



Onyango v Masinde Muliro University of Science and Technology (Employment and Labour Relations Claim 10 of 2022) [2022] KEELRC 1660 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELRC 1660 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
EMPLOYMENT AND LABOUR RELATIONS CLAIM 10 OF 2022**

JW KELI, J

JULY 28, 2022

(FORMERL KISUMU ELR CAUSE NO. 120 OF 2017)

BETWEEN

ODHIAMBO ONYANGO CLAIMANT

AND

MASINDE MULIRO UNIVERSITY OF SCENCE AND TECHNOLOGY RESPONDENT

RULING

1. The claimant in the instant suit filed an application dated July 17, 2021 seeking for the court to adopt the judgment in Kisumu ELRC No 397 of 2015 Kenya University Staff Union v Masinde Muliro University of Science and Technology and enter judgment for the claimant against the respondent as pleaded in the claimant’s memorandum of claim dated November 3, 2015 together with costs. The court to also provide cost for this application.
2. The application is based on the grounds that the court on the June 27, 2017 stayed proceedings in this cause to await outcome of the determination in another related case being Kisumu ELRC 397 of 2015(supra)whose outcome was to determine the instant suit. That judgment in Kisumu ELRC 397 of 2015 was delivered on the April 12, 2018 in favour of the claimant therein. That the cause of action in the instant suit is identical cause in Kisumu ELRC 397 of 2015.
3. The applicant states that in compliance with the orders of the court in this file of June 27, 2017 it is only prudent that this cause be accordingly determined by adoption of the judgment in Kisumu ELRC No 397 of 2015 Kenya University Staff Union v Masinde Muliro University of Science and Technology .
4. The application is supported by the affidavit Bruce O Odeny counsel for the claimant sworn on July 17, 2021 reiterating same grounds and producing judgment and decree in Kisumu ELRC No 397 of



- 2015 Kenya University Staff Union v Masinde Muliro University of Science and Technology(BOO-1 and BBO-2)
5. The application is opposed. The respondent filed replying affidavit of Linda Omenya sworn on the July 30, 2021 and received in court on the August 3, 2021. Only ground (d) of the application is in dispute. The respondent avers that the claimant, engaged as a deputy registrar on permanent and pensionable terms on September 25, 2003(MM2- is the letter of appointment) was retired on the February 3, 2021 upon attaining mandatory age of 60 years (MMU-3 is the retirement letter).
 6. The respondent's deponent avers that on the March 29, 2017 following application by the claimant dated March 28, 2017, the court issued orders restraining the university from retiring him at 60 years pending the hearing and determination of his application. The application was grounded on the existing KUSU CBA providing for his retirement at 65 years. The University complied with the court order and did not retire the claimant at 60 years (MMU5) is the court order)
 7. The respondent's deponent avers that the claimant was retired on February 3, 2021 following judgment of the court on the matter of implementation of the collective bargaining agreements (CBAs) for 2017 -2021 for public universities which judgment was delivered by Justice Maureen Onyango on the January 15, 2021 in cause No. ELRC CBA 1/2020 where the court affirmed that retirement age in the public service is guided by government regulations and public policy. The current government regulations sets the retirement age for public officers at 60 years. At the time of being retired from service the claimant was 64 years old.
 8. The respondent avers that it was well guided in its action hence the opposition to the application for being overtaken by events.
 9. The claimant submits that the current application before court has nothing to do with Nairobi Milimani ELRC CBA/1/2020 which came later. That this cause was stayed to await outcome in Kisumu ELRC No 397 of 2015 Kenya University Staff Union v Masinde Muliro University of Science and Technology who decision was also to determine this cause. Hence the request to the court is merely procedural to close this matter. That litigation must come to an end and the respondent is essentially not opposing adoption of the judgement in Kisumu ELRC No 397 of 2015 Kenya university Staff Union v Masinde Muliro University of Science and Technology
 10. The respondent submits that averments in the affidavit by Linda Omenya have not been controverted. That the application should fail for being overtaken by events, the cause was compromised by the very nature of prayers sought and by acquiesces of the applicant who failed to agitate his cause until he regularly retired in February 2021 hence caught up in the principle of equitable estoppel for seeking to have a second bite at the cherry. The respondent further submits that the document of engagement in respect of service of contract at the time of cause of action was the CBA 2012-2013 whereas the service contract at the time of regular retirement was regulated by the CBA 2017 -2021. That the applicant never retired under this cause as he continued to serve without loss of benefit until regular retirement on November 3, 2021.

Determination.

Is the application merited?

11. In the in instant claim the claimant sought the following reliefs:-
 - a. An order for injunction restraining the respondent for retiring the claimant at the age of 60 years.



- b. An order of prohibition prohibiting the claimant from retiring the claimant until he attains the age of 65 years.
12. The court find similar orders were sought Kisumu ELRC No 397 of 2015 Kenya University Staff Union v Masinde Muliro University of Science and Technology.
 13. The court stayed the instant case to await outcome of the decision in Kisumu ELRC No 397 of 2015 Kenya University Staff Union v Masinde Muliro University of Science and Technology.
 14. The judgment was delivered in favour of the claimants and they now seek it to be adopted as judgment of court in the instant case as per order of the court on August 27, 2017.
 15. The respondent submits that following the decision of the court in the matter of implementation of the collective bargaining agreements for 2017 -2021 for public universities which judgment was delivered by Justice Maureen Onyango on the January 15, 2021 in cause No. ELRC CBA 1/2020 where the court affirmed that retirement age in the public service is guided by government regulations and public policy the claimant was properly retired. The current government regulations sets the retirement age for public officers at 60 years. At the time of being retired from service the claimant was 64 years old. The instant cause has been overtaken by events and the judgment in Kisumu ELRC No 397 of 2015 Kenya University Staff Union v Masinde Muliro University of Science and Technology cannot apply here
 16. The claimant submits that the request to the court vide the application is merely procedural to close this matter. Is it?
 17. The court is doubtful that it is merely a procedural matter. The Kisumu ELRC No 397 of 2015 Kenya University Staff Union v Masinde Muliro University of Science and Technology cause was under 2012-2013 CBA with retirement age of 65 years which was in force then.
 18. Paragraph 23 of the said judgment reads: ‘clause 28.0 (i) of the CBA on retirement which provides for compulsory retirement to be 65 years precedes the circular of government until the CBA is renegotiated and terms in the circular adopted therein, the retirement age of non -teaching staff of the respondent remains 65 years and the court so finds”.
 19. Section 59 of the *Labour Relations Act* provides that a CBA binds for the period of agreement between the parties.
 20. The respondent submits that the claimant retired under the 2017-2021 CBA under which the retirement age for public officers is 60 years as declared in judgment of the court in *Inter Public Universities Councils Consultative Forum of the Federation of Kenya Employers v Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (KUDHEIHA) & 2 others; Ministry of Education & 3 others (interested parties)* [2021] eKLR
 21. The court reproduces the part of the judgment on the 2017-2021 collective bargaining agreements adopted by court.

‘Retirement age’ (proposal under CBAs presented to court for adoption)

The three CBAs provide for retirement ages as follows –

CBA No 1 of 2020

The mandatory retirement age for all employees in the public universities within grades 1-4 shall be 65 years.



Employees shall be expected to retire when he/she reaches his/her subsequent birth day.

CBA No 2 of 2020

4.11 (a) The retirement age shall be 75 years;

(b) An academic member of staff may retire voluntarily at the age of 50 years or above.

CBA No 3 of 2020

The retirement age for members covered under this agreement shall be sixty-five (65) years.

Any member of staff under these terms may opt for early retirement at fifty (50) years.”

22. CBA No 3 of 2020 is by KUSU and public universities hence the relevant one to the instant claim. The court held as follows on the retirement age: ‘retirement in the public sector is governed by government policy. The last circular on retirement in the public sector is dated March 20, 2009 and reviewed mandatory retirement age for public servants from 55 to 60 years but retained retirement age for public servants whose retirement age was above 60 years.

The circular states: -

“Review of the mandatory retirement age for public servants

The current policy on retirement of public servants provides for a mandatory retirement age of 55 years. This is with the exception of judges, academic staff in public universities, research scientists and public servants with disabilities whose retirement ranges from 60 years to 74 years.

...In order to address the above challenges and in the spirit of harmonizing the retirement age applicable to the East African Community countries, the government has decided to raise the mandatory retirement age for all public servants from 55 years to 60 years with effect from April 1, 2009. The provisions in the *Pensions Act* cap 189, various pension schemes and other policy guidelines governing the civil service, disciplined services, teachers, state corporations, public universities and the armed forces regarding compulsory and voluntary retirement will remain.

...”The SRC guidelines which this court is enjoined to consider while dealing with matters that fall under the purview of SRC, provide that among the parameters to be considered in negotiations are government policies and guidelines. The SRC guidelines provide –

8. Government policies and guidelines: collective bargaining negotiations should adhere to existing policies and guidelines such as the minimum wage guidelines, public service commission human resource policies and procedures manual, state corporation guidelines and various SRC advisories.

Parties can therefore not negotiate outside public policy and guidelines.

For these reasons the proposals for amendment of retirement age are expunged from the CBAs.”

23. The court then finds that the 2017-2021 CBA was amended by the court and the retirement age for the period under the CBA for members of KUSU is on attaining 60 years. Consequently, any member of KUSU under the 2017-2021 CBA ought to have retired on attaining the mandatory age of 60 years.
24. The court finds that the judgment in Kisumu ELRC No 397 of 2015 Kenya university Staff Union v Masinde Muliro University of Science and Technology was only applicable under the 2013-2017 CBA.



The claimant having been retired under the 2017-2021 CBA then cause 397 of 2015 was no longer a suitable test case.

25. The court finds and determines that the application is not merited and dismisses the same. The parties to take action towards determination of the instant claim.
26. Mention on the September 29, 2022 hearing directions.
27. No order as to costs.
28. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 28TH DAY OF JULY, 2022.

J. W. KELI,

JUDGE.

In The Presence Of:-

Court Assistant : Brenda Wesonga

Claimant/Applicant:- Bruce Odeny

Respondent: Absent

