



**Gongera v Co-operative University of Kenya (Cause E848 of 2021)
[2022] KEELRC 1411 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1411 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E848 OF 2021**

**MN NDUMA, J
MAY 19, 2022**

BETWEEN

GEORGE GONGERA CLAIMANT

AND

CO-OPERATIVE UNIVERSITY OF KENYA RESPONDENT

RULING

1. The applicant filed application dated 17th November, 2021 seeking the Court to review, revoke and/or set aside the Court orders of 21st October, 2021 which restrained the applicant from instituting or conducting any disciplinary proceedings against the claimant.
2. The application is premised on the grounds set out on the face of the Notice of Motion and in the supporting affidavit of Anne Mmata, the Principal Human Resource Manager of the applicant to wit, that the respondent was employed by the applicant on 16th November, 2012 as an Associate Professor of Human Resource. That in October, 2020, the applicant received a complaint from one Dr. Nancy Mucogo Njeru a former student of the claimant/respondent that the respondent had plagiarized her masters thesis and published it as his own work without giving her credit.
3. That the applicant noted that the respondent had listed the said publication in his Curriculum Vitae as his own original work when applying for the position of an Associate Professor and the article was also published in the university Repository in February, 2016.
4. That the applicant was denied of its right to administer the contract of employment and the right to manage its business.
5. The Order should be vacated and applicant given a chance to conclude its internal disciplinary process.
6. That the respondent obtained the orders on 21st October, 2021 upon withholding material facts and deliberately misleading the Court as to the true facts pertaining to the allegations of plagiarism.



7. That the applicant will suffer grave injustice if the orders are not granted.
8. That the applicant takes the issue of academic plagiarism and dishonesty seriously and it is on this basis that the applicant issued a notice to show cause to the respondent on 4th June, 2021. He responded to the notice by requesting for further information on 16th June, 2021 which was availed to him on 28th September, 2021.
9. The response received by the respondent was not satisfactory and as a result he was served with a charge sheet and invitation to attend a Disciplinary hearing on 27th October, 2021.
10. The respondent moved the Court and obtained orders restraining the applicant from conducting the disciplinary hearing on 21st October, 2021 and so the hearing did not proceed on 27th October, 2021.
11. The respondent filed a replying affidavit sworn to on 29th November, 2021 in which he deposes inter alia that the application dated 8th October, 2021 was served on the Deputy Vice Chancellor – Finance Planning and Administration through email which Anne Jemmima Mmata claims was registered as spam. Service was therefore done. That the orders of the Court made on 21st October, 2021 were deserved and regular and no proper basis has been advanced to disturb them.
12. That the applicant responded to the applicant’s letter dated 4th June, 2021 and did not receive a response until 28th September, 2021 three months later. That the intended disciplinary process was unprocedural and a sham. That the orders obtained by the respondent were proper and no legitimate grounds known in law have been advanced by the applicants to have the orders of the Court set aside.
13. That the applicant upon receipt of the response by the respondent dated 4th October, 2021 framed different complaints against the respondent on 19th October, 2021. That these fresh charges violate sub-judice rule since the matter was already before Court.
14. That the matter should proceed to hearing on the merits for both parties to be heard.

Determination

15. Both parties filed written submissions. The applicant relies in the submissions on Rule 17(7) of the repealed 2011 rules.
16. Rule 22(1) of 2016 rules provide:-
 - “ [22(1) where a hearing notice was served on the parties and an affidavit of service has been filed, the Court may proceed with the case before it in the absence of any party thereto if:-
 - (a)
 - (b) the party fails to appear for the hearing without providing any reason.
17. The application dated 8th October, 2021 was served on the applicant and an affidavit of service filed. The applicant did not attend the hearing and the Court granted interim orders pending the hearing and determination of the main suit.
18. At paragraph 4 of the supporting affidavit, Anne Mmata admits that the application dated 8th October, 2021 and other documents were served on the Deputy Vice Chancellor – Finance, vide his email dvc-fpg@cuk.ac.ke but the documents were registered as spam and so the respondent was unable to see the documents in good time.



19. That when the matter came for hearing on 21st October, 2021, the respondent had not seen the document and that failure to attend was not intentional. That the applicants stand to face grave prejudice if they are not allowed to proceed with the disciplinary hearing due to the gravity of the allegations made against their employee, the respondent.
20. That it is fair and just that internal disciplinary process be allowed to be concluded before the matter in Court is heard and determined.
21. The applicant cites the case of *George Muraya Kirira –vs- Zadock A.M. Enane* (2006) eKLR:-
“... the Court has unfettered discretion to discharge or vary or even set aside an injunction Order if the ends of justice so demand, or if it does not serve the ends of justice.
22. That failure to be accorded a hearing for reasons beyond their control is a good reason to have the interim orders set aside and the application be heard interpartes.
23. The Court was also referred to the case of *Alfred Nyungu Kimungui -vs- Bomas of Kenya* [2013] eKLR in which Rika J. held:-
“The Industrial Court should be cautious in exercising its jurisdiction, so as not to appear to take over and exercise managerial prerogatives at work places. Grant of interim orders that have the effect of limiting genuine exercise by management of its rights at the workplace, should be avoided.”
24. In the circumstances of this case now fully placed before the Court, and having understood that the failure by the respondent to file a replying affidavit and attend interpartes hearing was not intentional but arose from a placement of the proceedings served by way of email in the ‘spam’ box, the Court finds it just and fair to accord the applicant a hearing on the application dated 8th October, 2021 upon which interim orders pending hearing of the main suit was granted.
25. The Court therefore directs that status quo be maintained and the application dated 8th October, 2010 be heard interpartes on a date to be granted by the Court.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF MAY, 2022.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 18 of the *Civil Procedure Act* (chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MATHEWS N. NDUMA



JUDGE

M/s Maina for Respondent/Applicant

Mr. Nyakundi for claimant/respondent

Ekale – Court clerk

