



**KCA University v Kenya Private University Workers Union Chairperson
& another; Registrar of Trade Unions (Interested Party) (Petition
E044 of 2022) [2023] KEELRC 2766 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2766 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E044 OF 2022
K OCHARO, J
OCTOBER 5, 2023**

BETWEEN

KCA UNIVERSITY PETITIONER

AND

**KENYA PRIVATE UNIVERSITY WORKERS UNION CHAIRPERSON 1ST
RESPONDENT**

KENYA UNIVERSITY WORKERS UNION 2ND RESPONDENT

AND

REGISTRAR OF TRADE UNIONS INTERESTED PARTY

RULING

Introduction

1. Through a Notice of Motion Application dated the 7th March 2022 expressed to be brought under Articles 22 and 23 of the Constitution of Kenya 2010, Order 51 Rules 1 and 4 of the Civil Procedure Rules 2010, sections 1A, 1B, 3A and 63 [e] of the Civil Procedure Act, the Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice and Procedure Rules, 2013, Sections 3 [1] [2] [3] [5], 4, 10 and 13, the Petitioner/Applicant seeks the following orders:
 - a. That service of this Application be dispensed with in the first instance and it be certified as urgent.
 - b. That pending the hearing and determination of this Application, the Honourable Court be pleased to and hereby issues a temporary injunction restraining the Respondents, whether by themselves, officers, employees, servants, agents, successors and or assigns from scheduling any other Union Activities at the or trespassing into Petitioner’s campuses/Properties.



- c. That pending the hearing and determination of this suit, the Honourable Court be pleased to and hereby issues a temporary injunction restraining the Respondents, whether by themselves, officers, employees, servants, agents, successors and or assigns from scheduling any other Union Activities at the, or trespassing, Petitioner's campuses/Properties.
 - d. That the costs for the Application be provided for.
 - e. Any other or further order or relief that this Honourable Court may deem fit to grant.
2. The Application is premised on the grounds obtaining on the face of it and the supporting affidavit sworn on the 7th of March 2022 by Prof. Isaiah I.C Wakindiki, the Vice Chancellor and the CEO of the Petitioner/ Applicant herein.
 3. The Application was vehemently opposed by the 1st and 2nd Respondents through an affidavit sworn on 30th March 2022 by Peter Owiti, the General Secretary of the 1st Respondent.
 4. The Court directed that the Application be canvassed by way of written submissions. The Applicant and the Respondents have their submissions on record.

The Petitioner/Applicant's Application.

5. The Petitioner/Applicant contended that through a Memo dated 8th February 2022, the Respondents invited their members to its premise for "prayers" and "discussions of the other issues affecting them. The meeting was slated for 9th February 2022.
6. By a letter dated 8th February 2022, the Petitioner/Applicant's Advocates on record wrote to the Respondents informing them that even though they enjoy the right to manage and partake in their lawful activities, to seek to do so in its premises when learning process is ongoing and without seeking the permission of the Petitioner, would violate the students' fundamental right to education and the Petitioner's right to quiet possession of its property.
7. The Petitioner avers that its letter dated 8th February 2022 received a rather surprising response which read in part:

"Your letter has exposed how illiterate you are in labour matters. We have been holding meetings with employees at this university since 2016 please remember what the labour officer told you the last time you were at his office pole keep on misleading your Prof of the soil."
8. The Applicant further avers that its refusal to host the activities of the Respondents was due to fear of chaos and the likely disruption of learning programmes as had been the case before, where the Respondents and a group of its members attempted to ingress the Petitioner's campus, forcefully.
9. Lastly, it is contended that it is of utmost importance that the orders sought be granted, to evert the unlawful actions of the Respondents and actualization of their threats. If the Orders aren't granted immeasurable harm will be suffered by the university and its students.

1st and 2nd Respondent's Response to the Petitioner's Application.

10. The Respondent resisted the application through the grounds of opposition dated 26th April 2022. The grounds basis for the objection being; that this Court has no jurisdiction to hear and determine the matters raised in the application as they relate to Section 25 of the Land Registration Act, No. 3 of 2022; the application offends the right to fair labour encapsulated under Article 41 of the Constitution



including the right to participate in the activities of Trade Unions of their own choice; the application offends the provisions of Article 159 of the *Constitution* and Part II Section 4 of the *Labour Relations Act*, which commands engagement of alternative dispute resolution mechanisms. The petitioner has refused and or ignored to be involved in an already initiated Conciliation process, and the application offends the stipulations of Section 56 of the *Labour Relations Act*, which gives Trade Unions a right to access the employer’s premises for purposes of pursuing its lawful activities inter alia recruiting member lawful activities of its members, holding meetings with its members and other employees outside working hours.

11. To grant the orders sought shall be a negation of the Union’s Member’s constitutionally guaranteed rights under Articles 36 and 41 of the *Constitution*.

The Petitioner’s Submissions.

12. The Petitioner’s Counsel submitted that requiring the 1st Respondent to consider hosting its union activities outside learning hours and or within agreed parameters was a reasonable request. However, the 1st Respondent did not submit the names of its authorised officials as was requested by the Applicant in its letter dated 2nd December 2021. The law enjoined it to so do. To support this submission, reliance was placed on the case *Kenya Union of Road Contractors and Civil Engineering Workers v Cale Infrastructure Construction Company Limited* [2021] eKLR.
13. It is submitted that the 1st Respondent to conduct its union activities is not absolute, it is qualified by the provisions of section 56 of the *Labour Relations Act*. Reliance is placed on the case of *Kenya Private Universities Workers Union v United States International University* [2017] eKLR in fortification of its submissions.
14. The Petitioner submits that if the orders sought are not granted learning activities will be disrupted. No amount of damages can compensate for the consequences of such a disruption. Further, there are no exceptional circumstances demonstrated by the 1st Respondent that would warrant interruption of the learning programmes.

The Respondent’s Submissions

15. The Respondent filed its Submissions on the 16th June 2023 submitting that the Applicant’s Application is spent and overtaken by events. The Applicant is not seeking a temporary injunction but rather a permanent injunction against the Respondents’ lawful activities. The court should not countenance this as such an act would enable a violation of the member’s constitutional rights under Articles 36 and 41 of the *Constitution* of Kenya 2010.
16. The Respondent further relied on section 56 of the *Labour Relations Act* 2007 that provides:
 - “(1) Without limiting the matters that may be dealt with in a recognition agreement, a recognition agreement shall provide for an employer to grant a trade union reasonable access to the employer’s premises for officials or authorised representatives of the trade union to pursue the lawful activities of the trade union, including but not limited to—
 - (a) recruiting members for the trade union;
 - (b) Holding meetings with members of the trade union and other employees outside of working hours;



- (c) Representing members of the trade unions in dealings with the employer; and
 - (d) Conducting ballots in accordance with the *Constitution* of the trade union.
- (2) An employer may—
- (a) impose reasonable conditions as to the time and place of any rights granted in this section to avoid undue disruption of operations or in the interest of safety; and (b) require officials or trade union representatives requesting access to provide proof of their identity and credentials.
- (3) Any dispute concerning the granting of access, or the conditions upon which access is to be granted, may be referred to the Industrial Court under a certificate of urgency.”

17. Lastly the Respondent submitted that contrary to the Petitioner’s assertions, the Respondent were not picketing but rather exercising the right of a Trade Union to access the employer’s premises under section 56 of the Labour Relation Act. To buttress this point reliance was placed in the cases of *Kenya Private Universities Workers Union v Scott Christian University* [2019] eKLR, *Kenya Shipping, Clearing & Warehouses Workers Union v Global Freight Logistics Limited* [2017] eKLR and the case of *Kenya Private Universities v Management University of Africa* [2020] eKLR.

Analysis and Determination

18. I have carefully considered the orders sought in the instant Notice of Motion Application, the grounds upon it is anchored, the affidavit in support thereof and distil only a single-issue determination, thus; whether the Petitioner has met the threshold for the grant of the orders sought.

19. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR the Court restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.”

20. What constitutes a prima facie case was amplified in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, where the Court stated as follows:

“It may not be easy to define what is meant by “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms “prima facie” case, and “genuine and arguable” case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words “prima facie” are frequently used to



refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...In civil cases a prima facie case 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is a standard, which is higher than an arguable case."

21. Similarly, in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR [Supra] the Court had this to say as far as prima facie case is concerned:

"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

22. The substratum of the petitioner's case is that by allowing the respondent Union to access and hold a meeting with its members who are its employees, within the University premises will lead to a violation of the students' legal rights to an uninterrupted learning environment, and its proprietary rights. This Court has not lost sight of Section 56 of the *Labour Relations Act* 2007 which provides:

- "(1) Without limiting the matters that may be dealt with in a recognition agreement, a recognition agreement shall provide for an employer to grant a trade union reasonable access to the employers premises for officials or authorised representatives of the trade union to pursue the lawful activities of the trade union, including but not limited to—
- (a) recruiting members for the trade union;
 - (b) Holding meetings with members of the trade union and other employees outside of working hours;
 - (c) Representing members of the trade unions in dealings with the employer; and
 - (d) Conducting ballots in accordance with the *Constitution* of the trade union.



- (2) An employer may—
- (a) impose reasonable conditions as to the time and place of any rights granted in this section to avoid undue disruption of operations or in the interest of safety; and (b) require officials or trade union representatives requesting access to provide proof of their identity and credentials.

Any dispute concerning the granting of access, or the conditions upon which access is to be granted, may be referred to the Industrial Court under a certificate of urgency.”

23. I have keenly considered the tone of the provision of section 56 of the Labour Relation Act 2007 and I am impelled to conclude that Trade Unions have the right to access the premises of the employer to hold meetings. It has not escaped this court’s sight that the 1st Respondent has been holding meetings at the Petitioner [employer’s] premises without any hindrance or any complaints by the Petitioner. By reason of the foregoing premises, I have reached an inescapable conclusion that the Petitioner has not demonstrated that it has a prima facie case with a chance of success to warrant the grant of an injunction against the Respondents.
24. The conditions for grant of an application for a temporary injunction have to be considered sequentially. Therefore, where the Applicant fails to establish the first condition, the prima facie condition, the Court will have no business to proceed to consider the other conditions. See the [Nguruman case](#) [Supra].
25. In the upshot, the Petitioner/Applicant’s Notice of Motion is hereby dismissed.
26. Orders Accordingly.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 5TH DAY OF OCTOBER, 2023.

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OCHARO KEBIRA
JUDGE.

In the presence of;

Mr. Owiti holding brief for Rakoro for Respondents

Ms Allan holding brief for Ms Mwangi for Interested Party

No appearance for Applicant/Petitioner

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.

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OCHARO KEBIRA
JUDGE

