



**Nyongesa v Masinde Muliro University of Science and Technology  
& another (Employment and Labour Relations Cause E023 of 2022)  
[2023] KEELRC 3155 (KLR) (30 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3155 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E023 OF 2022  
JW KELL, J  
NOVEMBER 30, 2023**

**BETWEEN**

**DR FERDINAND CHIRURE NYONGESA ..... CLAIMANT**

**AND**

**MASINDE MULIRO UNIVERSITY OF SCIENCE AND  
TECHNOLOGY ..... 1<sup>ST</sup> RESPONDENT**

**MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY  
COUNCIL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant on 22<sup>nd</sup> August 2022 filed a Statement of Claim dated even date supported by his Verifying Affidavit. The Claimant further with leave of the court filed amended claim dated 27<sup>th</sup> March 2023 on the 29<sup>th</sup> March 2023. The Claim was accompanied by the Claimant's list of witnesses dated 22<sup>nd</sup> August 2022, his witness statement dated 22<sup>nd</sup> August 2022, his list of Documents of even date, and his bundle of documents as per the list of documents.
2. The suit had been triggered by the Respondent's action of unilaterally removing the Claimant from the payroll and stopping his salary. Vide the Amended Statement of Claim, the Claimant has prayed for the following reliefs:-
  - a. A declaration that the Claimant is a permanent and pensionable employee of the Respondents; the Respondents have no power to execute discipline on the Claimant in election matters, and arbitrary stoppage of the Claimant's salary was unlawful,
  - b. An order to be issued directing the Respondents to:-



- i. Reinstatement of the Claimant back on the payroll and pay salary arrears @ KES 276,349.00 per month.
- ii. A permanent injunction restraining the Respondents, their agents, Servants, or any person acting through them from striking the Claimant off the payroll.
- iii. Costs and interest of the case.

### **In the alternative**

- a. Formalize the Claimant's Resignation
  - b. Pay Claimant's salary(KES 276,349.00) arrears from 1<sup>st</sup> July 2022 to the date of formalization.
  - c. Pay for any other remedies in general damages as the court may determine arising from arbitral and unilateral stoppage of salary.
  - d. Costs and interests of the case.
3. The Amended Statement of Claim was accompanied by the Claimant's additional list of Documents dated 27<sup>th</sup> March 2023 and his additional bundle of documents.
  4. The Claimant on 21<sup>st</sup> November 2022 had filed a Reply to the Joint Written Statement of Defence dated 21<sup>st</sup> November 2022 together with a further list of documents dated 21<sup>st</sup> November 2022 and the additional document.
  5. The Respondents had entered appearance on 26<sup>th</sup> August 2022 through the firm of G. Ombito Advocates and filed a Joint Statement of Defence dated on even date to the original Statement of Claim.
  6. The Respondents on 19<sup>th</sup> January 2023 filed their List of documents dated 18<sup>th</sup> January 2023 together with their bundle of documents.
  7. On 1<sup>st</sup> February 2023, the Respondents filed the Witness statement of Benard Ooko dated 21<sup>st</sup> November 2022.
  8. On 17<sup>th</sup> May 2023, the Respondents filed a Response to the Amended Statement of Claim dated 16<sup>th</sup> May 2023.
  9. The Claimant on 18<sup>th</sup> May 2023 filed a Reply to the Response to the Amended claim dated on even date.

### **Hearing And Evidence**

10. The Claimant's case was heard on the 26<sup>th</sup> July 2023 when the Claimant testified on Oath(CW), he adopted his amended Statement of claim; his Application, and affidavit of 27<sup>th</sup> March 2023; his Reply to the Joint Written Statement of Defence dated 21<sup>st</sup> November 2022; his Reply to the Response to the Amended Claim dated 18<sup>th</sup> May 2023 all as his evidence-in-chief, and produced his documents as per his list of documents dated 22<sup>nd</sup> August 2022, his further list of documents dated 21<sup>st</sup> November 2022; and his list of Documents dated 27<sup>th</sup> March 2023. The Claimant was cross-examined by Counsel for the Respondent, Senior State Counsel, Mr. Tarus.
11. The Respondents' case was heard on 28<sup>th</sup> September 2023, where its witness Bernard Ooko(DW1) testified on oath as the Respondent's witness of fact and adopted his statement dated 21<sup>st</sup> November



2022 as defence evidence in chief and produced the documents as per the list of documents dated 18<sup>th</sup> January 2023 as Defence Exhibits 1 to 3.

### **Claimant's case in summary**

12. The Claimant states that he was offered employment on 9<sup>th</sup> September 2004 by the Respondents as a lecturer in the Department of Electrical and Communication Engineering on Permanent and pensionable terms a position that was confirmed on 14<sup>th</sup> August 2007 upon completion of a two-year probation period(FCN-2).
13. The Claimant states that he had discharged his duties smoothly(FCN-5, FCN-6, FCN-7)) and enjoyed a smooth relationship with the Respondents until 2021, when after applying for promotion, he filed a Petition No. E005 of 2021 against the Respondents after the said promotion process was marred by irregularities.
14. It was the Claimant's case that since the institution of the said petition, the Respondents through the 2<sup>nd</sup> Respondent have not treated him well and to confirm this, the Respondents removed him from the payroll without affording him any notice or opportunity to be heard(FCN-3).
15. The Claimant states that the Respondents stopped his salary alleging that he did not resign before contesting in elections and argues that matters of elections fall within the ambit of the Independent Electoral and Boundaries Commission (IEBC) under the [Elections Act](#), 2012; and the Respondents do not have a legal mandate to punish anyone in that regard nor did they provide evidence that IEBC mandated them to punish the Claimant.
16. The Claimant states that the IEBC cleared him based on the requirements under the Election Act, 2012 and that the same has nothing to do with the Respondents.
17. The Claimant states that the Respondents in stopping his salary and raising a counterclaim is uncalled for as the Claimant did not fail to perform his mandate.
18. The Claimant states that the Respondents' allegation that the Claimant did not resign before vying for an elective seat is malicious as the Claimant through his letter of 26<sup>th</sup> January 2022(FCN 1b) communicated his intention to resign, and no notice was required for one to resign under the [Elections Act](#). That the Respondents failed to act on it.
19. The Claimant states that resignation is a process and not an event, which involves the employer and employee, where the employee starts by writing the letter of resignation and the employer acknowledges with acceptance or rejection, upon which depending on whether it is an acceptance of the resignation, the employer issues guidelines to an employee to clear or hand-over with access to terminal benefits where applicable as a standard practice.
20. The Claimant states that the [Elections Act](#), Section 43(5) required a prospective candidate to resign by 8<sup>th</sup> February 2022, 6 months before the elections of 9<sup>th</sup> August 2022, but the Respondent failed to act on his resignation letter which was in their custody.
21. The Claimant states that with the Respondents' failure to clear him, status quo prevailed and he continued to render his services to students awaiting clearance which affected the Claimant's campaigns and cost him victory.
22. The Claimant states that he could not abandon his students acknowledging their right to education under the Right to Education (RTE) initiative of the United Nations Educational and



- Cultural Organisation (UNESCO) and in the Sustainable Development Goal 4 of the Millennium Development Goals (MDGs) of the UNITED Nations to which Kenya is a Signatory.
23. The Claimant states that he is supervising a master's student for Electrical Engineering (FCN 1c) undertaking a project based on a Simulation code developed by the Claimant and he therefore stayed on.
  24. The Claimant states that the Respondents possess a bad habit of failing to respond to his Memos as evidenced by various memos previously unresponded to(FCN 1d, FCN 1e, FCN 1f, FCN 1g & FCN 1h).
  25. The Claimant states that the Respondents' action of paying him a salary beyond the intended resignation date of 31<sup>st</sup> January 2022, he assumed that due to the Respondents' nature of failing to respond to him, they had likewise ignored his resignation and decided to retain him considering his rare field of specialization in VANET, a cutting edge technology in Mobile and Wireless communications(DSRC) in the interest of students undertaking postgraduate studies in Wireless Communication Engineering Option.
  26. The Claimant states that if the Respondents consider that students do not need his expertise since he vied in an election, he holds no power to restrain them and they can therefore process his exit in a proper process.
  27. The Claimant states that the Respondents' unilateral action of stopping his salary was arbitrary and has caused him to suffer irreparable damages from pecuniary financial constraints as he could not service his bank and Sacco loans that were guaranteed by the Respondents (FCN 10), household budgets, school fees, listing with the Credit Reference Bureau(CRB) and other obligations as he could not access his terminal benefits to fend off without an exit letter as confirmed by the Staff Retirement Benefits Scheme(FCN 1j).
  28. The Claimant states that he was a permanent and pensionable employee and that the Respondents hold no power to punish him for an election offence and that the stoppage of his salary was arbitrary and unlawful.
  29. The Claimant states that a letter of Professional Misconduct dated 18<sup>th</sup> August 2018 against him and which he saw on 25<sup>th</sup> August 2022 was sent after he had already instructed his advocates(FCN 2a) to come to court. He states that he had on 23<sup>rd</sup> August 2020 sent the orders obtained in court to the Respondent and it was agreed to ventilate the issues in Court(FCN 2b), and thus his suit is maturely before the Court.
  30. The Claimant states that he continued to go to work in the absence of any termination letter until the Chairman of the Department of Electrical and Communications Engineering -COD excluded him from the undergraduate timetable in September 2022. He raised the issue (FCN-2c) but never received any response but continued to supervise the postgraduate student(FCN-1c).

### **The Respondents' case**

31. The Respondents' case is that the Claimant did not resign from his position as a lecturer before he was gazetted to vie for an electoral seat vide the Gazette Notice No. 129A(BO1) and proceeded to campaign for the position of Member of Parliament for Kanduyi Constituency in the 2022 General Elections in breach of election laws which required that candidates vying for electoral seats to have resigned by 8<sup>th</sup> February 2022(BO2).



32. It is the Respondents' position that it never received a resignation from the Claimant from his position and that the present suit is premature since disciplinary proceedings against the Claimant are pending with the Respondents.
33. The Respondents states that the Claimant is not entitled to the alternative prayers sought as he has never reported to work since he offered himself for elections.

### **Counterclaim**

34. The Respondents state that the Claimant continued to fraudulently draw salaries and other emoluments (BO3 a-e) despite his gazette to vie for an electoral seat and counterclaims for the earnings erroneously paid to the Claimant given the foregoing irregularity, for the salary earned since 9<sup>th</sup> February 2022 to June 2022 and 3 months' salary in lieu of notice totaling to Kshs. 1,886,630, pursuant to the provisions of the Collective Bargaining Agreement (CBA)(BO4).
35. The Respondents state that by the CBA signed by all the Respondents' staff, under Section 28.1, an academic staff may resign by giving a three months' notice to the Deputy Vice-Chancellor (A& F) or paying in lieu of notice for the equivalent period.
36. The Respondents state that the Claimant was aware of the above provision and this prompted the Respondents to issue the letter of 18 August 2022(BO5) citing the Claimant for Professional Misconduct as its investigations had also confirmed the Claimant's involvement in elections as an aspirant of Kanduyi Constituency(BO6).

### **Written submissions**

37. The court gave directions for the filing of written submissions after the hearing. The parties complied. The Claimant's written submissions were drawn by the Claimant and were dated 3<sup>rd</sup> October 2023 and received in court on an even date. The Respondent's written submissions were drawn by Senior State Counsel, Gilbert C. Tarus and were dated 16<sup>th</sup> October 2023 and received in court on 17<sup>th</sup> October, 2023.

### **Determination**

#### **Issues for determination.**

38. The Claimant in his submissions did not identify issues for determination and submitted generally on the merits of his claim.
39. The Respondents in their written submissions identified the following issues for determination: -
  - a. Whether the Claimant resigned and what are the consequences.
  - b. Whether the Respondents were justified in stopping the Claimant's salary.
  - c. Whether the Claimant is entitled to the reliefs sought.
40. The Court having considered the issues addressed by the parties in their submissions and pleadings was of the considered opinion that the issues to be addressed in the determination of the dispute were as follows:-
  - a. Whether the Claimant resigned and the consequences of the resignation?
  - b. Whether the Claimant is entitled to the reliefs sought?



## Whether the Claimant resigned and the consequences of the resignation?

41. The Claimant contends that he resigned but continued to teach and was currently supervising a Master's student.
42. What is resignation? The Black's Law Dictionary 10<sup>th</sup> Edition defines Resignation as "the act or an instance of surrendering or relinquishing an office, right or claim.; a formal notification of relinquishing an office or position; an official announcement that one has decided to leave one's job or organisation, often in the form of a written statement."
43. The Claimant on 26<sup>th</sup> January 2022, delivered an Internal Memo with the Subject "Resignation" which was dated 25<sup>th</sup> January 2022 resigning as. Lecturer with effect from 31<sup>st</sup> January 2022(FCN 1b).
44. The Respondents contend that the Claimant never resigned as they never received the Claimant's resignation.
45. During the hearing, DW confirmed that letters are received at the Respondents' registry, the Registry personnel file the letters received in their respective files to their respective recipients, and that the sender of a letter has no opportunity to follow up to confirm whether their letter was received.
46. Therefore by this statement, the Claimant's letter of resignation was tendered and the same was to be effective by 31<sup>st</sup> January 2022, as the last day when the Claimant would be a Lecturer of the Respondents.
47. The Court of APPEAL in Public Service Commission & 4 others v Cheruiyot & 20 others (Civil Appeal 119 & 139 of 2017 (Consolidated)) [2022] KECA 15 (KLR) (8 February 2022) (Judgment) ( (DK Musinga, W Karanja & AK Murgor, JJA) held that:-

"A notice of resignation is basically a notice of termination of employment, given by an employee to the employer. It is a unilateral act. The Black's Law Dictionary (tenth Edition) defines resignation as follows: "The act or an instance of surrender or relinquishing an office, right or claim. A formal notification of relinquishing an office or position, an official announcement that one has decided to leave one's job or organization, often in the form of a written statement."

There was no evidence placed before the trial judge to show that the resignation by the 2<sup>nd</sup> to 4<sup>th</sup> respondents was involuntary. The 2<sup>nd</sup> to 4<sup>th</sup> respondents resigned voluntarily in compliance with a section of the law that was in force at the time. The 2<sup>nd</sup> to 4<sup>th</sup> respondents having resigned, their resignations having been formally accepted, their dues paid, and their respective positions filled meant that their resignation notices had already crystallized. There was nothing to go back to. The employee-employer relationship between the 2<sup>nd</sup> to 4<sup>th</sup> respondents and the County Government of Embu had already come to an end. The Employment and Labour Relations Court ought to have arrived at this finding and immediately downed its tools."(Emphasis added)

48. While the Respondents state that they had not received the Claimant's resignation, the Claimant voluntarily resigned and acting on the very nature of a resignation being Unilateral, the Claimant proceeded to present his received letter of resignation received on 26<sup>th</sup> January 2022, whose effect was to crystallize by 31<sup>st</sup> January 2022, to the IEBC for clearance.



49. The Claimant resigned voluntarily wishing to participate as an aspirant in an elective post of a Member of Parliament. The Claimant could not present his documentation for clearance if he still was a lecturer, a position which is a public office.
50. The Court of Appeal in *Public Service Commission & 4 others v Cheruiyot & 20 others*(supra) affirming the mandatory requirement for a public officer to resign before vying for an elective seat held:-

“The provisions of sections 43(5) are not hollow Lenaola, J in the Charles Omanga petition (supra) observed as follows at paragraph 26 of his judgment: “26. I also wish to state the impartiality of public servants is a cardinal value enshrined in Article 232(1)(a) of the Constitution which provides that the public servant and service must be responsive, prompt, impartial, and equitable in the provision of services. How can a public servant espouse those principles if he is allowed to remain in office until the election date? Suppose a Judge who intends to run for an elective post (it is his right) is allowed to sit on the bench and preside over election-related cases until the election date, where is his impartiality? Similarly, how can a Commissioner of the Independent Election and Boundaries Commission serving his last year in office and with ambition to run for elective office, be allowed to remain in office and oversee an election in which he is a candidate? The absurdity of both situations merely serves to show the justifiability of the need for public servants to leave public office within a reasonable time before the election in which they will be candidates.”

The requirements for neutrality and impartiality of public officers are also provided for in other relevant statutes and regulatory framework related to the conduct of public officers. Section 23(2) and (3) of the Leadership and Integrity Act, 2012 provides that: “23 (2) An appointed State officer or public officer shall not engage in any political activity that may compromise or be seen to compromise the political neutrality to the office subject to any laws relating to elections. (3) Without prejudice to the generality of subsection (2) a public officer shall not- engage in the activities of any political candidate or act as an agent of a political party or a candidate in an election.b.publicly indicate support for or opposition against any political party or candidate participating in an election.”The importance of political neutrality and impartiality of public officers during the term of employment cannot be overemphasized. We therefore fully agree with the findings of Lenaola, J in the Charles Omanga petition on the necessity for public officers desirous of running for elective posts to resign in good time. The provisions of sections 43(5) and (6) also seek to promote, inter alia, the principle of good governance and the value of the integrity contemplated under articles 10(2)(c) of the Constitution.

It is also not lost on us that a general election has very strict timelines which political parties, the IEBC, aspirants, and other stakeholders must adhere to in order to have free and fair election. One of the events that precedes a general election is the nomination of candidates by political parties pursuant to the provisions of section 13 of the Elections Act, 2011. It is only after the nomination process has taken place that the IEBC can proceed to print the necessary ballot papers which contain information on the candidates vying for a particular seat in a particular electoral area. The resignation of public officers at least six months before the general election therefore ensures that the IEBC has sufficient time to undertake its processes and that the calendar of the general election is not disturbed and/or interrupted unnecessarily.”

51. Evidence was tendered that indeed the Claimant was duly nominated as a Candidate of the Jubilee Party as a member of the National Assembly for the 9<sup>th</sup> August 2022 election (BO-1).



52. Article 99(2) of *the Constitution* states that:-  
 ‘(2)A person is disqualified from being elected a member of Parliament if the person—  
 (a) is a State officer or other public officer, other than a member of Parliament;  
 (b) has, at any time within the five years immediately preceding the date of election, held office as a member of the Independent Electoral and Boundaries Commission; .....
53. A Person could not be cleared to be a candidate as a Member of Parliament if they were Public Officers. Section 2 of the Public Ethics Act, 2003 states that “public officer” means any officer, employee, or member, including an unpaid, part-time, or temporary officer, employee, or member, of any of the following— (f) a public university.”
54. The Claimant’s resignation had crystallized on 31<sup>st</sup> January 2022 when his notice period of 6 days’ lapsed. Resignation is unilateral and does not require an employer to accept. Once one issues a resignation it is a formal notification of relinquishing an office or position and an official announcement that one has decided to leave one’s job or organization, often in the form of a written statement. This was the case for the Claimant, he wrote a resignation letter and stated the period of when his resignation would take effect.
55. I uphold the decision cited by the Respondent in *Edwin Beit Kipchumba v National Bank of Kenya Limited* (2018)e KLR to hold that resignation is a unilateral act on the part of the employee and that there is no legal requirement suggesting that its effectiveness is dependent on the action of the employer.

### **The Consequences of the Resignation.**

56. Under the Collective Bargaining Agreement between the Respondent and the University Academic Staff Union produced for the period of 1<sup>st</sup> July 2012 to 30<sup>th</sup> June 2017; (D-Exh-3) under Clause 28.1, A member of the Academic staff who wished to resign at the level of the Claimant was required to give a three months’ notice before resigning or to pay three months in lieu of Notice.
57. The Claimant issued a 6-day notice which was in breach of the Notice period allowed and was thus required to pay the salary in lieu of the Notice period of three months to the Respondents. The Court finds that the purpose of the notice was defeated as the Claimant worked within the period of the 3 months on tendering the notice hence the Respondent cannot sustain the claim of notice against him.
58. The resignation of the Claimant crystallized on 31<sup>st</sup> January 2022, and the employer–employee relationship between the Claimant and the Respondents was extinguished.
59. The Claimant had ceased being a Lecturer when he relinquished his office, and he conversely was not required to continue to supervise any students of the Respondents having left his office. Any services he rendered supervising students was on his own frolic as he was no longer an a lecturer with the Respondents.
60. The Claimant when tendering his resignation did not expect any salary from the Respondents and was well aware of the effect of him tendering his resignation.
61. The Claimant’s employment with the Respondents ceased on 31<sup>st</sup> January 2022.
62. The Claimant’s employment ceased on 31<sup>st</sup> January 2022, and any subsequent actions on behalf of the Respondents were undertaken without authority but with acquiescence of the Respondent management who failed to stop allocation of work pursuant to the resignation. The Respondent



ofcourse denied receipt of the resignation letter. On the claim for payment of further wages the court having held the Claimant had resigned it was prudent on the Claimant to have informed the student he was allegedly supervising that he was no longer a Lecturer. The Court found evidence that it was the Respondent who assigned classes to the Claimant and as it was not dispute he worked the Court declines to order refund of paid salaries or even the notice period. The Court simultaneously declines to award any claims of unpaid wages by the Claimant post the resignation.

63. The Claimant additionally confirmed that he had already began the process of applying for his pension fund as evidenced by the response from the Board of Trustees of the Respondent's pension scheme when he was requested to supply a copy of his resignation letter as the case may be(FCN 1j).
64. The Claimant voluntarily resigned and proceeded to act on that knowledge to seek clearance to be qualified to contest in an electoral seat. During cross-examination by Counsel for the Respondent, the Claimant confirmed he had written a letter of resignation in January 2022 and that when he was vying he presented the said resignation letter to the IEBC for clearance.
65. The Court upholds the observation of the Court of Appeal in the Public Service Commission case (supra) on the necessity of political neutrality of public officer as follows:- ‘The requirements for neutrality and impartiality of public officers were also provided for in other relevant statutes and regulatory frameworks related to the conduct of public officer. In particular section 23(2) and (3) of the *Leadership and Integrity Act*, 2012 provided that an appointed State officer or public officer was not to engage in any political activity that could compromise or be seen to compromise the political neutrality of the office subject to any laws relating to elections. Section 12(1) of the *Political Parties Act* No. 11 of 2011 on the other hand barred public officer from being eligible to be a founding member of a political party, being eligible to hold office in a political party, engaging in political activity that could compromise or be seen to compromise the political neutrality of the person's office, publicly indicate support for or opposition to any political party or candidate in an election. Clause 24 of the Public Service Code of Conduct and Ethics, 2016 provided, inter alia, that a public officer was to remain politically neutral during his term of employment.’ The said Court noted of officers like the Claimant that :- ‘17....It was not desired that state or public officers intending to join elective politics have one leg in public service and another in elective politics’. In the upshot the Claimant made a choice to join elective politics. He could not still be in employment as he resigned severing the employer employee relationship with the Respondent.
66. The Respondents acted within the law in stopping the Claimant's salary as he was no longer an employee of the Respondents.
67. The Claimant cannot be reinstated to the payroll by the Court having resigned. I find it is in the Respondent's management prerogative to decide whether or not to re-engage him under a new employment contract. The Respondent's owes no duty to the Claimant as they no longer have an employer employee relationship.
68. The court agreed with the submissions of Respondent that the Claimant is not entitled to the reliefs sought and his terminal benefits if any be proceeded in the normal way.

## **Conclusion**

69. The Court holds that the Claimant having resigned holds no employer employee relationship with the Respondent. The Respondent having allowed him to work despite the tendered resignation the claim for counterclaim fails. The Claimant was paid for work done. The Claimant's terminal benefits if any be processed in the normal way as he is no longer an employee of the Respondent having resigned.



70. The claim dated 27<sup>th</sup> March 2023 is dismissed.
71. No order as to costs.
72. It is so Ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 30<sup>TH</sup> NOVEMBER 2023.**

**JEMIMAH KELI,**

**JUDGE.**

In The Presence Of:-

Court Assistant : Brenda Weseonga

For Claimant : In person present

For Respondent:- Absent

