



REPUBLIC OF KENYA



KENYA LAW

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**Mukindia & 20 others v Kenyatta University (Cause 12 of 2020)
[2022] KEELRC 12700 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12700 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 12 OF 2020**

**M MBARŪ, J
JUNE 30, 2022**

BETWEEN

**GILBERT MUKINDIA 1ST CLAIMANT
THOMAS MBULO 2ND CLAIMANT
ROSEWACHIURI 3RD CLAIMANT
KHAMISIMWALESO 4TH CLAIMANT
PETER MUGO 5TH CLAIMANT
GIDEON OMONDI 6TH CLAIMANT
CAROLINE KILONZI 7TH CLAIMANT
GIDEON MUTUKU 8TH CLAIMANT
GEOGINAH MULWA 9TH CLAIMANT
LUCAH KIRIMI 10TH CLAIMANT
MARGARET SIKUTA 11TH CLAIMANT
ALICE MORAA 12TH CLAIMANT
MATHEW RONO 13TH CLAIMANT
JOSPHAT KOOME 14TH CLAIMANT
RUTH MAUNDU 15TH CLAIMANT
CAROLINE GITONGA 16TH CLAIMANT
LILIAN JOSEPHINE NJERI 17TH CLAIMANT
RACHAEL KIMANI 18TH CLAIMANT
CHRISTOPHER NDICHU & 2 OTHERS 19TH CLAIMANT**



AND

KENYATTA UNIVERSITY RESPONDENT

RULING

1. The claimants filed application dated April 26, 2022 under the provisions of article 41, 48 and 159 of the Constitution and section 3, 12 of the Employment and Labour Relations Court Act, 2011 and rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and seeking for orders that;
 1. A mandatory injunction be and is hereby issued compelling the respondent to commence with due immediacy prompt payment of the health risk and extraneous allowance to the applicants pending inter-parties hearing and determination of the present claim/suit.
 2. An order of discovery do issue and in hereby issued compelling the respondent to disclose and submit a report as to its expenditure of the sum it has continuously received from the Salaries and Remuneration Commission which sum is meant to cater for the payment of health risk and extraneous allowances to the applicants.
 3. This court do admit the Ministry of Health as an interested party to the proceedings in the main claim.
 4. This court do admit the Salaries and Remuneration Commission as an interested party to the proceedings in the main claim.
 5. Costs be borne by the respondent.
2. The application is supported by the affidavit of Gideon Omondi and on the grounds that on June 11, 2010 a task force was constituted by the office of the Prime Minister to look into the allowances of medical staff in the public medical institutions and it recommended the payment of a health risk allowance to the health workers. Universities were requested to submit their budgets to facilitate the aid payments to its employee.
3. The Salaries and Remuneration commission (SRC) adopted the recommendations and the said allowances were released through the Ministry of Higher Education, Science and Technology to institutions including the respondent a total of Ksh 40.9 million for medical allowances.
4. On November 24, 2016 the Kenya Universities' Staff Union (KUSU) to which the claimants are members signed a CBA with the respondent and paragraph 24 provided for payment of extraneous and risk allowances at Ksh 25,000 and Ksh 20,000 respectively. Despite making demands for the payment of these allowances, the respondent has refused to oblige. The claimants moved the court on January 10, 2020 and pray for a declaration that the respondent should implement the payment of the due allowances from October, 2019 henceforth.
5. In his affidavit, Gideon Omondi avers that he is the 10th claimant and in support of the application.
6. In reply, the respondent filed grounds of opposition that the prayers sought cannot issue in the interim and ought to await full trial and determination and to grant the application would be to condemn the respondent unheard contrary to articles 47 and 50 of the Constitution. The applicant has not satisfied the threshold for grant of mandatory injunction.



7. The entire suit is an attempt to hold the respondent accountable for a contractual arrangement it is not party to and the entire suit violates the doctrine of privity of contract and the same has no merit and should be dismissed.
8. Both parties attended and made oral submissions which are put into account and the issues which emerge for determination is whether the court should compel the respondent to pay the health risk and extraneous allowances pending hearing of the suit herein; whether the respondent should be compelled to disclose and submit a report as to its expenditure of the sum it has continuously received from the SRC which sum is meant to cater for the payment of health risk and extraneous allowances; and whether there should be joinder of the SRC and Ministry of Education as Interested parties herein.
9. Mandatory orders in the interim can only issue where there are special circumstances. Such must be clear and apparent. On the facts presented and before the court can go into the merits, the case must be clear and unambiguous.
10. In the case of *Paul Mwaniki Gachoka & another v Nation Media Group Limited & another [2019] eKLR* the court held that;

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing but, in the absence of special circumstances it will not normally be granted. However, if the case is clear, and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the defendant attempted to steal a match on the plaintiff. A mandatory injunction will be granted on an interlocutory application. ...From my analysis of the respective positions presented above, I have not come across any compelling factors that would warrant the granting of a mandatory injunction at this stage. I also find that the applicant has not brought any credible evidence to show that the injury to his reputation is so immediate as to result in grave hardship unless and until a mandatory injunction is granted at this interlocutory stage."
11. In the memorandum of claim dated January 10, 2020 the claimant is seeking for various remedies and under clause (i) and (iv) is seeking for;
 - i) Declaration that the respondent in withholding the payments of health risk and extraneous allowances to the claimant is unfair and unlawful.
 - iv) A declaration that the respondent implement with due immediacy the inclusion of the said allowances (health risk and extraneous) at the said approved rates in the claimant's payroll from October, 2019 henceforth during the subsistence of their work life as the respondent's employees.
12. These remedies shall be addressed were the court to hear the main claim on the merits. The claimants have not presented any matter with regard to the urgency of such orders in the interim save to urge the court that they have not been able to secure a hearing date for the claim and opted to move through an interlocutory application. Such is abuse of court process.
13. A hearing of the main claim for address the claims on the merits.
14. With regard to the prayer to have the respondent to disclose and submit a report, upon the determination as to whether the claimants enjoy the right to the benefits of risk and extraneous allowances, the outcome directions without need for fishing for supporting evidence shall suffice.



15. Though the issue with regard to the joinder of the SRC and Ministry of Education were not gone into by the claimants in the supporting affidavit of Gideon Omondi or in the oral submissions, the application is that both should be enjoined herein as interested parties.
16. When the claimant filed the instant claim, the claim related to alleged violation of their employment right and benefits by the respondent. there is no remedy sought against the SRC or the Ministry of Education.
17. The joinder of a part as an *interested party* is defined under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 to be one who is;

"interested party" means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;"
18. Unlike a respondent to a claim, an interested party is one who has an identifiable state or legal interests or duty in the proceedings before court. The essence of interested party is that the case must be clear and the interest apparent.
19. The court finds no material or submissions necessary to require the SRC and the Ministry of Education to be joined in these proceedings as *interested party*. No interest for and on behalf of such parties is demonstrated by the claimants.
20. Accordingly, orders sought shall not issue in the interim. Application dated April 26, 2022 is found without merit and is hereby dismissed in its entirety. Costs shall abide the outcome of the suit.

DELIVERED IN COURT AT NAIROBI THIS 30TH DAY OF JUNE, 2022.

M MBARÚ

JUDGE

In the presence of:

Court Assistant:

..... **and**

