



**Katieno v University of Eastern Africa Baraton (Cause E039 of 2021) [2022] KEELRC 4155 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 4155 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
CAUSE E039 OF 2021  
NJ ABUODHA, J  
JULY 29, 2022**

**BETWEEN**

**JEFF STEVE OGANGA KATIENO ..... CLAIMANT**

**AND**

**UNIVERSITY OF EASTERN AFRICA BARATON ..... RESPONDENT**

**RULING**

1. Through a notice of motion dated December 8, 2021, the claimant sought orders among others that:
  - a. That pending the hearing and determination of this application inter-parties, this court be pleased to issue temporary restraining orders against the respondent, its agents, servants and/or assignee from victimizing, harassing, discriminating, intimidating, coercing, terminating, redeploying, suspending and/or subjecting the claimant to any unfair treatment and/or disciplinary action.
  - b. That the decision contained in the respondents letter of November 16, 2021 redeploying the claimant from tutorial fellow to a farm manager be stayed pending the hearing of this application inter-parties and thereafter pending the hearing and determination of the case.
2. The application was premised on several grounds and on the affidavit of the claimant in which he deponed among others that:
  - a. That the respondent has discriminated against me and treated me unfairly against the law and the fair labour practices.
  - b. That the respondent purported to summarily dismiss me from employment vide a letter dated September 17, 2021 without giving me an opportunity to be heard before the said decision.
  - c. That on receipt of the said letter I appealed against the decision.



- d. That the respondent's council on receipt of my appeal mischievously set a date for hearing of the appeal and gave me only thirty (30) minutes to prepare and appear to ventilate my appeal which was unfair for want of sufficient notice.
  - e. That the respondent's council upon hearing my appeal, to date has never communicated to me their verdict.
  - f. That I was shocked to receive a letter dated October 5, 2021 purportedly suspending me for two (2) months with half salary effective October 1, 2021 in the pendency of my appeal.
  - g. That the suspension contravened the fair labour practices and the respondents staff handbook which provide that suspension with consequential loss of pay/income should be for a period not exceeding 28 days.
  - h. That on October 21, 2021, I received an invitation to appear before the respondent's council sub-committee sitting on November 4, 2021.
  - i. That before the hearing set for November 4, 2021, on October 25, 2021 I wrote an email to the respondent's Council, expressing my apprehension with regard to the presence of the Vice Chancellor at the hearing set for November 4, 2021 since the vice chancellor was the secretary of the University Council and I had in the past had a personal history with the Vice Chancellor who consistently chaired the meetings that recommended my summary dismissal however, my concerns were ignored and/or never addressed.
  - j. That on November 4, 2021 I appeared before the University Council submitted committee and made a defence presentation disputing the grounds for recommendation of my summary dismissal and the irregular procedure of disciplinary action adopted.
  - k. That I concluded my presentation and was discharged by the Council. However, the Council including the Vice Chancellor together with some other people who are not council members remained behind for further discussions whose details are unknown to me.
  - l. That on November 16, 2021 I received communication via a letter from the University Council to the effect that the council voted to: Strongly reprimand me and to give me a last and final warning against my conduct. Redeploy me under new terms and conditions of service.
  - m. That on the same day, that is, November 16, 2021 I received a letter from the respondent's Administrative Board redeploying me from a tutorial fellow to a farm manager with effect from November 16, 2021.
  - n. That one of the new terms and conditions of service was that I was required to sign the attendance book every day at the Human Resource Office by specifying time in and time out, something that has never happened and no one else in the institution has ever been required to do and/or subjected to which is clearly discriminative.
3. The respondent filed a replying affidavit through one Professor Philip Kimely Maiyo who deponed in the main that:
    - a. That I am the Vice Chancellor of the respondent University and currently serve as the Secretary of the respondent's Council.
    - b. That in my capacity as the secretary of the respondent, I am in-charge of policies, administrative and incidental matters, touching on and/or concerning the respondent and therefore have the responsibility to swear this affidavit on behalf of the respondent.



- c. That in regards to the instant matter, I wish to state that the claimant/applicant herein is an employee of the respondent currently serving and/or working as an internal auditor and that I am the one who supervises him.
- d. That the claimant/applicant herein has had a long history of indiscipline issues and that I am aware that same has been redeployed more than once which redeployment are as a result of disciplinary actions taken against him.
- e. That despite being redeployed and appointed as an internal auditor the claimant/applicant herein declined and/or refused to take up that role and thus was redeployed to the School of Business as tutorial fellow in the Department of Accounting.
- f. That be that as it may, the claimant/applicant herein has been discharging his duties as a tutorial fellow up to and including the month of August, 2021 when same absconded duty. For clarity, the claimant/applicant herein had applied for annual leave which application was received and approved and that same was expected to return and/or report back to work on the 18<sup>th</sup> day of August, 2021.
- g. That I know as of knowledge that due to the Covid 19 pandemic, the respondent issued directive in regards to mode of teaching by its various staff whereby it was directed that the teaching method would be blended that is both physical and online. Beside, no staff was allowed to teach vide online only. On the other hand, the students were expected to physically attend the classes.
- h. That however despite exhausting the leave days and the need to report back to work, the claimant/applicant herein failed to report to work as expected and thus did not teach the students who had reported back to university for the new first semester 2021/2022. For coherence, the acting Head of Department of Accounting and Finance one Dr David Aunga upon realizing the absence of the claimant/applicant from work and that the students were not being taught generated a letter to the claimant/applicant vide letter dated 15<sup>th</sup> day of September, 2021.
- i. That besides, the acting Head of Department of Accounting and Finance also lodged a letter complaining about the absence of the Claimant/Applicant from work with the Dean, School of Business displaying his concerns about the absence from work on the part of the claimant/applicant and the failure to teach the students who had reported to class. For clarity, the claimant/applicant had absconded work approximately three (3) weeks.
- j. That following the receipt of the complaint letter from the acting Head of Department of Accounting and Finance through the Dean School of Business, the issue was reported to the respondents' Administrative Board which noted the urgency of the issue before it as students had not been taught from the 23<sup>rd</sup> day of August, 2021 to 15<sup>th</sup> day of September, 2021 when it received the complaint.
- k. That the Administrative Board noted that the claimant/applicant had not requested for permission to be absent from work neither was the faculty absence form filed by the Head of Department. On the other hand, despite being contacted by various officers, that is, the Head of Department and the Deputy Vice Chancellor Academic Affairs, the claimant/applicant declined to indicate when he would be reporting back on duty it was recommended that the respondent herein to summarily dismiss the claimant/applicant from service. For clarity, I am the chairperson of the Administrative Board.



- l. That I know as of personal knowledge that it became extremely necessary to get a replacement to take up the classes being taught by the claimant/applicant herein whose absence from work continued to have negative impact on the students taking up the respective courses and thus it was resolved that one Sharon Chepkosgei Waley who was part time Lecturer to take up the classes being taught by the claimant/applicant.
- m. That in regards to the decision of the administrative Board of the respondent herein, I am aware that the Employee Handbook 2018 which is a contractual foundation that pinpoints the contractual relationship between the claimant/applicant herein and the respondent provides for instances when an employee can be summarily dismissed.
- n. That I know that as of personal knowledge that misconduct and gross misconduct offences have been provided under the respondent's Employee Handbook 2018 vide section 4.6.1 at page 225 for coherence, paragraphs thereof provide that:
  5. Failure to report for work on time or absenting oneself without permission.
  6. Failure to report to work without giving the supervisor or department head notice absence within two hours after the beginning of the scheduled workday.
- o. That the decision of the Administrative Board was not final but merely a recommendation to the respondents Council and thus the final decision to uphold, dismiss and/or take disciplinary action rested with the respondents Council.
- p. That nonetheless, I know that upon the administrative Board giving its recommendation on summary dismissal of the claimant/applicant which decision was conveyed to him, the claimant/applicant herein lodged an appeal to the administrative Board against the decision of September 16, 2021.
- q. That the appeal therein was heard in the presence of the claimant/applicant herein. For clarity, the decision by the Administrative Board recommending the dismissal of the claimant/applicant by the respondent's council was upheld.
- r. That consequently, pursuant to the outcome of the said Appeal and awaiting the decision of the respondent's Council in regards to the recommendation on summary dismissal of the claimant/applicant herein, the administrative Board opted to suspend the claimant/applicant herein for two months. On the other hand, it is worth noting that suspensions as articulated herein for two months. On the other hand, it is worth noting that suspensions as articulated under section 4.7.5.3 (g) did not apply to the claimant's/Applicants case as suspension regarding the claimant/applicant was based on half pay. Same earned salary while on suspension and without any work being done thus the suspension for two months was procedural.
- s. That following the decision of the Administrative Board to uphold the decision of September 15, 2021 and to suspend the claimant/Applicant, the claimant/Applicant herein lodged an appeal to the respondents Council vide letter dated 5<sup>th</sup> day of October, 2021 whereby same raised various allegations while using inappropriate language and/or made insinuations on the part of the Vice Chancellor and members of the Administrative Board.
- t. That I am credibly informed by the respondents' Advocates on record, which information I verily believe to be true, that though the right to appeal was available to the claimant/applicant herein, same chose to bring petty, unnecessary and/or personal emotions on the issue



at hand and thus the choice of words depicted in the letter dated 5<sup>th</sup> of October, 2021 were only disrespectful, out of line, deviant, discourteous and/or misplaced but also were in clear violation of section 4.6.1 (12) of the Employee Handbook which states that a misconduct and Gross Misconduct include, ... using abusive or insulting language, or behaves in a manner insulting to employer or to a person placed in authority over him/her by the employer.

- u. That be that as it may and despite the repellant demeanor of the claimant/applicant demonstrated in the letter of appeal dated 5<sup>th</sup> day of October, 2021, the respondent through its Council and also the employer of the claimant/applicant vide letter dated 21<sup>st</sup> day of October, 2021 to the claimant/applicant invited same to a disciplinary hearing in regards to his appeal before the sub-committee of the council.
- v. That I know as of knowledge that in the said letter dated October 21, 2021, the claimant/applicant was advised to confirm his availability to attend the meeting that was being scheduled on the 4<sup>th</sup> day of November, 2021 and that he was advised to be accompanied by a representative of his own choice.
- w. That besides, I know as of knowledge that one of the functions of the respondent's council is to appoint, transfer, or dismiss administrative officers, faculty and staff members of the respondent and thus the Appeal was proper before the respondent's council.
- x. That I also know as of knowledge that the claimant/applicant herein lodged his submissions in regards to his Appeal whereby same annexed various documents in support of his appeal including but not limited to class attendance sheet.
- y. That besides, the administrative affairs sub-committee of the Council upon hearing the submissions of the claimant/applicant and representative of the administrative board, was of the view that the claimant /applicant herein be given a last and final warning and that same be re-deployed to a new position. Other than re-deployment, administrative affairs sub-committee of the Council voted that, '... Mr. Jeff Katieno, be warned, advised and counseled against his conduct, his disrespectful language against the Administrative board both through his letters and submission, by the university chaplain...'
- z. That the decision taken by the respondents' council was communicated to the claimant/applicant vide letter dated 16<sup>th</sup> day of November, 2021 which letter was dully received by the claimant/applicant herein.
- aa. That pursuant to the decision of the Council, the claimant/applicant was redeployed and appointed as acting farm manager and advised to clear the outstanding grades of the respective students.
- ab. That on the other hand, the claimant/applicant was expected to report to duty on the 25<sup>th</sup> day of November, 2021 and take up his role as the acting farm manager but declined, failed and/or refused to comply with the command of his employer i.e the respondent herein. The refusal to report to duty elicited the letter dated December 6, 2021 whereby a show cause notice was issued to the claimant/applicant to explain why disciplinary action should not be taken against him.
- ac. That upon review of the reasons as to why the claimant/applicant could not take up his new position as acting farm manager which reason was that the position did not coincide with his specialization, the Administrative Board resolved vide, letter dated December 9, 2021 to redeploy the claimant/applicant to my office as an internal auditor.



- ad. That besides, the claimant/applicant herein upon being appointed as the internal auditor acknowledge the position and appreciated the decision of the Administrative Board vide his email dated December 14, 2021.
- ae. That interestingly, vide email dated 14<sup>th</sup> day of December, 2021, the claimant/applicant opted to make fresh demands that same was not willing to accept the new appointment unless the charges that had been subject of disciplinary action were withdrawn.
- af. That I am further credibly informed by the respondents advocates on record which information I verily believe to be true, that the email dated December 14, 2021 was an appeal in disguise against the Council, decision contrary to section 4.7.5.2 of the Employee handbook that provides that the decision of the Council shall be final.
- ag. That going by the contents of “annexture PKM 30”, it appears that the claimant/Applicant is keen to conduct himself in a manner that causes disharmony to the work place. For clarity, despite being required to report to work at 8.00am, the claimant/applicant herein chose to design his own reporting time and reports to work late contrary to the Human Resource policies of the respondent herein.
4. In his submissions in support of the application, Ms. Wahome for the claimant submitted that the application merits the granting of the orders sought since the respondent’s actions and the letter dated November 16, 2021 redeploying the claimant from the position of tutorial fellow to farm manager was ill motivated, discriminatory and amounted to demotion. The action breached fair labour practices set by law.
5. According to counsel, the position of tutorial fellow and farm manger have different qualifications and duties. The applicant never trained as a farm manager for him to be redeployed there. The letter was issued to the claimant without according him an opportunity to be heard.
6. Ms Wahome further submitted that even though the respondent further redeployed the claimant from a farm manager’s position to internal auditor, the purported redeployment was still on disciplinary grounds and were clearly malicious. Further the claimant was not consulted before the redeployment to Internal Audit contrary to section 10(5) of the *Employment Act* and further the purported redeployment was in defiance of the Court order issued on December 22, 2021.
7. Counsel submitted that the claimant’s right as a tutorial fellow under terms of this contract risked violation on account of the letter dated November 16, 2021 and unless halted by the court pending the hearing of the suit, the respondent is likely to continue violating the claimant’s rights.
8. According to counsel, the unfairness was demonstrated by the respondent’s purported dismissal of the claimant on December 17, 2021 without giving him an opportunity to be heard.
9. The claimant appealed against the dismissal to the Administrative Board who set the date for hearing of the appeal without notice to the claimant and only called him to prepare to be before the administrative Board in thirty minutes to ventilate his appeal which was unfair for want of sufficient notice and not being given an opportunity to be accompanied by a person of his choice.
10. The Board subsequently by a letter dated October 5, 2021 suspended the claimant for two months on half salary. This decision, according to counsel, was again made without according the claimant a hearing before it was done. The suspension according to the claimant contravened fair labour practices and respondents staff handbook which provided that suspension should not be more than twenty eight days.



11. The claimant further submitted he received an invitation to appear before the respondent's Council Sub-committee on November 4, 2021. He however wrote an email on October 25, 2021 expressing his apprehension with regard to the presence of the vice chancellor at the hearing set for November 4, 2021 who had a personal history or differences with the claimant and always recommended that the claimant be summarily dismissed. This concern was however not taken into account.
12. Counsel further submitted that the letter of deployment of the claimant subject of this suit purported to give the claimant a last and final warning yet the claimant had never been previously warned over any disciplinary issue for the thirteen years he served the respondent.
13. The respondent's counsel, Mr Ochwa submitted that the redeployment of the claimant had been carried out long before the order was served on the respondent hence the application herein had been overtaken by events. The respondent also contended that the claimant had continued to withdraw salaries of acting farm manager while he failed to report to work.
14. Counsel further submitted that upon receiving a demand letter by the advocate for the claimant, it reviewed the issue of redeployment of the claimant as a farm manager and transferred him to internal audit. The claimant acknowledged the position and accepted the same. According to counsel the claimant having rejected the position of farm manager and accepted the post of internal auditor, the present application has been overtaken by events.
15. This is an interlocutory application hence the courts main concern is to review the claim and persuade itself that the applicant has made out a *prima facie* case with chances of success and further that damages would not adequately compensate the claimant if he becomes successful.
16. The claimant seeks order among others to restrain the respondent from redeploying him to work as a farm manager and further an order reinstating him as Tutorial Fellow.
17. From the evidence, upon complaint over deployment as a farm manager, the respondent reviewed its decision and redeployed the claimant as an internal auditor. He accepted though grudgingly the position and sought more information about his job description and place of work.
18. The court further notes that transfer, redeployment or redesignation is a management discretion which the court is always reluctant to interfere with. By his own conduct of accepting the position of internal auditor, the claimant has significantly compromised his complaint hence it would be inconvenient to the respondent to grant the interlocutory orders sought.
19. The claimant did not demonstrate that the only skills he possessed were that of a tutorial fellow and he could not therefore work in any other department or office. Besides there are accusations by the respondent that the claimant missed classes for a considerable period of time leaving the students stranded.
20. To this extent the court finds and holds that the applicant has not demonstrated that he has a *prima facie* case with probability of success to warrant the grant of interlocutory orders.
21. The application is therefore found without merit and is hereby dismissed with costs.
22. It is so ordered

**DATED AT ELDORET THIS 29TH DAY OF JULY, 2022**

**DELIVERED THIS 29TH DAY OF JULY, 2022**

**ABUODHA JORUM NELSON**



**JUDGE**

