Kabue & another v Council, Egerton University & another (Judicial Review 01 of 2022) [2022] KEELRC 4129 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELRC 4129 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

JUDICIAL REVIEW 01 OF 2022

DN NDERITU, J

SEPTEMBER 22, 2022

BETWEEN

GRACE WANJIRU KABUE ..... 1ST APPLICANT

EGERTON UNIVERSITY CHAPTER ..... 2ND APPLICANT

AND

COUNCIL, EGERTON UNIVERSITY ..... 1ST RESPONDENT

VICE CHANCELLOR, EGERTON UNIVERSITY ..... 2ND RESPONDENT

JUDGMENT

I. Background

1. By way of Notice of motion dated January 18, 2022 brought under Article 47 of the *Constitution*, Sections 8 and 9 of the *Law Reform Act*, Order 53 Rule 1 of the *Civil Procedure Rules*, and all other enabling provisions of the law, the ex-parte Applicants (Applicants) are seeking for the following orders:-

    1. That this Honourable court be pleased to issue a Judicial Review order of prohibition restraining the Respondents from proceeding with a disciplinary cause against the 1st Applicant scheduled for January 19, 2022 (or on such other time), on account of any allegations or grounds contained in the disciplinary charge preferred by the Respondents against the 1st Applicant.

    2. Thatcost of the application be provided for.

2. The application is based on the grounds on the face of the application and the supporting affidavit of the 1st Ex-parte Applicant, Dr Grace Wanjiru Kibue, and that of PROF Mwaniki Silas Ngari, for the 2nd Applicant, both sworn on January 18, 2022. The two deponents indicate that they are further

relying on statement of facts dated January 6, 2022 and their respective affidavits in support thereof sworn on January 6, 2022.

3. For avoidance of doubts, the statements of facts and the supporting affidavits referred to in the foregoing paragraph were filed in support of the ex-parte chamber summons dated January 6, 2022 wherein the Applicants sought leave of court to file the Judicial Review proceedings and for that leave to operate as stay of any disciplinary action against the 1st Ex-parte Applicant by the Respondents. Several documents are attached to the said affidavits as exhibits.

4. This court granted leave on January 13, 2022 and ordered that the said leave do operate as stay pending the filing, hearing, and determination of the Judicial Review proceedings, now the subject matter of this judgment. The said Judicial Review proceedings were ordered to be filed within 14 days of the granting of the leave failing to which the leave would automatically lapse.

5. The application for judicial review seeking the aforestated orders was timeously filed by the Applicants on January 20, 2022.

6. In response to the application the Respondents filed replying affidavits one sworn by Prof Richard Mulwaon February 25, 2022 and another one by Prof Isaac Kibwage sworn on February 25, 2022and a further affidavit by Prof Isaac Kibwage sworn on March 15, 2022. Annexed to those affidavits are various attachments as exhibits.

7. Also filed by the Applicants is a further supporting affidavit of Dr Grace Wanjiru Kibuesworn on April 28, 2022 with several documents attached thereto as exhibits.

8. On March 28, 2022, by consent of Counsel for both sides, it was agreed that the matter be heard by way of written submissions. The Counsel for the Applicants filed on May 10, 2022 and Counsel for the Respondents on May 4, 2022. Counsel for the Applicants filed further submissions on May 19, 2022.

II. Ex-parte Applicants' Case

9. The case by the Ex-parte Applicants can be gathered from the pleadings filed, evidence adduced, and submissions by Counsel instructed by Mirugi Kariuki & Co Advocates. The 1st Applicant is a lecturer in employment of Egerton University (the University) through the 1st Respondent which is the apex administrative body of the said University with the powers to hire and fire employees and initiate disciplinary proceedings against any employee of the University. The 2nd Respondent is described as the Chief Executive Officer (CEO) of the University responsible for executing and implementing the decisions of the 1st Respondent.

10. The 2nd Applicant is a branch of the Universities Academic Staff Union (UASU) which is the national trade union of universities academic staff in Kenya and the union is duly registered under Section 14 of the *Labour Relations Act*, 2007. The 1st and 2nd Applicants are secretary and chairman of the said branch of the UASU, respectively.

11. The Applicants aver that on or around April, 2021 there arose an industrial dispute between the 2nd Applicant and the University concerning slashing and withdrawal of negotiated salaries, non-implementation of court adjudicated CBA, non-remittance of deducted statutory dues and those due to third parties, biased and unfair promotions, poor leadership, and non-accommodation of divergent views by the leadership of the University amongst other issues.

12. The Applicants state that after negotiations to resolve the above issues failed to yield a solution, the 2nd Applicant called its members to a strike with effect from Monday November 15, 2021. The strike

was preceded by picketing by all members of the 2nd Applicant effective from November 8, 2021 from 8 am to noon each day

13. The Applicants aver that vide a letter dated November 16, 2021 during the strike, the 2nd Respondent called all members of staff of the University to a meeting to be held on November 17, 2021 dubbed 'Vice-Chancellor's address'.

14. The 2nd Applicant held a meeting and took a decision to advise its members not to attend the said meeting called by the 2nd Respondent. The Applicants have exhibited a copy of the minutes of the said meeting and the letter advising the members not to attend the same. The 1st Applicant categorically states that she wrote this letter in her capacity as the secretary to the 2nd Applicant. The meeting called by the 2nd Respondent was subsequently called off on account of 'unavoidable circumstances.'

15. On November 19, 2021 the Respondent issued the 1st Applicant with a show cause letter as to why disciplinary action should not be taken against her for authoring the letter dated November 16, 2021 advising academic members of the 2nd Respondent not to attend the meeting called by the 2nd Respondent on November 17, 2021. The 1st Applicant responded to the show cause letter explaining that she had written the said letter in her capacity as the secretary to the 2nd Applicant and not as an employee (lecturer). She alluded that as a union official she was insulated against the intimated disciplinary action. Copies of the letter to show cause and the response thereto have been exhibited.

16. Again, on November 30, 2021 the Respondents issued the 1st Applicant with a show cause letter this time on the grounds that she had interfered with and or disrupted examinations that were scheduled for November 8, 2021. The Applicants allege that the said examinations fell on the first day of picketing and that the Respondents had been duly notified of the said picketing. The 1st Applicant responded to the said show cause letter on December 6, 2021 explaining that she did not personally disrupt administration of the examinations but that the same failed to take place due to the industrial action that was on-going. She has exhibited said show cause letter and her reply thereto.

17. It is the Applicants' case that the Respondents were aware of the industrial action having been duly notified and that the examination process that fell outside the picketing period of between 0800 hours and noon proceeded unhindered and that those that were affected were rescheduled.

18. Notwithstanding the explanations given in the responses to the two show cause letters, the Respondents through an invitation dated December 22, 2021 directed the 1st Applicant to appear before Staff Disciplinary Committee on January 19, 2022 to answer to charges contained in the two show cause letters alluded to above. The Applicants have exhibited the said invitation.

19. It is the Applicants' view that the intimated disciplinary action is malicious, unreasonable, and intended to victimize, intimidate, and harass the 1st Applicant with a view of terminating her from her job as a lecturer for undertaking her lawful duties as a union official.

20. The 1st Applicant alleges that initially the Respondent intended to take disciplinary action against all the officials of the 2nd Applicant but later, following a return to work formulae, withdrew actions against all of them except herself, which to her demonstrates discriminatory conduct by the Respondents against her.

21. It is on the basis of the foregoing that the Applicants approached the court for leave to file Judicial Review proceedings, as stated elsewhere in this judgment, and obtained the said leave which stayed the intended disciplinary proceedings and subsequently filed the judicial review proceedings, now the subject matter of this judgment.

III. Respondents' Case

22. The position taken by the Respondents is contained in the replying affidavits of Prof Richard Mulwaand Prof Kibwage, and the further affidavit by Prof Isaac Kibwage, all alluded to in an earlier part of this judgment, and the written submissions by their Counsel instructed by Wekesa & Simiyu, Advocates.

23. The Respondents state that as per the University Charter the 1st Respondent is the governing body of the university whose functions include employment of staff and approval of the terms and conditions of such employment.

24. In paragraph 21 of his replying affidavit Prof. Richard Mulwaalleges that the Applicants did not file the judicial review proceedings within 14 days of the leave granted and that the stay granted automatically lapsed.

25. The Respondents aver that the strike called by the 2nd Applicant was illegal and that the 2nd Applicant had no powers to call for a strike or indeed any other industrial action without the sanction from the national office of the union (UASU).

26. The Respondents argue that the Applicants took part in an illegal strike and as such the University has a right to take disciplinary action against them as the employer.

27. The Respondents argue that the said strike had serious and negative financial and operational impact on the University as students' fees, the main source of revenue, could not be collected as students remained out of college.

28. It is the view of the Respondents that this court should not interfere with the right of the University, as an employer, in taking disciplinary action against the 1st Applicant who is an employee.

29. In his further affidavit, Prof Isaac Kibwagealleges that the disciplinary proceedings against the 1st Applicant has nothing to do with the illegal strike that had been called off as at the time he swore that affidavit.

30. The deponent alleges that when he called a meeting to address the staff on November 16, 2021 in his capacity as the Vice-chancellor of the University, the 1st Applicant wrote a letter on November 16, 2021 inciting members of academic staff not to attend the said meeting. He avers that the said action by the 1st Applicant amounted to gross misconduct or incitement and insubordination, and calling of members to ignore lawful orders from a person placed in authority by the employer.

31. The deponent alleges in paragraph 12 that 'the 1st Applicant stormed examination rooms and turned away lecturers from administering the said examinations.'

32. The deponent argues that the Respondents have a right to taking disciplinary action against the 1st Applicant and that this court should not interfere with that right.

33. It is on the basis of the foregoing that the Respondents pray that the application for an order of prohibition be denied to the Applicants to pave way for disciplinary action against the 1st Applicant for the perceived disciplinary breaches alluded to above.

IV. Submissions By Counsel For The Applicants

34. The Counsel for the Applicants filed written submissions on May 10, 2022 and further written submissions on May 19, 2022. Counsel identifies four (4) issues for determination, to wit, whether

the issue of legality of the strike is res judicata, whether the disciplinary proceedings against the 1st Applicant are malicious, and whether the 2nd Applicant has powers to call for a strike, and whether considering the entire circumstances of these proceedings the application should be allowed.

35. Counsel for the Applicants submits that an order of prohibition in judicial review is available where an applicant demonstrates that malice and other extraneous matters divorced from the goals of justice have been taken into account in quasi-judicial proceedings, and especially where the proceedings areintended to settle personal score. Counsel has relied on *Republic v Attorney General & 4 Others Ex-parte Kenneth Kariuki Githui (2014) eKLR*, and *Kuria & 3 Others v Attorney General (2002) eKLR 69* to illustrate this point.

36. Further, Counsel has cited *Jorum Mwende Guantai v The Chief Magistrate (2007) & 2 EA 170* to illustrate that the Judicial Review order of prohibition is not only available where the quasi-judicial proceedings offend provisions of the law, but also where such proceeding offend the rules of natural justice.

37. Further, Counsel relied on *Republic v Secretary of Firearms Licencing Board & 2 Others Ex-parte & Senator Johnstone Muthama (2018) eKLR* and The Ugandan case of Pastoli v Kabande District Local Government Council & Others (2008) EA 300, among other decisions, to illustrate that illegality, irrationality, and procedural impropriety are good grounds for a court to issue the judicial review order of prohibition.

38. On the futuristic nature of an order of prohibition, Counsel relied on *Republic v Nairobi City Council & Another Ex-parte Hema Virendra Kashiyap (2016) eKLR* and *Kenya National Examinations Council v Republic Ex-parte Geoffrey Gantengi Njoroge & Others (1997) eKLR*.

39. Counsel submitted that the two charges against the 1st Applicant relate to the strike called by the 2nd Applicant from November 15, 2022. He argues that the issue as to whether the said strike was lawful or illegal is res-judicata following a consent order in Nakuru ELRC Cause No 005 of 2022 - Egerton University v University Academic Staff Union & 15 Others.

40. Further, Counsel submits that all disciplinary proceedings against members of the 2nd Applicant who took part in the said strike were withdrawn vide Nakuru ELRC Judicial Review No 2 of 2022 Republic v The Council, Egerton University & Another Ex-parte University Academic staff Union, Egerton University Chapter & 14 Others. However, the charges against the 1st Applicant were not withdrawn and Counsel submits that the selective withdrawal of disciplinary action against all the others except the 1st Applicant is discriminatory and that the 2nd Respondent is using the disciplinary proceedings to settle a personal score against the 1st Applicant.

41. Counsel presents that there is nothing illegal in the conduct of the 1st Applicant as she did all that she did, as stated in the two charges, in her capacity as the secretary to the 2nd Applicant, and that the strike has not been declared illegal. To drive this point home Counsel relied on Section 79 (3) of the *Labour Relations Act* and Section 46 of the *Employment Act*.

42. Last but not the least, the Applicants' Counsel invited this court to pronounce itself on whether a branch of a union, such as the 2nd Applicant, can call for a strike or any industrial action as, according to Counsel, there is a lacuna in the law on this issue.

43. On the basis of all the foregoing, Counsel for the Applicants prays that the motion for Judicial Review order of prohibition be allowed as prayed with costs to the Applicants.

V. Submissions by Counsel for the Respondents

44. Counsel for the Respondents has identified five (5) issues for determination in his submissions. They are -

    Whether this cause is an appropriate one for judicial review, whether the suit is incompetent for joining Egerton University Council as a party, whether this cause meets the threshold for judicial review, whether this court can interfere with the employer's right to discipline employees, and whether the 1st Ex-parte Applicant's case is different from the other disciplinary cases that were dropped against other officials and members of the 2nd Applicant.

45. In respect of the first issue, Counsel submits that judicial review is available in employment matters if only the terms of such employment is either statutorily or constitutionally provided for. He argues that judicial review is a public law remedy and hence not available in a private employment contract such as that between the 1st Applicant and the Respondents. He proposes that the 1st Applicant ought to have filed an ordinary cause vide a memorandum of claim.

46. In driving this point home Counsel has cited *Republic v Kimeinyi Exparte Kenya Institute for Public Policy and Research Analysis (KIPRA) (2013) eKLR* wherefrom he has cited the following passage from the court of appeal -

    > ' Judicial Review remedies are discretionary and the court has to consider whether they are the most efficacious in the circumstances of the case. Judicial Review is in the purview of public law not private law. In normal circumstances, employment contracts are not the subject of judicial review.'

47. Counsel has also cited *Dickson Kiplagat Kasebe v National Police Service Commission (2020) eKLR* wherein Abuodha J stated in part that 'Judicial review orders are pubic law remedies hence apply in very limited circumstances to situations which may on initial evaluation be private law matters.'

48. Counsel has also cited *Republic v Kenyatta International Convention Centre Ex-parte Maurice Adongo Biyango (2017) eKLR* wherein Ndolo J expressed similar sentiments to those of Abuodha J above.

49. Based on the foregoing decisions counsel argues that the employment relationship between the 1st Applicant and the University is a private contract of employment that does not lie in the realm of Judicial Review and therefore prays for dismissal of this application with costs.

50. On the second issue, Counsel argues that the 1st Respondent is not a legal or juridical body and hence has no capacity to sue or be sued. He has relied on sentiments by Wendoh J in *Kiama Wangai v Pamela Tsimbiri & 7 Others (2014) eKLR* where the learned judge stated that 'in the end I agree with Mr Kisila's submissions that the Egerton University Council is not capable of suing or being sued.'

51. Counsel has cited the Supreme Court in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others (2014) eKLR* in arguing that 'a suit can be struck out if a wrong party is enjoined in it.'

52. Counsel has passionately submitted that the strike called by the 2nd Applicant was illegal but this court shall leave out that matter for now and comment thereon towards the end of this judgment.

53. Counsel has also argued that the illegality or otherwise of the strike is not res judicata as the cause that should have rendered a decision thereon being Nakuru ELRC E005 of 2022 was withdrawn under Order 25 Rule 1 of the Civil Procedure Rules. That cause was not heard and decided on merits and as such Section 7 of the *Civil Procedure Act* does to apply, Counsel further submits.

54. Counsel has also submitted on circumstances under which a judicial review remedy may be issued. He has submitted that illegality, irrationality, and procedural impropriety are good grounds for judicial review and he has cited Pastoli v Kabale District Local Government Council & Others (2008) 2EA 300 to support that position. Further Counsel has submitted that judicial review is concerned with the decision making process and not the merits or otherwise of the outcome of that process. He has cited Municipal *Council of Mombasa v Republic & Another (2002) eKLR* in support of that preposition among either decision.

55. Counsel argues that the Applicants are inviting the court to investigate the matter and render its opinion on the matters of contest between the parties which relate to a private contract of employment. Counsel submits that the steps so far taken by the Respondents against the 1st Applicant are procedural and hence do not call for interference from this court. He submits that the Respondents are simply exercising their disciplinary prerogative over the 1st Applicant who is an employee of the University.

56. Counsel has cited the sentiments of Rika J in *Alfred Nyungu Kimunguni v Bomas of Kenya Limited (2013) eKLR* cautioning this (ELRC) court from interfering with employers' right to discipline errand employees. He has also cited Mbaru J in *Mulwa Msanifu Kombo v Kenya Airways (2013) eKLR* wherein the learned judge commented that 'The intervention in disciplinary process by employers will be entertained by the court rarely and in clear cases where the process is likely to result into unfair imposition of a punishment against the employee. The court will intervene in an administrative disciplinary procedure if it is established that the procedure relied on by the employer offends fairness or due process by not upholding the rules of natural justice, or, if the procedure is in clear breach of the agreed or legislated or employer's prescribed applicable policy or standards, or, if the disciplinary procedure were to continue it would result into manifest injustice in view of the circumstances of the case.'

57. Counsel for the Respondents further submits that the disciplinary proceedings against the 1st Applicant are completely different from those that were withdrawn against the other officials of the 2nd Applicant. He argues that the 1st Applicant's conduct went beyond the sphere of the strike. Counsel submits that the Respondents intend to investigate and deal with the two specific issues in the two show cause letters alluded to earlier on in this judgment. He argues that the other officials of the 2nd Applicant had been charged with 'absence from duty without lawful authority.' Counsel argues that this is the reason why this cause is not one of those that were agreed to be withdrawn in the return to work formulae.

58. Pleading with this court to dismiss this application with costs, based on all the foregoing, Counsel submits further that the strike called by the 2nd Applicant was illegal.

VI. Applicants' Counsel Response

59. Counsel for the Applicants responded to the submissions by Counsel for the Respondents emphasizing that the 1st Respondent is properly joined in these proceedings as it is a lawful agent of the University. He cited *Paul Kipruto v University Council, Moi University & 3 Others (2022) eKLR* wherein the judge found that the Council of Moi University was a proper party in that cause as an agent of the said University based on the definition of an employer under the *Employment Act* and Article 260 of the *Constitution*.

60. Further, Counsel submitted that the Respondent deliberately failed and or refused to include the withdrawal of this cause in the list of those that were withdrawn in the return to work formulae yet the said formulae stated in part that 'The Egerton University Council shall unconditionally withdraw all

disciplinary actions directly related to the union activities during the pendency of the strike.' Counsel argues that the subject matter of this cause directly relates to the strike.

61. Counsel insists that disciplinary proceedings are quasi-judicial in nature and hence properly subject of judicial review. He relied on Section 7 of the *Fair Administrative Action Act* No 4 of 2015 in asserting that the Respondents have demonstrated ulterior motive or purpose calculated to prejudice the legal rights of the 1st Applicant, bad faith, irrationality, outright discrimination, and bias.

62. Counsel concluded by insisting that the 2nd Applicant had the legal powers to call for the strike and urged the court to allow this application with costs.

VII. Issues for Determination

63. This court has carefully gone through the pleadings and evidence filed by the parties, and the elaborate submissions filed by Counsel for both parties. This court has analysed and summarised all that in the foregoing parts of this judgment.

64. In the opinion of this court the following issues commend themselves to this court for determination:-

(a) Is this a proper case for judicial review?

(b) Is the 1st Respondent properly joined in this matter?

(c) Are the Applicants entitled to the orders sought for?

(d) This court has also been called to decide on the following two issues that this court considers to be rather extraneous:-

(i) Was the strike called by the 2nd Applicant illegal?

(ii) Can the 2nd Applicant, being a branch of UASU, call for any industrial action?

(e) Costs.

VIII. Proper Case the Judicial Review?

65. Article 47 of the *Constitution* provides as follows:-

> ' 47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
>
> (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
>
> (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
>
> (a) Provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
>
> (b) Promote efficient administration.'

66. To operationalize the above Article the Legislature enacted the Fair Administrative Actions Act No 4 of 2015. Section 2 of that Act defines 'administrative action' to include-

> ' (i) The powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
>
> (ii) Any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.'

67. There is no dispute that Egerton University is a public body whose operations are funded by the public. To use a loose description, the University is owned by the public through their lawfully constituted government. The university is therefore a public body with authority as per the law established, policies, manuals and guidelines.

68. The 1st Respondent is the highest (apex) decision making organ of the University while the 2nd Respondent is the Chief Executive Officer (CEO) thereof.

69. It is the opinion and holding of this court that based on the above definition the powers, functions, and duties exercised by the 1st and 2nd Respondents, for and on behalf of the University, which may affect the constitutional and legal rights of those affected by such actions, are quasi-judicial. Such administrative actions are hence subject to Article 47 of the *Constitution* and by extension provisions of the *Fair Administrative Action Act*.

70. The disciplinary proceedings against the 1st Applicant, as commenced by the Respondents through the two show cause letters, may conclude with a dismissal, warning, admonishment, or any other available option which shall clearly affect the constitutional and legal rights of the 1st Applicant, not only as an employee, but also as an official of the 2nd Applicant in the office of the Secretary. Clearly, the disciplinary proceedings are an administrative action as defined under Section 2 of the *Fair Administrative Action Act* alluded to above.

71. The 1st Applicant has held throughout these proceedings that she took all the steps for which she is now facing disciplinary action in her capacity as the secretary to the 2nd Applicant.

72. Article 41 of the *Constitution* in part provides as follows-

> 1(1) Every person has a right to fair labour practises.
>
> (2) Every worker has a right –
>
> (a) To fair remuneration;
>
> (b) To reasonable working conditions;
>
> (c) to form, join or participate in the activities and programmes of a trade union; and
>
> (d) to go on strike.'

73. In the understanding of this court, and I so hold, fair labour practises include fair administrative action in disciplinary proceedings, such as those facing the 1st Applicant. This is so because, as noted above, the outcome of the disciplinary proceedings shall in one way or another affect the constitutional and legal rights of the 1st Applicant, both as an employee of the University and as one of the top officials of the 2nd Applicant.

74. This court has carefully studied the notice for a strike dated November 8, 2021, the demand notice dated November 4, 2021, the minutes of a meeting of the 2nd Applicant held on November 15, 2021 wherein the 1st Applicant was directed to issue a notice to members of the 2nd Applicant not to attend the vice Chancellor's address, and the notice dated November 16, 2021.

75. The 1st Applicant authored and issued all the above in her capacity as the secretary to the 2nd Applicant. The Respondents have not availed any evidence to demonstrate that the 1st Applicant acted ultra vires the express instructions from the 2nd Applicant.

76. Section 46 of the *Employment Act* No 11 of 2007 provides as follows:-

> ' The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty-
>
> a -
>
> b -
>
> (c) An employee's membership or proposed membership of a trade union;
>
> (d) The participation or proposed participation of an employee in the activities of a trade union outside working hours or, with the consent of the employer, within working hours;
>
> (e) An employee's seeking of office as, or acting or having acted in the capacity of an officer of a trade union or a workers' representative;
>
> (f) An employee's refusal, or proposed refusal to prior withdraw from a trade union;
>
> (g) -
>
> (h) -
>
> (i) An employee's participation in a lawful strike.'

77. Whether the strike by members of the 2nd Applicant was lawful or unlawful is an issue that has not been resolved so far. However, as far as the evidence on record goes, the 1st Applicant did all that she did in the material aspects of these proceedings, as a member of the 2nd Applicant and moreso in her capacity as an official thereof in the office of the secretary.

78. In so far as this court can gather from these proceedings, based on the pleadings and all materials placed before this court, the disciplinary proceedings against the 1st Applicant are based on her activities as a member and an official of the 2nd Applicant and hence any outcome of such proceedings shall not only affect the constitutional and legal rights of the 1st Applicant but also those of the 2nd Applicant and the entire membership thereof.

79. In other words, the disciplinary proceedings against the 1st Applicant shall equally affect the 2nd Applicant and that is why, and understably so, the 2nd Applicant has joined these proceedings. The disciplinary proceedings against the 1st Applicant shall not only affect her but also the 2nd Applicant and the members thereof. The disciplinary proceedings may, for example, have the outcome of the 2nd Applicant losing the services of one of its top officials and also affect the willingness of other members of the 2nd Applicant in taking up leadership positions in the union for fear of future disciplinary action

by the employer. Such an impact would be against the spirit and letter of Article 41 of the *Constitution* and the other provisions of the law cited above.

80. In the circumstances, the dispute between the Applicants and the Respondents herein is not about the employment relationship between the 1st Applicant and the University. It goes beyond that. It is about labour relations and rights based on constitutional and legislative rights cited above.

81. It is the considered view and opinion of this court, and I so hold, that the dispute between the Applicants and the Respondents herein is in the category and fits in those provided for under Section 3 of the *Fair Administrative Action Act* which provides –

> ' 3(1) This Act applies to all state and non-state agencies, including any person –
>
> a. Exercising administrative authority;
>
> b. Performing a judicial or quasi-judicial function under the *Constitution* or any written law;
>
> or
>
> c. Whose action, omission, or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.'

82. Section 4 of the *Fair Administrative Action Act* provides the breaches in administrative action which may form a ground for the affected person(s) to take legal action. The legal action envisaged is provided for in Section 7 of that Act to be judicial review.

83. Section 7 of the *Fair Administrative Action Act* provides as follows-

> ' 5(1) In any case where any proposed administrative action is likely to materially and adversely affect the rights or interests of a group of persons or the general public.
>
> (2) Nothing in this Section shall limit the powers of any person to
>
> (a) -
>
> (b) Apply for review of an administrative action or decision by a court of competent jurisdiction in exercise of his or her right under the *Constitution* or any written law.'

84. While the Applicants may have had the option of bringing their pleas in these proceedings by way of an 'ordinary' employment cause, this court gathers nothing illegal or unprocedural in the Applicants' taking the option that they exercised in filing for judicial review herein.

85. While this court agrees with the decision of the Court of Appeal in Republic v Mwangi S Kimenyi Ex-parte KIPPRA (Supra), Dickson Kiplagat Kasebe v National Police Service Commission (Supra), Republic v Kenyatta International Convention Centre Ex-parte Maurice Adongo Anyango (Supra) this court finds and holds that in the entire circumstances of this matter, the pleadings, and materials presented, the parties involved, and for all the reasons stated above, based on the Constitutional and legislative provisions, this judicial review application was properly filed before this court. This court has the requisite constitutional and legal mandate to adjudicate on the same.

86. The first issue for determination is hence returned in the affirmative.

IX. Is the 1st Resppondent Properly Joined?

87. The Respondents have filed affidavits to the effect that the 1st Respondent is the top decision making organ of the University and that one among its many functions is to hire and fire employees. It is through the 1st Respondent that the 1st Applicant was hired as a lecturer and it is through the same organ that the 1st Applicant was issued with the two show cause letters.

88. The 1st Respondent therefore has a direct and active role in the employment and labour relations affecting all members of staff at the University, including the 1st Applicant, and by extension with the membership of the 2nd Applicant and the officials thereof, including the 1st Applicant herein.

89. Section 2 of the *Employment Act* defines an employer as –

> 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.'

90. There is no doubt that in all that the 1st Respondent does in its function to hire and fire employees, it does so for and on behalf of the University, as an agent. This applies to the 2nd Respondent as well. In this context, in relation to employment and labour relations matters, the 1st Respondent is a proper party in these proceedings.

91. The foregoing clearly distinguishes the subject matter of this judicial review from the subject matter in Kiama Wangai v Pamela Tsimbiri & 7 Others (Supra) as the latter related to a cause defamation in which the 1st Respondent herein had been joined as an interested party. The subject matter in that cause did not relate to matters employment and labour relations which are the subject matter of the instant judicial review proceedings.

92. In view of the foregoing, the second issue for determination is returned in the affirmative, that the 1st Respondent is properly joined as a party in these proceedings for judicial review to the extent that the same relates to employment and labour relations wherein both the Respondents are agents of the University.

X. Reliefs

93. The Applicants are seeking that the Respondents be prohibited from taking further disciplinary action against the 1st Applicant based on the allegations contained in the two show cause letters alluded to in the foregoing paragraphs of this judgment.

94. The Applicants have annexed an extract from the Registrar of Trade Unions indicating that as of July 2, 2021 the 1st Applicant was the secretary to the 2nd Applicant. In the entire pleadings and materials placed before the court it is not in dispute that the 1st Applicant held that position at all material times to these proceedings.

95. This court has already held in an earlier part of this judgment that the 1st Applicant authored all the notices and letters that she did, as specified therein, in her capacity as the secretary to the 2nd Applicant. There are minutes authorising the 1st Applicant to write as she did and the 2nd Applicant has not in any way disowned the said minutes, letters, and notices which were issued on the 2nd Applicant's letter-heads.

96. Although the Respondents have argued that the 1st Applicant exceeded her authorised limits as a union official, there is no evidence tendered to prove and demonstrate that allegation. For example, there

is an allegation that the 1st Applicant stormed into examinations rooms to stop other lecturers from administering examinations. However, no one such lecturer has filed an affidavit in support of that allegation.

97. It is the considered view, opinion, and holding of this court that the allegations and charges against the 1st Applicant as contained in the two show cause letters relate to activities carried out by the 1st Applicant in her capacity as the secretary to and a member of the 2nd Applicant. Allowing the Respondents to continue with the disciplinary action against the 1st Applicant based on the two show cause letters would amount to allowing the Respondents to violate the constitutional rights of the 1st Applicant under Articles 41 and 47 of the *Constitution* and Sections 3, 4, and 7 of the *Fair Administrative Action Act*, and Section 44 of the *Employment Act*, which have all been alluded to in an earlier part of this judgment.

98. The very act of issuing the two letters to show cause by the Respondents to the 1st Applicant based on her lawful activities as a member and an official of the 2nd Applicant is unconstitutional and unlawful for the reasons alluded to above. The Respondents have not availed any evidence on how the 1st Applicant exceeded her mandate as an official of the 2nd Applicant and as a member thereof. He who alleges must prove based on Section 107 of the *Evidence Act* (Cap 80).

99. While this court agrees that the Respondents as agents of the University are legally entitled to take disciplinary action against its employees, such action nevertheless must be constitutional and lawful. Where an employer is in clear violation of the constitutional and legislative provisions, it shall be an abdication of duty for this court to sit back and say, well, the employee will come to court to seek legal redress if she is aggrieved by the decision arrived at by the employer.

100. This court has a duty to prevent violation of such rights of the citizens and all those who come before such violation occur. In this instant case, this court has identified and delineated the constitutional and legislative rights of the Applicants that have been violated and are likely to continue being violated if the Respondents are allowed to continue with the disciplinary proceedings.

101. It is not the 1st Applicant alone who took part in the strike alluded to by the Respondents, which they term as illegal. The 1st Applicant was not the only official of the 2nd Applicant who took part in the said industrial action. Section 7 of the *Fair Administrative Action Act* identifies numerous reasons upon which this court may grant an order of judicial review. This court has already found the University, through the Respondents, to be in violation of clear constitutional and legislative provisions by issuing show cause letters alluded to above against the 1st Applicant for lawful activities undertaken in her capacity as a member of the 2nd Respondent and as an official thereof.

102. To the extent that no similar disciplinary action was taken against other officials of the 2nd Applicant or members thereof, this court finds and holds that the disciplinary proceedings against the 1st Applicant as commenced by way of the said two show cause letters for the two specific reasons contained therein, are discriminatory and biased against the 1st Applicant. The said action is illogical, irrational, unreasonable, and unfair and if allowed to continue shall prejudice the legal and constitutional rights of the 1st Applicants as well as those of the 2nd Applicant.

103. As noted in an earlier part of this judgment, the issues in this matter are not just about the employment relationship between the University, through the Respondent as its agent, and the 1st Applicant. The issues go deeper into the labour relations between an employer, and employee, and a trade union.

104. For all the foregoing reasons, this court finds and holds that although the court should be slow in interfering with disciplinary proceedings by an employer against an employee, and Counsel for the

Respondents has passionately submitted on this issue, the case before this court is one that calls upon this court to intervene and stop the disciplinary proceedings commenced against the 1st Applicant through the two show cause letters.

105. This court has studied the decisions cited by Counsel for the Respondents, including Alfred Nyangu Kimungui v Bomas of Kenya Limited (Supra) and Mulwa Msanifu Kombo v Kenya Airways (Supra) and notes that the judges in the two decisions did not hold that courts cannot interfere with employer's right to undertake disciplinary proceedings against an employee. What the judges said is that while the employer has a right to manage the workplace, courts shall interfere with disciplinary proceedings if the same are unfair, illogical, irregular, unprocedural, for example, and hence likely to result in the violation of the rights of the employee.

106. This court holds that this is one such matter wherein this court must intervene for all the reasons stated above. The third issue for determination is hence returned in the affirmative and hence the prayer for an order of prohibition is allowed in the terms set out at the end of this judgment.

XI.Legality of the Strike

107. Counsel for both parties have invited this court to determine and pronounce itself on the following two intertwined issues. The first issue is whether the strike called by the 2nd Applicant was illegal and the other is whether the 2nd Applicant is capable of calling for an industrial action as it did.

108. Now, if this court finds that the strike was lawful then it must essentially find that the 2nd Applicant must have had the requisite legal capacity to call for the same. While the two issues are evidently not res judicata under Section 7 of the *Civil Procedure Act*, as no determination was made in the causes where the two issues were the subject matter, as the said actions were withdrawn before being adjudicated upon, this court shall unfortunately decline the invitation to make a determination on the two issues for the reasons hereunder.

109. Firstly, the Notice of motion dated January 18, 2022 which is the subject matter of this judgment has not prayed for the determination of the two issues and as such it would be unprocedural for this court to endeavour in determining issues that have not been properly pleaded in the said application or placed before it for adjudication.

110. Secondly, the causes where the two issues were the subject matter were withdrawn and the matters therein are hence and clearly not res judicata. Either of the parties is free to file a proper cause for adjudication and determination of those issues.

111. Thirdly, the 2nd Applicant is a branch of the main national union (UASU). It would be unfair to determine such weighty issues without joining the national union for its input. This court could easily end up condemning the national union unheard moreso if the resultant orders turn out to be against the rights and or interests of the national union.

112. For the above reasons, inter alia, notwithstanding the spirited invitation by Counsel for both parties, this court declines the invitation and makes no findings on the two issues.

XII. Costs

113. Each party shall meet own costs.

XIII. Appeal to Parties

114. It is in the public domain that the University has been in the limelight for quite sometime now for all the wrong reasons. There has been long-standing industrial relations issues between the University and the unions representing various cadres of employees. The Respondents have filed affidavits in these proceedings indicating that the bad relationship between the employer and the employees is threatening the very existence of the University as a public institution of higher learning. According to the Respondents, the prolonged poor industrial relations and actions are also affecting businesses around the University at Njoro, Nakuru County.

115. It is about time that all the parties concerned decided to proactively engage to amicably resolve all the outstanding issues once and for all. It would not serve as a badge of honour for any member of the management of the University or an official of the unions to go into history that such a prominent public University disintegrated and died in their hands or under their watch. I say no more.

XIV. Orders

116. In disposal of this matter this court orders that the notice of motion dated January 18, 2022 be and is allowed in the following terms:-

(a) An order of prohibition be and is hereby issued retraining the Respondents by themselves, agents, servants and or others howsoever, from conducting, holding, or carrying out disciplinary proceedings or action against the 1st Applicant that was scheduled for January 19, 2022 or on any other date or time on account of any of the allegations, grounds, or charges contained in the two show cause letters dated November 19, 2021 and November 30, 2021 respectively or such other notices issued concerning the same or similar allegations, grounds, or charges and based on the two specific incidents, happenings, or occurrences contained therein.

(b) Each party shall bear own costs for these proceedings.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 22ND DAY OF SEPTEMBER, 2022.

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DAVID NDERITU

JUDGE