



**Kenya Universities Staff Union (Maseno University Branch) v Maseno University
(Petition E019 of 2022) [2022] KEELRC 12861 (KLR) (12 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12861 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E019 OF 2022**

S RADIDO, J

OCTOBER 12, 2022

**IN THE MATTER OF THE CONTRAVENTION OF THE FUNDAMENTAL
RIGHTS AND FREEDOMS UNDER ARTICLES 41, 47, 48 AND 50
OF THE CONSTITUTION OF THE REPUBLIC OF KENYA, 2010**

AND

**IN THE MATTER OF THE COLLECTIVE BARGAINING AGREEMENT BETWEEN
MASENO UNIVERSITY COUNCIL AND THE KENYA UNIVERSITIES STAFF UNION**

BETWEEN

**KENYA UNIVERSITIES STAFF UNION (MASENO UNIVERSITY
BRANCH) CLAIMANT**

AND

MASENO UNIVERSITY RESPONDENT

JUDGMENT

1. The Kenya Universities Staff Union, Maseno University Branch (the Union) sued Maseno University (the University) on 4 May 2022, seeking orders:
 - (a) A declaration that the terms and conditions of service of Maseno University and the Maseno University Human Resources Policy contradict the negotiated 2013/2017 Collective Bargaining Agreement (CBA) between the two parties hence a violation of the same.
 - (b) A prohibitory order do issue restraining the respondents, their agents, servants and whomsoever from commencing or proceeding with any disciplinary proceedings under the (terms and conditions under) the terms and conditions of Service of Maseno University and the Maseno University Human Resource Policy.
 - (c) Costs of the petition and



- (d) Any other orders that the honourable court may deem just and fit to grant.
2. The University filed a replying affidavit on 6 June 2022 and a further affidavit on 7 June 2022 (pursuant to leave).
 3. The court addressed a motion by the Union seeking interlocutory orders in a ruling delivered on 9 June 2022.
 4. The Union filed its submissions on 15 August 2022, and the University on 18 August 2022.
 5. The Union set out 2 issues in its submissions:
 - i. Whether or not public participation was undertaken in formulating the impugned Terms and conditions of service of Maseno University 2020 and the Maseno University Human Resource Policy 2020?
 - ii. Whether or not the petitioner is entitled to the orders sought in the petition?
 6. The University on its part identified the emerging issues as:
 - i. Whether the petitioner have the locus to file this suit?
 - ii. Whether there was public participation in the preparation of the Terms of Service and Maseno University Policy and Procedures Manual? / doctrine of estoppel.
 - iii. Whether the terms of service and the Human Resource Policy and Procedures Manual (are) in contravention with the Constitution and the 2013-2017 Collective Bargaining Agreement?
 - iv. Whether the Human Resource Manual has a legal basis for its existence?
 7. The court has considered the Petition, affidavits, and submissions.

The Case For The Union

8. The Case presented by the Union was that despite signing a collective bargaining agreement with the University for the period 2013-2017, and which agreement provided for disciplinary process, the University had reverted to using two instruments, the Maseno University Terms and Conditions of Service for Non-teaching Staff and Maseno University Human Resource Policy and Procedures Manual in conducting disciplinary Cases.
9. The Union contended that it was not involved in the preparation of the two instruments and further that the instruments were in violation of its members rights to fair hearing and administrative action as envisaged by articles 41, 47, 48 and 50 of the Constitution.

The Case For The University

10. Countering the assertions by the Union, the University contended that the Council had the power under section 22 of the Charter of Maseno University to appoint staff and set the terms and conditions of service for such staff. Sections 5 and 10 of the Employment Act were also cited.
11. The University also contended that there were no contradictions or inconsistencies between the collective bargaining agreement and the two challenged instruments and that the instruments formed part of the employment contracts of the Union's members.
12. The University further asserted that the Union was involved in the preparation of the two instruments and that the instruments did not violate any constitutional or statutory law.



13. The University also challenged the competency of the petition on the ground that it was premature as alternative dispute resolution avenues had not been exhausted.

Locus

14. The University challenged the locus of the Union to commence the proceedings on the ground that it had not presented a resolution granting authority to the branch to sue nor the authority to the deponent of the supporting affidavit. It was also stated that the Union had not demonstrated that it was registered.
15. The Court finds the objection misplaced. Trade union branches are recognised under section 25 of the *Labour Relations Act*, whilst article 22, as read with article 258 and the definition of person in article 260 of the *Constitution*, has extended the locus to sue, even to unincorporated bodies.

Exhaustion of alternative dispute resolution avenues

16. The Union (of which the petitioner Union is a branch) and the University have a recognition agreement as well as a collective bargaining agreement.
17. The question of prematurity or deferred jurisdiction therefore arises.
18. The subject matter of this petition revolves around the dismissal of the Union's members and whether the University could validly use the Maseno University Terms and Conditions of Service for Non-teaching Staff and Maseno University Human Resource Policy and Procedures Manual in the disciplinary process.
19. Under part VIII of the *Labour Relations Act*, the dispute between the parties herein should have been referred to conciliation, and the court approached only upon the conciliator issuing a certificate of unresolved dispute, or the giving of reasons in an affidavit.
20. The Union herein has not provided any evidence that they explored this avenue before moving to the court.
21. The Court of Appeal in the case of *Speaker of the National Assembly v Karume* (1992) KLR 21, while dealing with the principle of exhaustion, stated that:

Where there is a clear procedure for redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.
22. Similarly in the case of *Secretary, County Public Service Board & Ar v Hulbhai Gedi Abdille* (2017) eKLR the court had this to say on the same issue;

Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime.
23. By sidestepping the dispute resolution mechanism provided in the *Labour Relations Act* without any explanation whatsoever, the Union moved the court prematurely, and on that account, the Court would decline jurisdiction.



Whether the Petition raised any Constitutional issues?

24. From the facts apparent on the face of the record, the Union was challenging the disciplinary process adopted by the University.
25. It cannot be gainsaid that the carrying out of disciplinary action against an employee is the prerogative of the employer. This prerogative is protected by the Constitution and the Employment Act, and therein are built in protections to ensure there is fairness.
26. The primary remedies sought by the Union was that there was an inconsistency between the disciplinary instruments developed by the University and the Collective Bargaining Agreement in place.
27. In the court's view, such a dispute should not have been escalated to the realm of a Constitutional Petition. It was a dispute relating to a breach of contract.
28. Constitutional litigation should be reserved for disputes raising fundamental and real constitutional issues.
29. The point was underscored in the case of Bahadur (1986) LRC (Const) 297 as referred to in the case of Gabriel Mutava & 2 Ors v Managing Director Kenya Ports Authority & Ar AR (2016) eKLR where the Court held that:

....The Constitution is not a general substitute for the normal procedure for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper cause is to bring the claim under that and not under the Constitution....

Public Participation

30. The yardstick for public participation is that all interested parties should be granted an opportunity to know about an issue and have a say in it.
31. Public Participation has been defined in the Blacks Law Dictionary 9th Edition page 1229 as “the act of taking part in something such as partnership.....” This was further delineated in the South African case of Doctors for Life International vs Speaker of the National Assembly and others where it was stated as follows:

The phrase “facilitate public involvement” is a broad concept which relates to the duty to ensure public participation in the lawmaking process. The key words are “facilitate” and “involvement”. To “facilitate” means to “make easy or easier”, “promote” or “help forward”. The phrase “public involvement” is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of “involve” includes to “bring a person into a matter” while Participation is defined as “[a] taking part with others (in an action or matter);... the active involvement of members of a community or organization in decisions which affect them”. According to their plain and ordinary meaning, the words public involvement or public Participation refer to the process by which the public participates in something.

32. The Union contended that the Maseno University Terms and Conditions of Service and the Maseno University Human Resource Policy and Procedures Manual were alien to them as it had not participated in their formulation.



33. The University countered with evidence in the form of correspondences dated 9 June 2017 and 30 September 2017, showing some semblance of Participation on the Union's part.
34. A cursory look at the letter dated 9 June 2017 clearly shows the Union acknowledged having participated in the construction of the documents. The letter dated 30 September 2017 also clearly shows that the Union called for a meeting to among other things discuss the human resource policy and terms of service.
35. The above correspondences clearly show that the Union is being less than candid. All the evidence on record points to the Union's involvement, hence the argument that the rules of natural justice weren't adhered to doesn't arise.
36. It is evident that there was some semblance of participation and involvement of the Union in the formulation of the two documents. This fact is unchallenged. In the letter dated 9 June 2017, the Union even requested for copies of the documents and accedes to having participated in their construction.
37. The Union cannot, therefore, turn back and say that it were not involved.

Contradictions between the collective bargaining agreement and Maseno University Terms and Conditions of Service for Non-teaching Staff and Maseno University Human Resource Policy and Procedures Manual

38. Although alleging that there were contradictions or inconsistencies between the collective bargaining agreement in place and the Maseno University Terms and Conditions of Service for Non-teaching Staff and Maseno University Human Resource Policy and Procedures Manual, the Union did not establish any contradiction.
39. It is apparent to the Court that the Union was not certain of the case it was advancing. There was clearly a legal incongruity between the gravamen of the complaint, the Issues identified, and the remedies sought.

Conclusion and Orders

40. From the foregoing, the Court not only finds the Petition premature but without merits. It is dismissed with costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 12TH DAY OF OCTOBER 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Union Mr Odeny instructed by Bruce Odeny & Co. Advocates

For the Respondent Ms Joy A. Akinyi, Legal Department, Maseno University

Court Assistant Chrispo Aura

