



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NUMBER 88 OF 2020

BETWEEN

KENYA UNIVERSITIES STAFF UNION.....PETITIONER

VERSUS

1. EGERTON UNIVERSITY

2. KISII UNIVERSITY.....RESPONDENTS

RULING

1. The Petitioner filed an Application dated 10th June 2020, seeking the following main orders: -

a. Pending hearing and determination of the Application and the Main Suit, the Honourable Court be please issue an order restraining the Respondents whether by themselves, their servants and/ or agents or whomsoever is acting on their behalf, from implementing the Circular and Internal Memo dated 13th and 11th May 2020 respectively.

b. Pending hearing and determination of the Application and the Main Suit, the Honourable Court be pleased to issue and order restraining the Respondents whether by themselves, their servants, and/or agents or whomsoever from changing any terms and [condition] of services of the Applicant's members without consultation/ inclusion of the Applicant's inputs.

2. The Applications is founded on the Affidavit of Dr. Charles Mukhwaya, Secretary- General of the Petitioner, sworn on 10th June 2020, and on the Grounds on the face of the Notice of Motion.

3. These are summarized as follows: the Parties have a Recognition Agreement and a valid Collective Bargaining Agreement; they are under obligation in these instruments, to negotiate on any claims for alteration to terms and conditions of employment; the Respondents are members of Inter Public Universities Councils Consultative Forum [IPUCCF] which has recently concluded and registered a CBA, binding the Parties herein; the Respondents issued a Circular and a Memo on 13th May 2020 and 11th May 2020 on payment of April 2020 salaries; these documents vary the Petitioner's members' salaries; they are in disregard of the CBA; the Respondents have failed to consult the Petitioner on alteration contrary to Section 10 of the Employment Act and Article 41 of the Constitution of Kenya; and the Respondents have violated Petitioner's members' right to fair labour practices.

4. The 1st Respondent opposes the Application, through the Replying Affidavit of the Finance Officer Moses Odera Ouma, sworn on 25th June 2021. He explains that, the Respondents were called for a meeting by the 1st Respondent before the Circular and the Memo issued. The minutes of the meeting held between the Parties on 4th May 2020 are exhibited. The Finance Officer states that the 1st Respondent is financially constrained and not able to pay the Petitioner's members' salaries, at 100%. Part of the financial collapse is blamed on industrial action called by the Petitioner involving its members. It is argued that the Government reduced its financial support for the 1st Respondent creating financial gaps. Government capitation has reduced, as has the number of self-financing students. The 1st Respondent has been compelled to take a bank overdraft to sustain operations. At the same time, the 1st Respondent's bank accounts were frozen by the KRA over tax liabilities.

5. The 1st Respondent submits that following grant of similar orders as sought herein to another Union, **UASU in NAIROBI E&LRC PETITION NO. 80 OF 2020**, the Petitioner therein declined further negotiations with the 1st Respondent. The 1st Respondent apprehend that grant of the orders sought in the current Application will have similar effect as in the other Petition.

6. The Court has not seen any Replying Affidavit filed by the 2nd Respondent. It was agreed that the Application is considered and determined on the strength of the Parties' Affidavits and Submissions on record. The Submissions filed by the 2nd Respondent, dated 12th October 2021, refer to 'Affidavits filed by the Respondents.' It is submitted that salaries were paid on 21st May 2021 and the Application is therefore misconceived. The 2nd Respondent suffered financial constraints, attributed to the same factors given by the 1st Respondent in its reply. Proposal in reduction of salary was a temporary measure. The 2nd Respondent states it was later compelled to issue notices of redundancy on 30th September 2020, which is the subject of another litigation at **Kisumu E&LRC Cause E0013 OF 2020**.

The Court Finds: -

7. The 1st Respondent's suggestion, in the course of hearing the Application, is that the Application was settled through a Return-to-Work Formula.

8. A copy of the Return-to-Work Formula exhibited by the 1st Respondent, dated 30th November 2020, is between the 1st Respondent and the Universities' Academic Staff Union. The Petitioner herein, is the Kenya Universities Staff Union.

9. Parties have a Recognition Agreement and a valid CBA, concluded through the Inter Public Universities Councils Consultative Forum. They are bound to negotiate terms and conditions of employment through these collective bargaining structures.

10. There is an indication that the Management of the 1st Respondent met the Petitioner's Chapter Chairman and Organizing Secretary, alongside other Union's Chapter Officials, on 4th May 2020.

11. There is considerable doubt that such a meeting, would be considered a consultative forum, legally mandated to discuss the issues at hand.

12. Reduction or withholding of staff salaries to be released at a later date, is a matter at the core of Collective Bargaining and Negotiation, which could only be done at the national forum, where the CBA was negotiated and concluded.

13. The Chapter Representatives did not engage in negotiation of the proposed reduction and/ or partial withholding of salaries. They correctly told their counterparts, that the proposal was beyond their mandate. They expected full salaries to be paid. In the view of the Court, consultations should have involved the national forum, including the Inter Public Universities Councils Consultative Forum.

14. There are issues as stated in the Affidavit of Moses Odero Ouma, which have adversely affected the ability of the Respondents to meet their financial obligations. In responding to these issues, the right consultative forum is not the Chapters; the right forum would be the Head Offices of their respective Unions and the IPUCCF.

15. The Respondents have not shown that they have held consultations with the Petitioner, on the subject of change in the negotiated terms and conditions of employment, contained in the existing CBA.

16. There is therefore, no justification in issuing a Circular and Memo, unilaterally altering the existing CBA. The Application by the Petitioner dated 10th June 2020 carries considerable weight and is allowed.

IT IS ORDERED: -

a. *Pending hearing and determination of the Petition, the Respondents are restrained, by themselves, Agents, Servants and/or other Persons acting on their behalf, from implementing the Circular and Internal Memo dated 13th May 2020 and 11th May 2020 respectively.*

b. *Pending hearing and determination of the Petition, the Respondents are similarly restrained from changing any terms and conditions of service of the Petitioner's members, without the consultation/ inclusion of the Petitioner.*

c. *Costs in the Petition.*

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 25TH DAY OF FEBRUARY 2022.

JAMES RIKA

JUDGE