



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 57 OF 2019

PROF SHEM O. AYWA.....CLAIMANT

VERSUS

CHAIRMAN OF COUNCIL, KIBABII UNIVERSITY.....1st RESPONDENT

CHANCELLOR, KIBABII UNIVERSITY.....2nd RESPONDENT

PUBLIC SERVICE COMMISSION.....3rd RESPONDENT

JUDGMENT

1. Prof Shem Aywa (the Claimant) sued the Respondents on 20 June 2019, alleging breach of contract and constructive dismissal.
2. On 26 February 2020, the Claimant filed an Amended Memorandum of Claim, and the Respondents filed a Response on 4 December 2020.
3. The Cause was heard on 20 May 2021 when the Claimant testified, and on 7 February 2022, when Prof Isaac Odeo, the Vice-Chancellor with Kibabii University (the University), testified.
4. The Claimant filed his submissions on 7 March 2022 and the Respondents on 16 March 2022.
5. The Court has adopted the Issues as set out by the parties in the submissions.

Whether the dispute was resolved at mediation?

6. The Claimant was appointed as Deputy Vice-Chancellor, Administration, Finance and Development of the University on or around 6 May 2016.
7. Sometime in November 2018, the Council commissioned an audit on staff recruitment, and the audit report was released on 28 November 2018.
8. On or around 31 January 2019, the Claimant sent a letter of resignation from the position of Deputy Vice-Chancellor to the Cabinet Secretary, Education.
9. The Council formally accepted the resignation through a letter dated 4 February 2019.
10. However, on 20 March 2019, the Claimant purported to rescind the (notice of) resignation and on 25 March 2019, the Council requested the Public Service Commission to declare a vacancy for the position and commence a recruitment process.
11. On 11 April 2019, the Council issued a show-cause to the Claimant and instructed him to respond to allegations of abuse of office, incompetence, and negligence of duty within 7-days.
12. The Council followed on the show-cause with a letter dated 23 April 2019 informing the Claimant that it had declined to accept his decision to rescind the resignation.
13. On 10 May 2019, the Claimant appeared before the Governance and Human Resource Committee and accepted that the dispute be taken through mediation (a mediation agreement was reached on 8 June 2019 that the Claimant would continue serving as a professor of pure

mathematics and that he would resume work after completing his accumulated 186 leave days).

14. The Ministry of Education notified the Council through a letter dated 14 May 2019 that he concurred with the decision to accept the Claimant's resignation (an acting Deputy Vice-Chancellor was appointed on 30 May 2019).

15. On 27 May 2019, the Council invited the Claimant to appear for a disciplinary hearing on 8 June 2019.

16. The Claimant responded on 23 April 2019 and, on 13 May 2019, applied for 10-days' leave. The Vice-Chancellor approved the leave.

17. However, on 14 May 2019, the Public Service Commission declared and advertised a vacancy for the position of Deputy Vice-Chancellor, Administration, Finance and Development.

18. The Claimant was dismayed, and he moved the Court on 20 June 2019, and on 21 June 2019, the Court stayed the recruitment process.

19. The cause of action advanced by the Claimant accrued from November 2018 to around 14 May 2019.

20. To resolve the issues in dispute, the parties voluntarily entered into mediation and a mediation settlement agreement was executed on 8 June 2019.

21. The terms of the mediation agreement were:

(a) Both parties namely, Kibabii University and Prof Shem Omukunda Aywa agree to continue in the employment and labour relationship and shall henceforth follow an amicable settlement on the matter.

(b) The 2nd party, Prof Shem Omukunda Aywa shall take the position of Professor of Pure mathematics in the Department of Mathematics with effect from 1st May 2019 (now past).

(c) The 2nd party Prof Shem Omukunda Aywa's cumulative leave days is currently reflected as 186 days as at the date of this agreement.

(d) The 2nd party Prof Shem Omukunda Aywa requests for accumulated leave days of 186 working days and Kibabii university agrees to grant him the same with effect from 18th June 2019.

(e) The 2nd party Prof Shem Omukunda Aywa shall upon completion of his leave, report to the Chairman, Department of Mathematics for assignment of duties.

(f) Both parties mutually agree to abide by the terms set herein without resorting to unilateral deviation or variation of terms thereof.

22. By the time the Claimant entered the mediation settlement, all the facts he is relying on in this Cause were within his knowledge.

23. The mediation settlement having been entered voluntarily, the Court is of the view and finds that it bound the Claimant, and he must abide by its terms.

24. By moving the Court on the same subject dispute, which had been resolved at mediation, the Claimant was seeking to have a second bite at the cherry.

25. Considering that alternative dispute resolution is at the heart of litigation in this country, the Court will not allow the course taken by the Claimant to re-open a closed dispute.

26. Considering the above conclusion, it would serve no purpose for the Court to examine the questions posed by the Claimant concerning constructive dismissal or validity of the resignation save to observe that a resignation cannot be unilaterally revoked once tendered.

Conclusion and Orders

27. The Court finds that the dispute presented before the Court by the Claimant was resolved at mediation, and the Court not only declines jurisdiction, but finds the Cause without merit.

28. The Cause is dismissed with costs to the Respondents.

Delivered through Microsoft teams, dated and signed in Kisumu on this 27th day of April 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Mr. Omondi/Mr. Omondi instructed by Omondi Abande & Co. Advocates

For Respondents Mr. Masese instructed by the Federation of Kenya Employers

Court Assistant Chrispo Aura