



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 135 OF 2017

PAUL KIPROP CHEPKUTO.....CLAIMANT

v

UNIVERSITY COUNCIL,

MOI UNIVERSITY1st RESPONDENT

PROF J. KINYAMARIO2nd RESPONDENT

MOI UNIVERSITY..... 3rd RESPONDENT

LABAN P. AYIRO 4th RESPONDENT

JUDGMENT

1. Paul Kiprop Chepkuto (the Claimant) was appointed as acting Deputy Vice-Chancellor, Administration and Finance with effect from 20 March 2014 by the Cabinet Secretary, Education.
2. On or around 19 August 2016, Prof J. Kinyamario (2nd Respondent) issued a show-cause to the Claimant requesting him to respond to about 17 allegations within 14-days.
3. The Claimant responded on 24 August 2016, and on 1 September 2016, he was sent on compulsory leave. The compulsory leave was followed by a letter dated 13 October 2016 sending the Claimant on suspension pending further investigations and appearance before a Disciplinary Committee.
4. On 7 December 2016, the Vice-Chancellor (4th Respondent) invited the Claimant to appear for a disciplinary hearing on 21 December 2016.
5. The Claimant appeared before the Committee, and on 2 February 2017, the Council resolved to terminate his contract as Deputy Vice-Chancellor. He was informed of the decision through a letter dated 24 February 2017.
6. The Claimant appealed against the termination on 15 March 2017.
7. On 4 April 2017, the Claimant moved the Court alleging violation of his constitutional rights, unfair termination of contract and breach of contract.
8. The Memorandum of Claim was accompanied by an application which was dispensed with.
9. On 13 November 2020, the Claimant filed an Amended Memorandum of Claim, which prompted the Respondents to file an Amended Response on 16 November 2020.
10. The Claimant filed a Reply to the Amended Response on 4 December 2020.
11. The Cause was heard on 31 May 2021 and 6 December 2021. The Claimant, a Senior Legal Officer and Registrar with the University, testified (the Court scheduled delivery of judgment on 16 March 2022).
12. The Claimant filed his submissions on 6 January 2022, while the Respondents filed their submissions on 25 January 2022.

13. While preparing the judgment, the Court realised that it had dealt with another Cause raising similar questions.
14. The Court, therefore, directed the parties to file and exchange further submissions on the impact of the failure to disclose the filing of another Cause on the same facts.
15. The Claimant filed the further submissions on 28 March 2022 and the Respondents on 5 April 2022.
16. The Court has considered the pleadings, evidence and submissions and has adopted the Issues as set out in the parties' submissions.

Abuse of court process

17. It is not in dispute that the Claimant filed Nakuru Cause No. 443 of 2016, *Paul Kiprop Chepkuto v University Council, Moi University & 2 Ors* on 1 November 2016, alleging unfair labour practices and challenging his suspension. The Claimant sought a myriad of orders.
18. On 4 April 2017, the Claimant filed the instant Cause and among the actions challenged was the suspension.
19. In paragraph 55 of the Memorandum of Claim, the Claimant pleaded that there were no pending suits between the Respondents and himself over the same subject matter.
20. The Claimant then filed a Notice to Withdraw the Nakuru Cause on 9 March 2021.
21. The facts forming the subject matter of this Cause and the Nakuru Cause were the same. By the time the Claimant moved the Court in Nakuru, he had not been dismissed. However, the dismissal was communicated to him on or around 24 February 2017.
22. Instead of amending the Cause pending before the Court in Nakuru to incorporate the new set of facts, the Claimant opted to file another Cause in this Court.
23. The Respondents asserted that the Claimant never served the Nakuru Cause upon them despite its being in the Court docket for nearly 5-years.
24. This Court ordinarily has no territorial jurisdiction over disputes accruing in Eldoret. The Court with jurisdiction sits in Nakuru. The Court also used to conduct circuit hearings in Eldoret.
25. The Claimant filed parallel proceedings before 2 Courts, and he did not disclose that fact.
26. In *Aviation & Airport Services Workers Union v Kenya Airports Authority & Ar (2014) eKLR*, it was held:

Filing another suit during the pendency of a similar suit is clearly an abuse of the process of the court. It is immaterial that the Claimant has taken the step to have the first suit withdrawn, the fact of a filing a new suit during the pendency of the earlier suit and failing to disclose this fact to the Court during the granting of ex-parte orders is tantamount to peddling falsehoods while under oath. This is to be discouraged and avoided by all means possible, and a party so offending must pay the cost.
27. The failure of the Claimant to disclose the pendency of another cause on substantially the same subject matter amounted to a fundamental material non-disclosure. It was an abuse of the court process and flew in the face of section 6 of the Civil Procedure Act.
28. For the material non-disclosure, the Court is of the view that this Cause is for dismissal.
29. Assuming that the Court is wrong in that conclusion, the Court will examine the other issues raised by the parties.

Joinder of the University Council, Chair of the Council and Vice-Chancellor

30. The Respondents asserted that the University Council, the Chair of the Council, and the then Vice-Chancellor should not have been joined to the Cause because there was no pleading or evidence of wrongdoing alleged or provided against them.
31. According to the Respondents, the only entity capable of being sued under the Universities Act was the University (3rd Respondent). The Respondents relied on *Kiama Wangai v Pamela Tsimbiri & 7 Ors (2014) eKLR* and *Josephat K.Z. Mwatela v Technical University of Mombasa Council & 2 Ors (2016) eKLR*.
32. The Council of a public university is established under section 34 of the Universities Act. Amongst the functions of the Council include the recruitment of staff.
33. The Council is, therefore, an agent of the University.
34. Under section 2 of the Employment Act, 2007, the employer is defined as:

means any person, public body, firm, corporation, or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager, or factor of such person, public body, firm, corporation, or company.

35. From the above definition, the Court finds that the Council of a public university is an employer for the purposes of the Employment Act, 2007 and is therefore capable of being sued.

36. In reaching the conclusion, the Court takes comfort in the definition of *person* in Article 260 of the Constitution as:

includes a company, association, or other body of persons, whether incorporated or unincorporated and Article 22, which has recognised the capacity and competence of any person to institute legal proceedings.

37. Regarding the Chair of the Council and the Vice-Chancellor, the Court notes that particulars of wrongdoing were set out against them in paragraphs 13, 18, 22, 28, 39 and 40 of the Memorandum of Claim.

38. The Court further notes that under the Civil Procedure Rules, a claim cannot fail merely because of the joinder of a party.

39. The Court finds that the Council, Chair of Council and then Vice-Chancellor were necessary parties to the dispute.

Unlawful suspension/show-cause

40. The Claimant was suspended through a letter dated 13 October 2016. He challenged the lawfulness of the suspension on the grounds that the allegations leading to the suspension were the same allegations outlined in the show-cause notice dated 19 August 2016.

41. A show-cause notice has antecedents in section 35(1) of the Employment Act, 2007, and it cannot have been unlawful for the Council to cause to be sent such a notice to the Claimant.

42. Suspension is routinely used in employment to enable investigations to establish the facts upon which the employer may take disciplinary action.

43. However, the suspension should have some contractual or legal foundation. It may be provided for in the contractual documents or statutory instruments such as in the Public Service Commission regulations in respect of civil servants.

44. Although the Claimant did not file a copy of the University's Human Resource Policy Manual in Court, he filed letters suggesting that suspension of staff was part of the terms and conditions of service provided for in the university's procedures and policies manual.

45. Therefore, the Court is unable to find, based on the record, that the Claimant's suspension was unlawful.

Limitation

46. The Respondents asserted that the head of the claim for unfair termination of employment was statute/time-barred because it was only introduced when an Amended Memorandum of Claim was filed on 13 November 2020, outside the 3-years prescribed by section 90 of the Employment Act, 2007.

47. The Respondents cited *Charles M. Kiget v Majani Mingi Group of Companies Ltd* (2019) eKLR.

48. The Court has looked at paragraphs 38 and 50 of the Memorandum of Claim. Therein, the Claimant made allegations of termination of employment.

49. By the time of filing the Memorandum on 4 April 2017, the Claimant had been notified of the termination of his employment. It is not clear why he did not plead as much.

50. Nevertheless, the Claimant applied to the Court on 3 November 2020 to be granted leave to amend the Memorandum of Claim. A copy of the draft Amended Memorandum of Claim was attached to the application.

51. The application was served upon the Respondents, and they raised an objection based on the law of limitation.

52. The Court took brief oral submissions on the application on 4 November 2020.

53. In a short Ruling delivered therein, the Court allowed the amendments. If the Respondents were not satisfied, their option should have been to appeal instead of raising the issue again in the submissions.

54. The Court, having rendered itself on the question of limitation, declines to revisit the issue.

Unfair termination of employment

55. Before delving into the question of unfair termination of employment, it is germane to indicate that the Claimant had two separate

contracts with the University.

56. The first contract was to serve as an Assistant Lecturer on permanent and pensionable terms commenced sometime in 1990 (the Claimant rose through the ranks, and on or around 16 June 2015, he was appointed as Professor).

57. The second was a fixed-term contract as Deputy Vice-Chancellor, Administration, Planning and Development, effective 20 March 2014.

Termination of contract as a lecturer

58. The Claimant was dismissed as a Deputy Vice-Chancellor through a letter dated 24 February 2017 (the Claimant appealed on 15 March 2017 against the termination of the contract).

59. Upon the termination, the Claimant returned to his department to resume duties as a professor, but when the Respondents realised he had resumed duty as such, they wrote to him on 22 March 2017, notifying him that he had been dismissed from the university services.

60. The letter informed the Claimant of a right of appeal.

61. The letter of 24 February 2017, however, though referenced as termination of employment as Deputy Vice-Chancellor, indicates that the Claimant had been DISMISSED from the University services.

62. The Respondents did not at any point in time notify the Claimant that his contract to serve as a lecturer on permanent and pensionable terms was at the risk of termination.

63. Since the Claimant had separate contracts and was not afforded an opportunity to make representations on the termination of the lectureship contract, the Court finds that the termination of the contract to serve as a lecturer/professor was procedurally unfair.

Termination of the contract to serve as Deputy Vice-Chancellor

Due process

64. The Claimant challenged the procedural fairness of the termination of his contract as Deputy Vice-Chancellor on the ground that his appeal was not heard.

65. The Claimant asserted that under the Human Resource Manual, his appeal should have been heard within 21-days of appeal but that up to the time he moved the Court, the appeal had not been heard.

66. The Claimant submitted that he had a legitimate expectation that his appeal would be heard as contemplated under the Human Resource Manual.

67. The Respondents took the position that the Claimant's appeal could not be processed because he moved the Court before the lapse of 21-days.

68. The Claimant was dismissed on 24 February 2017, and he appealed on 15 March 2017. The appeal verdict was delivered on 16 March 2017. He then moved to the Court on 4 April 2017. By the time the Claimant was moving the Court, the 21-days had lapsed.

69. The explanation by the Respondents that they could not process the appeal within the prescribed timelines was therefore without merit.

70. Since the Respondents did not process the Claimant's appeal within the timelines set out in the terms and conditions of service, the Court finds that the Respondents decision failed the procedural fairness test.

Validity and fairness of reasons

71. The letter terminating the Claimant's contract as Deputy Vice-Chancellor set out four allegations and indicated that all the allegations had been proved.

72. The allegations, in brief, were: failing to advise on the expiry of the contract of a staff member leading to payment and loss of revenue from 1 July 2014 to 30 July 2015; failing to issue an appointment letter to Dr Philip K. Tonui of the University leading to underpayment of salary; recruitment of 226 employees without a competitive process or reference to staff establishment and causing to be published an advertisement for the position of Registrar, Academic Affairs with qualifications inconsistent with the Human Resource Policy Manual.

73. To prove the allegations in Court, the Respondents called a Senior Legal Officer and the Registrar, Administration, Planning and Finance.

74. In his response to the first allegation, the Claimant stated that the function of finance fell under the docket of the Deputy Vice-

Chancellor, Finance.

75. The Claimant presented a witness before the Disciplinary Committee, and the witness, an acting Deputy Registrar, Human Resource, took responsibility for any errors on the ground that he was the one who had drafted the letters for the Claimant's signature.

76. On the question of the terms of service (salary) for Dr Tonui, the Claimant answered that it was the duty of the Human Resources department to prepare letters of appointment for his signature, and any mistake in salary grading should have been placed on the doorstep of the department and not upon him.

77. An acting Deputy Registrar, Human Resource, who appeared during the disciplinary hearing, owned up that the error was attributable to him since he was designated to prepare the appointment letters.

78. The Claimant filed records in Court to show that the error was rectified on 18 March 2016.

79. On the third charge of recruiting 226 employees without a competitive process, the Claimant responded that the Vice-Chancellor had approved the recruitments.

80. The Claimant produced in Court, Circulars indicating that the Vice-Chancellor approved some of the recruitments on temporary terms.

81. The Respondents took the view that the Claimant could not hide under the excuse of having received the go-ahead or instructions from the Vice-Chancellor when such instructions were unlawful and contrary to the policies in place.

82. Concerning the last charge, the Respondents asserted that the Claimant's action to advertise for the position of Registrar, Academic Affairs was contrary to the university statutes and that this constituted open defiance of the statutes.

83. Responding to the allegations concerning the advertisement for the position of Registrar, Academic Affairs, the Claimant maintained that after the initial advertisement, which attracted only three applicants, the Council's Appointments and Promotion Board met on 10 February 2016 and set the new qualifications, which he caused to be published. He also stated that he got verbal instructions from 2 of the Council members to re-advertise.

84. Internal Memos dated 15 October 2015 and 10 February 2016 to the Vice-Chancellor seeking his input into the advertisement(s) were filed in Court.

85. The Claimant further stated that he did not participate in the shortlisting or interview the shortlisted applicants, and he produced copies of the minutes of the shortlisting meeting held on 16 May 2016 and the minutes of the Appointments and Promotion Board meeting held on 13 July 2016 (the minutes indicate the Board had given the go-ahead for re-advertisement).

86. The witnesses presented by the Respondents did not have direct involvement in the allegations leading to the termination of the Claimant's contract.

87. The allegations arose out of an audit that was conducted. The auditor or members of his staff who participated in the audit were not called to testify.

88. A copy of the audit report was not placed before the Court by the Respondents. The Claimant, however, produced extracts or summaries of reactions to the audit queries.

89. Considering the nature of the allegations against the Claimant and the responses he made during the disciplinary hearing, a member of the audit team should have been called to testify since the explanations by the Claimant appeared plausible.

90. The Court finds that the Respondents did not discharge the burden imposed on them by sections 43 and 45 of the Employment Act, 2007.

91. The Court can, therefore, conclude that the termination of the Claimant's employment was not for valid and fair reasons.

Compensation

92. The Claimant was on a 5-year contract to serve as a Deputy Vice-Chancellor. He was also on a contract to serve as a lecturer until retirement. He had served for about 27-years.

93. The Claimant is a professional, and he did not indicate whether he had tried to secure alternative employment, but he testified that he has moved on.

94. In consideration of the above, the Court is of the view that the equivalent of 10-months gross salary as compensation would have been fair.

Pay in lieu of notice

