Kirinyaga University UASU Chapter v Kirinyaga University & another (Petition E031 of 2023) [2023] KEELRC 2358 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2358 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E031 OF 2023

BOM MANANI, J

OCTOBER 5, 2023

IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 23, 24, 27, 28, 35, 41, 48, 50, 52, 159,162, 165, 258, 259 AND 260 OF THE CONSTITUTION

AND

IN THE MATTER OF VIOLATION OR THREATENED VIOLATION OF ARTICLES 1, 2, 6(3), 10, 20, 21, 22, 23, 24, 25, 27, 28, 35, 40, 41, 43, 48, 49, 50(1), 159, 160, 161, 162, 165, 258, 259 AND 260 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTION 5 OF THE UNIVERSITIES ACT, 2012

AND

IN THE MATTER OF THE SECTION 4 AND 5 OF THE FAIR ADMINISTRATIVE ACTION ACT NO 4 OF 2015

AND

IN THE MATTER OF A DETERMINATION ON THE ACADEMIC WORKLOAD AND PART-TIME TEACHING POLICY FOR THE ACADEMIC STAFF OF KIRINYAGA UNIVERSITY

BETWEEN

KIRINYAGA UNIVERSITY UASU CHAPTER ..... PETITIONER

AND

KIRINYAGA UNIVERSITY ..... 1ST RESPONDENT

VICE CHANCELLOR OF KIRINYAGA UNIVERSITY ..... 2ND RESPONDENT

RULING

Background

1. The Petitioner is a chapter of the University Academic Staff Union (UASU). It is in charge of the Kirinyaga University academic staff collective labour matters.

2. The Petitioner has sued the Respondents to challenge implementation of the Academic Workload Policy prepared and issued by the 1st Respondent in April 2021. The Petitioner's contention is that the Respondents did not consult it on formulation and implementation of the policy.

3. The Petitioner states that it has a Recognition Agreement with the 1st Respondent under which the Respondents were obligated to consult it on the Academic Workload Policy before issuing the said policy. Contrary to this requirement, the Respondents allegedly unilaterally prepared, issued and commenced implementation of the impugned Workload Policy in April 2021.

4. The Petitioner avers that on learning of this development, it wrote to the Respondents asking them to halt implementation of the policy pending consultations on the matter. However, the Respondents did not react to this request. The Petitioner avers that the Respondents' failure to react to its request, forced the Petitioner to move to court via this Petition.

5. Accompanying the Petition is an application for conservatory orders. Through it, the Petitioner prays that the court issues orders restraining the Respondents from further implementing the impugned policy.

6. The Respondents have opposed the application for conservatory orders. They have filed a replying affidavit in this respect.

7. The Respondents argue that the Academic Workload Policy matter did not alter the individual contracts of academic staff. Therefore, it did not fall in the category of matters that require consultation under section 10 of the *Employment Act*. That notwithstanding, the Respondents contend that the process that yielded the policy was consultative. It is the Respondent's case that members of the teaching staff were engaged on the matter through various forums.

8. The Respondents assert that the dispute between them and the Petitioner is a private law dispute premised on work related matters. Consequently, it is their position that the Petitioner has wrongly filed the action as a constitutional petition.

9. The Respondents also assert that the Petitioner has not met the requirements for the grant of an interim injunction. Importantly, it is contended that the application for conservatory orders has come too late as the impugned policy was effected in 2021. Therefore, the orders should not issue.

Analysis

10. From the preliminary evidence on record, there is no doubt that the impugned policy was issued in 2021. This is evident from the letter by the 1st Respondent dated January 6, 2022 which directed that all members of the academic staff take an additional teaching load of two units for semester II of 2021 under the Internal Part Time Policy.

11. It is also evident that the Petitioner objected to the new policy on the ground that it had not been consulted over the matter. This is evident from the Petitioner's letters to the Respondents dated January 13, 2022, February 9, 2022, March 17, 2022 and October 4, 2022. It is also evident that the

Petitioner marshaled its members to issue a memorandum dated January 13, 2022 expressing their rejection of the policy.

12. It would appear that following resistance to the policy, the Respondents issued a circular dated January 21, 2022 calling off its implementation. The Respondents proposed further consultations on the matter. However, they left it to individual members of faculty who were willing to take up more courses to do so voluntarily.

13. There is no indication that the Respondents formally responded to the Petitioner's letters. Similarly, there is no indication that the Respondents subsequently subjected the impugned policy to further consultations as they had proposed in their circular of January 21, 2022.

14. Despite the Petitioner stating that as the trade union chapter representing academic staff at the university, it was not consulted over the impugned policy, the Respondents did not provide evidence to negate this assertion. Instead, they provided evidence suggesting that consultations were undertaken through Faculty Heads.

15. As representatives of the teaching fraternity, the Petitioner is a stakeholder in matters that affect this lot of staff at the University. Therefore, it was desirable that the Petitioner is consulted on the impugned policy.

16. The duty to consult on matters that are likely to affect an individual's rights and obligations is now firmly engrained in our legal architecture. It is necessary that anyone making a decision that is likely to impact on the rights and obligations of another ensures that the process is preceded with consultations. The earlier that this reality is embraced by decision makers the less we shall see of disputes such as the current one that jam the judicial system.

17. The Respondents argue that implementation of the new policy cannot be said to have affected the terms and conditions of service for academic staff because it did not take them outside the 40 hour workload limit for every week. This could as well be correct. However, I do not think that this per se, justified the decision not to consult the Petitioner on the matter. Hours of delivery aside, increased workload comes with its own inconveniences and challenges which require adjusting by an employee.

18. Having regard to the totality of the preliminary evidence before me, I am convinced that the Petitioner has a prima facie case. As was indicated in *Kevin K. Mwiti & others v Kenya School of Law & others* [2015] eKLR quoted with approval in *Universities Academic Staff Union (UASU) Tum Chapter v Technical University of Mombasa* [2019] eKLR, a prima facie case is not necessarily one that will ultimately succeed on merits. Rather, it is a case that is not frivolous. Having regard to the preliminary evidence before me, I do not think that the Petitioner's case is frivolous.

19. However, this is not the only matter to consider whilst determining an application for interim injunction. In addition to establishing a prima facie case, the applicant must satisfy other conditions as prescribed in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA. He must demonstrate that he will suffer irreparable damage should the injunctive order not issue. If the court is in doubt, it may issue the order on a balance of convenience.

20. In *Director of Public Prosecutions v Justus Mwendwa Kathenge & 2 others* [2016] eKLR, the Court of Appeal emphasized the importance of fulfilling the conditions for grant of interim injunctive orders before the orders can validly issue. The court expressed itself as follows:-

''Traditionally the basis of application of the equitable remedy of injunction has been section 63 of the *Civil Procedure Act* and Order 40 (previously 39) of the Civil Procedure Rules. Today Article 23 of *the Constitution* specifically identifies an order of injunction as one of the reliefs that a court can grant if it is

satisfied that a person's right or fundamental freedom under the bill of rights has been denied, violated or infringed or is threatened. Needless to emphasize, the remedy of temporary injunction is a vital tool intended to preserve the property in a dispute until legal rights and conflicting claims are established, so as to prevent the ends of justice from being defeated. Order 40 recognizes that a temporary injunction will be sought where a property in dispute is in danger of being wasted, damaged, or alienated, or wrongfully sold in execution of a decree, or where a party threatens or intends to remove or dispose of the property in order to defeat any execution that may ultimately be passed. An injunction may also be applied for to restrain a party from committing a breach of contract or other injury. It is equally settled that a temporary injunction cannot be claimed as a matter of right, neither can it be denied arbitrarily by the court.

Because of its importance and susceptibility to abuse certain guidelines have been developed while considering an application for temporary injunction. The three well known tests enunciated in *Giella v Cassman Brown* (1973) EA 358 are to the effect that a party seeking a temporary injunction has to establish a prima facie case, whether the party seeking injunction will suffer irreparable damage if injunction is denied, and in case of doubt the issue in contention ought to be decided on the scale of a balance of convenience.

It is not for nothing that the rules and general principles governing the grant of interlocutory injunction have been scrupulously developed. It is, for instance, critical for courts to remember the sequence of consideration of the Giella (supra) principles, that even where prima facie case is established, an injunction will not be granted if the injury or damage to be suffered is not irreparable or is capable of compensation." Emphasis added by underlining.

21. I have scrutinized the material before me. Nowhere does the Petitioner address the question of the nature of damage that its members are likely to suffer in the event that the court does not issue the orders that are sought. Absent evidence on this critical condition for the grant of the orders sought, the court cannot grant the orders. And it is not open to the court to proceed on assumptions in this respect.

22. It is correct that the scenario in *Universities Academic Staff Union (UASU) Tum Chapter v Technical University of Mombasa* [2019] eKLR (the Tum case) is substantially similar to the scenario in the case before me. However, the difference between the two matters is that unlike in the case before me, the applicants in the Tum case appear to have addressed the critical question of the damage that was likely to flow from non-issuance of the injunctive orders. As a result the court expressed itself on the matter as follows:-

"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 4th unit and to take away this income without consultation has potential to occasion financial ruin on the Petitioner's members."

23. It was for the Petitioner to address the court on all ingredients for grant of interim injunctive orders as set out in the Giella v Cassman Brown case. Absent evidence on some of these ingredients, the court cannot issue the injunctive orders sought.

24. There is also the question whether the court can issue an order to restrain an event that has already taken place. The purpose of an interim injunction is usually to prevent the carrying out of an impugned activity. Often, this presupposes that the event has not happened.

25. Although the court in *Universities Academic Staff Union (UASU) Tum Chapter v Technical University of Mombasa* [2019] eKLR issued an order to restrain the continued implementation of the impugned

policy after its implementation had already commenced and the Court of Appeal upheld the orders, several judicial pronouncements appear to suggest that a court cannot injunct that which has already happened. This was the position expressed in *Joel Kiprotich Koskei & 5 Others v Kenya Forest Service& 2 Others* [2013] eKLR.

26. However, since implementation of the workload policy was a continuing exercise, it is arguable that the court could issue an order to stop its continued implementation. This appears to be the position expressed in *Habiba Ali Mursal & 4 others v Mariam Noor Abdi* [2018] eKLR when the court stated as follows:-

''The purpose of an injunction is to restrain that which is threatened to occur or is in the process of being undertaken in breach of one's right. It is never meant to prevent what has already occurred.''

27. The foregoing notwithstanding, the Petitioner has not demonstrated that the failure to issue the order sought will result in irreparable damage to its members. For this reason, I will not grant the orders.

Determination

28. The upshot is that the application for conservatory injunctive orders is declined.

29. Costs of the application are granted to the Respondents.

DATED, SIGNED AND DELIVERED ON THE 5TH DAY OF OCTOBER, 2023

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI