



**Maitha v Kenyatta University (Cause E187 of 2022)
[2022] KEELRC 3918 (KLR) (20 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3918 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E187 OF 2022
JK GAKERI, J
SEPTEMBER 20, 2022**

BETWEEN

JOSEPH MAINGI MAITHA CLAIMANT

AND

KENYATTA UNIVERSITY RESPONDENT

RULING

1. Before me for determination is a notice of motion Application dated March 23, 2022 seeking the following orders:
 - i. That this application be certified urgent and service thereof be dispensed with in the first instance.
 - ii. That this honourable court be pleased to make an order directing the respondent to unconditionally lift the suspension of the claimant from employment and order for his immediate reinstatement pending the inter parties hearing and determination of this application and claim.
 - iii. That this honourable court do hereby make an order for the payment by the respondent, the claimants half withheld salary and allowances during the period of his suspension which now amounts to Kshs 5,822,304/= as at March 30, 2022.
 - iv. That pending the hearing and determination of this application and claim, this honourable court do make an order of injunction restraining the respondent either by themselves, employees, servants and/or agents from terminating the employment of the claimant.
 - v. The honourable court do issue such orders and give such directions as it may deem fit to meet the ends of justice.
 - vi. The cost of this application be paid by the respondent.



2. The application is expressed under article 41 of the [Constitution of Kenya 2010](#), [Employment & Labour Relations Court Rules, 2016](#), section 25 of the [Employment Act, 2007](#), and all other enabling provisions and is based on the following grounds:
 - a. That the claimant has been indefinitely suspended from employment since February 24, 2020 to date which suspension is unlawful and contrary to the claimant's terms and conditions of service, [employment Act 2007](#), and the [Constitution of Kenya 2010](#).
 - b. That the said suspension has been in force for a period of 25 months in blatant disregard of the provisions of section 63 of the [Universities Act](#) which requires matters to be dispensed off at the university council within 6 months.
 - c. That for the whole period of the claimant's suspension, he has been receiving half salary (incorrectly stated as salary), which in act is unfair and illegal.
 - d. That the said suspension is based on the facts which are unsubstantiated and unproven as to date the claimant is yet to be called for any disciplinary hearing in order to ascertain the veracity of the allegations labeled against him.
 - e. That it is in the interest of justice that the application be allowed and the orders sought to be granted.
3. The application is supported by the affidavit of Joseph Maingi Maitha, the claimant, sworn on the March 23, 2022 which retaliates the grounds set out in the application.
4. In response to the application dated March 23, 2022, the respondent filed a replying affidavit sworn by Prof Paul Okemo the Acting Deputy Vice-Chancellor (Administration) at the respondent sworn on the April 26, 2022.
5. The affiant affirms that the claimant was employed by the respondent as a lecturer on permanent and pensionable terms and was subsequently appointed as the Head of Pharmacognosy and the complementary/alternative medicine section.
6. The affiant states that vide a memo dated October 14, 2019 addressed to the Vice-Chancellor the claimant raised several complaints on an alleged poor and retrogressive academic and administrative leadership by the chairman of the respondent's Pharmacognosy, Pharmaceutical, and Industrial Department.
7. The claimant was issued with a warning in an internal memo dated December 3, 2019 issued by the Deputy Vice-Chancellor stating that he had flaunted the university protocol on communication which indicates that any communication should be through the supervisor.
8. The affiant states that subsequent to the internal memo dated November 14, 2019, the claimant conducted himself in an unprofessional manner on various occasions which were noted by the university management that;
 - a. On the November 7, 2019 the claimant failed to attend a departmental meeting without an apology.
 - b. On the December 13, 2019 the claimant was issued a warning letter on allegation of insubordination.



9. The affiant states that the claimant despite being warned wrote an internal memo on the January 7, 2020 addressed to the Dean of the School of Pharmacy and copied to the respondent's Vice-Chancellor where he raised complaints that had earlier been raised in the memo dated December 14, 2019.
10. The affiant states that the claimant was suspended from employment pending appearance before the respondent Senior Board of Discipline but was not able to convene the meeting due to Covid 19 restrictions and there was no representative from the union as its elections were nullified.
11. The affiant further affirms that prior to suspension the claimant earned a salary of Kshs 112,038/= per month and after the suspension, he has been earning half the salary.
12. He states that the application and the cause were premature as the internal disciplinary process was yet to run its course as the reasons preventing it were beyond the control of the respondent.
13. The affiant states that an order for unconditionally lifting the claimant's suspension and immediate reinstatement will absolve the claimant against the charges levelled against him.
14. The affiant prays that the court does allow it to fully conclude the disciplinary process which is an internal issue as the application is premature and should be struck out or dismissed.

Claimant's Rejoinder

15. In rejoinder, the claimant contends that the allegations raised in the replying affidavit sworn on the April 26, 2020 by Proff Paul Okemo that the claimant flaunted the respondent's protocol in writing an internal memo dated October 14, 2019 are untrue as the same was informed by section 25 of the [Public Officer Ethics Act 2003](#), which obligates any public officer to report any improper conduct.
16. The affiant further states that on the November, 7 when the meeting was held, he was in class and had duly communicated to the respondent through his Administrative Secretary.
17. The affiant further states that the allegations raised by the respondent in the replying affidavit and the internal memo dated December 19, 2019 are false, malicious and unsubstantiated and only aimed at assassinating his character.
18. The affiant further states that he was suspended on the February 24, 2020 by which time UASU officials were in office and the respondent had enough time to constitute a disciplinary board.
19. The affiant states that he has raised the issue of unreasonable suspension to the respondent and to the commission but has never received a response leading him to seek legal redress.
20. He states that his suspension is a scheme by the respondent to victimize him for holding the respondent accountable and urges the court to find the application is merited and to grant the prayers sought.

Claimant's/Applicant's Submissions

21. The claimant in his submissions distilled three issues for determination being:
 - i. Whether the claimant/applicant's 26-month suspension is lawful.
 - ii. Whether the claimant is entitled to the prayers sought.
 - iii. Who should bear the costs of this suit?
22. On the first issue the claimant submits that his suspension from employment by the respondent is unlawful and unfair and the same amounts to unfair labour practice within the meaning of Article 41 of the [Constitution of Kenya, 2010](#).



23. The claimant submits that he was suspended on the February 24, 2020 on allegations that he committed a scandalous and disrespectful act pending a hearing before the senior disciplinary board but 26 months later the disciplinary proceedings had not been initiated.
24. The claimant submits that the reasons set out by the respondent that its failure to commence the proceedings was due to Covid 19 restrictions cannot suffice as universities were reopened from September 2020 and gatherings of 15 people had been allowed between March 15, 2020 and September 2020, therefore, the disciplinary hearing could have been conducted without any hindrance.
25. The claimant further submits that the respondent's reliance on Justice Rika's Judgment in ELRC Petition E043 of 2021 that there is no representative from UASU is baseless as the respondent had 13 months from the date of suspension to when the case challenging the elections was lodged during which time there was representative.
26. The claimant submits that principles of equity and natural justice demand that justice be expeditiously served and relies in the holding in *State of Andhra Pradesh v N Radhakishan*, (1998) 4 SCC 154 where it was held that delay defeats justice and unless there is proper explanation for the delay, the court should intervene to save the employee from the ensuing jeopardy.
27. The claimant submits that the respondent has not given any valid explanation for the delay.
28. It is the claimant's submission that on the October 27, 2020, he wrote to the respondent inquiring about his suspension but did not get a response.
29. The claimant submits that section 63(3) of the *Universities Act, 2012* provides that "A university council shall expeditiously dispose of all matters before it and in any event, within six months.
30. The claimant further submits that the unexplained delay is nothing but a scheme to victimize him for holding the university accountable
31. Reliance is made on the holding by Justice Linnet Ndolo's reasoning in ELRC 1789 of 2013; *Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology* where the learned judge held that;

"In my view, to have disciplinary proceedings hanging over the head of an employee for close to a year much like the sword of Damocles or the tongue of an unforgiving spouse, amounts to an unfair labour practice within the meaning of Article 41(1) of the *Constitution*. Disciplinary proceedings should not be allowed to persist so as to acquire the character of an employer's core business. They must be dealt with expeditiously to allow both the employer and the employee to move on.
32. The claimant submits that the delay by the respondent in commencing the disciplinary proceedings is inordinate and amounts to unfair labour practice under article 41 of the *Constitution* and urges the court to lift the suspension and order for his reinstatement without loss of benefits, back salaries and allowances.
33. On the second issue, the claimant submits that at the time of suspension he was earning a gross salary of Kshs 355,478/= but since he was suspended, he receives a basic salary of Kshs 57,596/=, house allowance at Kshs 55,286/= making it a total of Kshs 112,882/= the amount of salary withheld since March 2020 amounts to Kshs 5,822,304/=.



34. The claimant submits that having established that as envisaged by section 63(3) of the [Universities Act](#), the disciplinary proceedings are commenced and concluded within 6 months and the suspension is unlawful and urges the court to order the respondent to pay the claimant's withheld salaries.
35. On the third issue the claimant urges the court to order the respondent to bear the cost of the suit and interest at court's rate.

Respondent's Submissions

36. The respondent submits that the claimant's suspension was lawful as he was suspended on grounds of gross misconduct in breach of section 44(4) (a) and (b) of the [Employment Act, 2007](#).
37. It also submits that the claimant has not demonstrated any legal breaches by the respondent affecting his suspension from employment.
38. The respondent further submits that the membership of the respondent's disciplinary board for staff is provided for under Schedule 1.4 of part A of the respondent's University Statutes, 2013 the membership include among other persons the relevant staff union representative.
39. The respondent submits that UASU chapter held elections for its officials which were later nullified by the court, consequently, there has been no representative who has been elected to sit on the Respondent Disciplinary Board.
40. The respondent submits that any disciplinary process commenced by the respondent in the absence of a UASU representative will perpetuate illegality on the part of the Respondent.
41. The respondent submits that the court should refrain from issuing an order for reinstatement of the claimant at the interlocutory stage as it is a substantive issue and will deny the respondent the opportunity of being heard.
42. The Respondent relies in the holding in [Dolly Nyambura Mwangi v Faulu Micro Finance Bank Limited](#) [2020] eKLR, where the court stated as follows:

“The case of *Anthony Omari Ongera v Teachers Service Commission* [2017] eKLR Mbaru J made the following observations in respect to the rationale for reinstatement -

“The rationale is that the order of reinstatement is final in nature and should only issue in exceptional cases which warrant specific performance. In the case of *Ahmed Aden Hire versus Natif Jama and County Government of Garissa*, Petition No 121 of 2016;

The court is analyzing the provisions of Section 49 of the [Employment Act](#) and Rule 17(10) of the Court Rules with regard to the orders of reinstatement held that;

“The rationale [of not reinstating an employee at the interlocutory stage] is that the order of reinstatement is a specific performance order with finality. To issue such an order in the interim is essentially to deny the other party a chance to their defense unless there exceptional circumstances that the court is appraised of to warrant the grant of the same in the interim.”

43. The respondent submits that payment of half salary to the claimant is a condition of the suspension pending the determination of the disciplinary hearing and therefore submits that the issue of the



withheld salary is a substantive issue that can only be resolved after hearing and determination of the cause and should not be issued at the interlocutory stage.

44. The respondent submits that payment of the claimant's dues will amount to prosecuting the entire claim through an application and relied in the holding in its decision in *Olive Mwihaki Mugenda v Okiyah Omtata & 4 others* [2014] eKLR, the Court of Appeal cited with approval, the following holding in the Indian case of *Deoraj v State of Maharashtra* (Civil Appeal No 2084 of 2004):

"Situations emerge where the granting of an interim relief would be tantamount to granting the final relief. And then there may be converse cases where withholding of an interim relief would be tantamount to dismissal of the main petition itself; for by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the Petitioner though all the findings may be in his favor. In such cases the availability of a very strong prima facie case...the court may grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases."

45. The respondent submits that the claimant did not make any substantive submission on the injunction and urges the court to dismiss the same and relies in the holding in *Nguruman Limited v Tan Bonde Nielsen & 2 others* [2014] eKLR, held that:

"In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- a. establish his case only at a prima facie level,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. allay any doubts as to (b) by showing that the balance of convenience is in his favour.

46. The respondent further submits that the claimant has not established a prima facie case nor demonstrated the irreparable damage that would not be adequately compensated by way of damages and that the balance of convenience tilts in favour of the respondents, therefore submits that the claimant has failed to demonstrate that he is deserving of an order of injunction
47. The respondent submits that the application is prematurely before the court, lacks merit and ought to be dismissed with costs.

Analysis and determination

48. Having perused through the application, response and the submissions from both parties, the court distilled the following issues for determination
- i. Whether the application is merited.
 - ii. Whether the claimant/applicant is entitled to the orders sought.
49. As to whether the application herein is merited, the opportune starting point is a summary of the facts of this case.
50. It is not in dispute that the applicant is an employee of the respondent and by a letter dated February 24, 2020, the respondent suspended him from employment on the grounds that;



- i. The applicant absented himself from a critical supplementary examination meeting held on November 7, 2019 without reasonable cause.
 - ii. On December 13, 2019, during a formal oral examination of students by the Department Board constituted of Dr Khodhiambo, Dr Runyoro and the Applicant, the applicant stopped the exercise alleging that “Dr Kodhiambo is unqualified” which amounted to insubordination, humiliation, slanderous and deaming and a similar statement was made during a Departmental Examination on December 18, 2019.
51. The letter stated that the claimant was suspended pending appearance at the Senior Board of Discipline where he would be invited to defend himself against the charges in the suspension letter “and other charges that might come up after further investigations.”
 52. The applicant responded by a letter dated February 28, 2020 denying the allegations, offering explanation and additionally stating his commitment to constitutionalism and the rule of law.
 53. By letter dated September 4, 2018, the applicant wrote to the Deputy Vice-Chancellor requesting for necessary tools for his duties namely; office, desk, chair, computer and a printer. The letter was received on the same day.
 54. Second, by letter dated October 14, 2019, the applicant wrote to the Vice-Chancellor complaining about “poor and retrogressive leadership manifested by the Chairman, Department of Pharmacognosy, Pharmaceutical Chemistry and Pharmaceutics and Industrial Pharmacy – Dr Maurice Kodhiambo alleging misuse of resources, the Chairs qualification, non-compliance with the QMS, Academic trip to Mombasa in September, 2018, October 7, 2019 and Western Kenya, failure to consult, regular failure to by the Chair of Department to submit examination drafts for moderation and continued engagement of staff not qualified to teach clinical pharmacy.
 55. As a consequence of the foregoing letter, the Applicant received a warning letter dated December 3, 2019, for flouting University protocol on communication.
 56. Finally, by an internal memo dated January 7, 2020, the applicant wrote to the Dean School of Pharmacy setting out the names of members of the academic staff who in his view were unqualified to teach in the Bachelors of Pharmacy degree program. This included the Chair of Department.
 57. The memo was infact a demand letter which gave the Dean sixty (60) days notice to institute proceedings against the University, undeniably to the wrong office.
 58. Similarly, by letter dated October 27, 2020 to the Deputy Vice-Chancellor (Administration), the Applicant complained of violation of his rights and freedoms by the continued unfair suspension by the University since February 24, 2020.
 59. By letter dated March 25, 2021, the applicant complained to the Commission on Administrative Justice (CAJ) on his suspension by the respondent since February 24, 2020 and the Commission wrote to the Vice-Chancellor of the respondent setting out the nine (9) complaints by the applicant.
 60. The Commission requested the respondent to investigate the complaints and revert to the Commission within 21 days on the steps taken or intended actions with time frames.
 61. It is unclear whether the respondent carried out any investigation or reverted to the CAJ on the actions taken and timelines.



62. It is common ground that suspension of an employee by an employer is an internal process and generally paves way for investigations and may be the precursor of the disciplinary proceedings. It need not necessarily be.
63. Paragraph 26(g) of the Collective Bargain Agreement between the Kenyatta University Council and the Universities Academic Staff Union (UASU) 2013/2017 dated September, 2016 provides that
- i. An employee on suspension shall be entitled to half salary and full medicare except where the offence is of theft or loss of university funds.
 - ii. Where an employee's suspension has been lifted and the employer has exonerated him/her from any blame, he/she shall be paid all his/her dues, which may have been withheld on account of such suspension.
 - iii. Where an employee is found guilty for an offence but pardoned and re-instated to duty, he/she shall not be paid his/her withheld dues.
64. Regrettably, neither the applicant nor the Respondent has provided the detailed disciplinary procedures of the respondent, other than the provisions of section 63 of the *Universities Act, 2012* cited by the Applicant. The Applicant relies on section 63(3) of the *Universities Act, 2012* which provides that;
- A university council shall expeditiously dispose of all matters before it and in any event within six months.
65. Paragraph 1.4 of the 1st Schedule to the Kenyatta University statutes, 2013 establishes the Disciplinary Board for Staff.
66. The applicant has not demonstrated that the respondent's council was seized of the issue at hand.
67. In *Christpus Lleli Kunuva v County Government of Kitui & another* (2020) eKLR, the court expressed itself as follows;
- “In employment and labour relations, the employer has the prerogative to deal with discipline of its employee(s) by application of the internal mechanisms, disciplinary measures or human resource management policies. Such prerogative can only be interfered with by the court where there is apparent illegality or apparent violation of the *Constitution* or law as held in the case of *Mulwa Msanifu Kombo v Kenya Airways Ltd* and in *Professor Francis M Njeru V Jomo Kenyatta Univeristy of Agriculture and Technology* (2013) eKLR.
- Also, the employer has the prerogative to suspend an employee as an administrative action to allow for investigations. Once an employee is placed on suspension, it should therefore be seen as an administrative action imposed on an employee with stated reasons . . .
- Inherently, a suspension is meant to pave way for investigations or as required. The employee is removed from the shop floor to be recalled for a hearing and where the investigations do not require a hearing, the employee is recalled back to work . . .
- As addressed above, such suspension should be addressed within a reasonable time to avoid anxiety . . .”
68. Similar sentiments were expressed in *Samson Omwoyo v Maasai Mara University & another* Cause No 2367 of 2016 and in *Victor Sammy Mutiso v Teachers Service Commission* (2016) eKLR.



69. It is not in dispute that applicant was suspended on February 24, 2020 and remains on suspension more than 2 years 6 months which is undoubtedly unreasonably long.
70. The respondent promised that he would be invited to defend himself but he is yet to be invited. In the meantime, the claimant continues to earn a gross salary of Kshs 112,882/= per month comprising half salary and house allowance as opposed to the gross pay of Kshs 337,324.00 per month.
71. Puzzlingly, the respondent has tendered no evidence to justify or explain the inordinate delay in taking the necessary steps to bring this matter to closure. The contention that the disciplinary panel does not have a union representative is as submitted by the claimant unsustainable as the respondent had 13 months to conclude the process before the court decision it relies upon. It is intriguingly that the respondent can rely on an uncertain matter to continue holding the applicant on suspension indefinitely at half salary.
72. In *Ann Maina, Monica Nyambura & Joshua Patrick Macharia v Jomo Kenyatta University of Agriculture and Technology* (Supra), Linnet Ndolo J stated as follows;
- “In my view, to have disciplinary proceedings hanging over the head of an employee for close to a year much like the sword of Damocles or the longue of an unforgiving spouse amounts to an unfair labour practice within the meaning of Article 41(1) of the *Constitution*. Disciplinary proceedings should not allowed to persist so as to acquire the character of an employer’s core business. They must be dealt with expeditiously to allow both the employer and the employee to move on.”
73. The court quashed the disciplinary proceedings.
74. In *Chrispus Lleli Kunuva v County Government of Kitui & another* (Supra), Mbaru J declined to reinstate the claimant but awarded half salary and the unpaid half to the date of judgement and ordered the Respondent to conclude the disciplinary process within 30 days.
75. Similarly, the court is cognizant of the persuasive decisions in *P Mahadevan v MD; Tamil Nadu Housing Board* (2005) 6 SCC 636 and *State of Andhra Pradesh v N Radhakisan* (1998) 4 SCC 154 where the court underscored the necessity of expeditious conclusion of disciplinary inquiries in the interest of justice.
76. In the instant case, the *Universities Act, 2012* accords University Councils six (6) months to dispose the matters before them. Although it has not been shown that the Applicant’s suspension is a matter before the council of the respondent, it has taken inordinately long and immediate closure is necessary.
77. The respondent’s contention that it would be inopportune to reinstate the applicant at this stage is of no moment for the simple reason that the claimant is still an employee of the respondent. Put in alternative terms, reinstatement becomes a discretionary remedy after unfair termination of employment or dismissal, not before. The remedy has no application in the circumstances of this case.
78. For the foregoing reasons, the court is satisfied that applicant has made a case for the courts intervention following the indefinite and lengthy suspension.
79. Accordingly, the application dated March 23, 2022 is allowed in the following terms;
- a. The respondent shall conclude the disciplinary process and/or lift the applicant’s suspension within forty five (45) days from the date hereof failing which the suspension shall be deemed to have lapsed.



- b. The respondent shall pay the applicant the due and unpaid 50% salary to date.
- c. Costs shall be in the cause.

80. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF SEPTEMBER 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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 1B 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.

DR. JACOB GAKERI

JUDGE

