



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**PETITION NO. E015 OF 2021**

**UNIVERSITY ACADEMIC STAFF UNION,**

**MASENO CHAPTER.....PETITIONER/RESPONDENT**

**VERSUS**

**MASENO UNIVERSITY.....APPLICANT/ RESPONDENT**

**RULING**

1. This ruling relates to a Notice of Motion application dated 29<sup>th</sup> June, 2021, expressed to be brought under Sections 3,12,16, 20(1)(4) of the Employment and Labour Relations Court Act, Sections 28 and 33 of the Employment and Labour Relations Court (Procedure) Rules 2016, Sections 19, 20 (1) (a), (3), 21 and 25 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and Article 50(2) of the Constitution of Kenya, 2010.

2. The Applicant seeks the following orders:

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2. That this Honourable Court be pleased to review, vary and/or set out its order dated 31.5.2021 giving directions on how Petition dated 15<sup>th</sup> February, 2021 is to be heard.

3. That this Honourable Court be pleased to give new directions to hearing of the said petition and allow the Respondent to file additional documents and the petition to be heard by *viva voce* evidence.

4. That the costs of this application be provided for.

3. The application is supported by grounds on the face of the motion and an Affidavit sworn by Joy A. Akinyi, the Legal Officer of the Applicant herein.

4. The application is premised on orders issued by the court on the hearing and determination of the petition, where it directed parties to file their respective submissions to the main petition.

5. The Applicant's position is that no proper instructions and client guidance had been sought and given to counsel holding brief for the Applicant when the directions subject of the application were issued.

6. The Applicant's further case is that there are different set of facts pleaded which need to be expounded on and tested by examination and cross examination to enable the court establish the truth and appreciate the facts in the matter.

7. The Applicant states that it needs to file additional documents in support of their case. The Applicant further states that it would be greatly prejudiced if they are unable to call witnesses in the matter to testify and present documents in support of their case.

8. Ms. Joy A. Akinyi in her supporting Affidavit states that prior to the date of the orders subject of this ruling, she did not get an opportunity to discuss the matter with counsel who held their brief, so as to enable him take an appropriate position based on instructions given. It is her assertion that the Applicant's court Assistant, one Mr. Kennedy Nyong'o deemed it fit to request Mr. Rodney Oluoch to hold her brief to avoid a situation where the Applicant would be unrepresented.

9. The Applicant states that their particular intension is to put in more documents relating to Adhoc committee deliberations, and minutes of consultative meetings it held before the teaching hours were adopted by its Senate.

10. The Respondent opposed the application vide grounds of opposition dated 3<sup>rd</sup> July, 2021.

11. Both Parties filed submissions in the matter.

### **The Applicant/Respondent's Submissions**

12. It is submitted that the Applicant has a right to a fair hearing as enshrined in the Constitution of Kenya, 2010, specifically Article 50(1). The Applicant further submits that the purpose of Article 50(1) is to accord a person an opportunity to be heard and to ventilate their case.

13. The Applicant further submitted that under Article 50(2)(K), evidence adduced before a court can be challenged and seeks that the conciliator's report be expunged from the court record for being inaccurate and not having given the Applicant an opportunity to interrogate and respond to it.

14. It is submitted for the Applicant that per Section 20 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, a petition can be dispensed with by way of affidavits, written submissions or oral evidence. It is further submitted that under the same section, the Court may upon application or on its own motion direct that the petition or part thereof be heard by oral evidence. They sought to rely on the holding in the case of **Muindi Kimeu & 3,285 others v Kenya Pipeline Company Ltd & Another (2021) eKLR** to support this position.

15. The Applicant further submitted that it has demonstrated a deep dispute of facts in the petition and which necessitates the calling of witnesses to adduce evidence and to be cross examined. They rely on the holding in the case of **Gerald Macharia v Samuel Murimi (2016) eKLR**.

16. The Applicant submit that the application herein is meritorious and it is in the interest of justice that it be allowed in its entirety.

### **The Respondent's/Petitioner's Submissions**

17. The Respondent's submission is that the impugned order was made in the presence of Counsels for both parties; Mr. Onsongo appearing for the Respondent/Petitioner and Ms. Akinyi for the Respondent.

18. It is submitted for the Respondent that the Applicant must establish a case on the basis of which the court can review its decision.

19. It is further submitted for the Respondent that the application herein, does not meet the requirements of Rule 33(1)(a) of the Employment and Labour Relations Court (Procedure) Rules, that provide as follows in respect of an application for review of an order/decreed of a Court:

***“(a) If there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made.”***

20. It is the Respondent/Petitioner's submission that the grounds upon which the application is premised does not fall within the four corners of the grounds on which a court can be called upon to review its orders/directions. They rely on the cases of **Menginya Salim Murgani v Kenya Revenue Authority (2014) eKLR, Tokesh Mambili & Others v Simion Litsanga (2004) eKLR and Ajit Kumar Rath v State of Orisa & 9 others, 9 Supreme Court Cases 596 at page 608** amongst others to support their position.

21. The Respondent/Petitioner further submitted that the documents upon which the application is anchored were authored and published on 6<sup>th</sup> August, 2019, which is over a year since the date of filing this petition. It is their submission that the documents were in the custody of the Applicant as at the time of filing the petition.

### **Determination**

22. I have considered the application, the grounds upon which it is premised and the submissions of the parties. The issue for determination is whether the Applicant has proved a case for review of directions issued by the court on 31<sup>st</sup> May, 2021.

23. The subject directions/orders, were as follows: -

***“ 1. THAT this Petition to be determined on merit.***

***2. THAT Petitioner to file and serve submissions before 30/6/2021***

***3. THAT Respondent to file and serve submissions before 30/7/2021***

***4. THAT judgment on 24/11/2021.”***

24. The Applicant's contention is that their counsel was not in court on the date the impugned directions were given and that the counsel who

held her brief did not have the appropriate instructions on the position of the Applicant in regard to the matter.

25. The Respondent on their part stated that one Ms. Akinyi, Counsel for the Applicant, was present in court on the day the orders were made.

26. A look at the court's coram for the day of the impugned orders for directions, indicate that Mr. Onsongo was present for the Petitioner while Mr. Oluoch was holding brief for Ms. Akinyi for the Respondent/Applicant.

27. My first finding is therefor that as submitted by the Applicant, the Applicant's counsel was not present on the date the directions subject of this application and ruling were issued, and that indeed, her brief was held by a Mr. Oluoch.

28. The issue then become, whether the absence of the Applicant's counsel and bearing in mind that her brief was held by another counsel, is ground enough to review the orders for directions issued in the matter.

29. The Applicant's application is based on reasons that no proper instructions and client guidance had been sought and given to counsel holding brief for the Applicant when the directions subject of the application were issued. The Applicant's further case is that there are different set of facts pleaded to which need to be expounded on and tested by examination and cross examination to enable the court establish the truth and appreciate the facts in the matter.

30. The Applicant's position is that they particularly wish to put in additional documents that will help them ventilate their case. They submitted that denial would amount to violation of their right to a fair hearing under Article 50(1) of the Constitution.

31. The Applicant in their supporting Affidavit have set out the issues in dispute and for which they need to file additional documents. A party can file additional documents in a case upon close of pleadings and at any stage before the court delivers a judgment, for as long as they have the leave of the court, which in essence, is prayer number 3 of the instant application.

32. The court notes that the Applicant's counsel admitted that their court Assistant requested counsel to hold their brief. This court will not hold the Counsel's/Legal Assistant's mistake against the Applicant. Article 50(1) of the Constitution protects a person's right to a fair hearing. In the case of *Muindikimeu & 3,285 Others v Kenya Pipeline Co. Lt & Another (2021) eKLR*, Mbogo J stated as follows in regard to a party's right to fair trial:

***“I acknowledge that these Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice Rules and Procedures, 2013, are on a pedestal higher than the ordinary Civil Procedure Rules. It is important to bear in mind that directions are procedural matters that should not override considerations of a fair trial....”***

33. The Rules of procedure cited as the basis upon which the Applicant's application should not be granted are inapplicable (See *Ahad v CJE (2019) eKLR*)

34. The directions given, do not in my view, tie the hands of the court for the life of the case, and especially that a party thinks that an opportunity to file additional documents will help them ventilate their case.

35. In conclusion, I find and hold that it is in the interest of justice that this court allows this application, so as to facilitate a just and expedient resolution of the dispute between the parties.

36. In light of the foregoing, I find the application merited and the orders issued on 31<sup>st</sup> May, 2021 are varied as follows:

- i. That the Petition herein shall be heard and determined by way of written submissions as earlier directed.
- ii. That the Applicant/Respondent has 14 days from the date of this ruling to file any additional documents they may wish to file in relation to the petition.
- iii. That the Petitioner will have corresponding leave to file a reply if they so wish within 14 days of receipt of the Applicant/Respondent's documents.
- iv. That both parties will thereafter have 14 days each to file their submissions starting with the Petitioner.
- v. That the matter will be mentioned on a date to be assigned after the delivery of this ruling, to confirm compliance and fix a judgment date.

25. Orders accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 3<sup>RD</sup> DAY OF FEBRUAY, 2022.**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Ms. Akinyi present for the Applicants

Mr. Onsongo present for the Respondents

Ms. Christine -C/A