15, Registrar planning, research and innovation grade 15 were open to be advertised directly externally for open, competitive, fair and merit based recruitment process. On prima facie basis the court finds no apparent evidence of discrimination in the advert was disclosed against the members of the claimant on the grade 15 positions (GML2).
32. The court finds on prima facie basis that there was no evidence of compliance with clause 2.15.4. of the manual that before external recruitment is considered for job grade 14 and below the following steps of filling up the post internally be complied with. Clause 2.15.4. b required internal advertisement to



be done to attract applications from any staff members within the university. The court holds that the blanket statement by Prof. Shibairo that no staff holds such qualifications for medical officer and legal officer is not compliance with the said manual.

33. Consequently, the court sets aside its order of December 21, 2022 based on the foregoing reasoning and varies it to state:- “an interim temporary injunction be and is hereby issued restraining the respondent and the council or its employees against the recruitment of legal officer grade 12 and medical officer grade 12 published on November 25, 2022 in the daily nation advert pending the hearing and determination of the application dated December 8, 2022 inter-partes which shall be heard on priority basis.
34. Each party to bear own costs in the application.
35. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA IN OPEN COURT THIS 2ND FEBRUARY 2023.

J W KELI,

JUDGE.

IN THE PRESENCE OF :-

Court Assistant:- Brenda Wesonga

Respondent /Applicant: -Ochola & Tarus

Claimant /Respondent: -Mr Indimuli

