



REPUBLIC OF KENYA



KENYA LAW
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Odongo v Masinde Muliro University of Science and Technology (Cause E025 of 2022) [2022] KEELRC 13363 (KLR) (2 December 2022) (Ruling)

Neutral citation: [2022] KEELRC 13363 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE E025 OF 2022
JW KELI, J
DECEMBER 2, 2022

BETWEEN

GEORGE ODONGO CLAIMANT

AND

**MASINDE MULIRO UNIVERSITY OF SCIENCE AND
TECHNOLOGY RESPONDENT**

RULING

1. The claimant *vide* a statement of claim dated September 2, 2022 sought the following reliefs against the respondent:-
 - i. That preferably at the interlocutory stage of this suit, the respondent be ordered to release to the claimant withheld or stopped salaries for the months of May, June, July and August, 2022.
 - ii. A declaratory order that the claimant is deemed as constructively dismissed by the respondent.
 - iii. An award of damages for the wrongful constructive dismissal under section 49 (1) (c) of the *Employment Act*, 2007.
 - iv. An award of 3-month salary in lieu of termination notice under section 49(1) (a) of the *Employment Act*, 2007 in the aggregate sum of Kshs 490,329/-.
 - v. An award of general damages for the psychological torture/trauma, financial embarrassment, injury to credit and defamation of character suffered by claimant.
 - vi. Costs of this suit.
 - vii. Interest on terms 'a' 'b', 'c' 'd' and 'e' above from the date of filing this suit till payment in full.
 - vix. Any other or further relief that this Honourable court may deem just and fit to grant in the interest of justice.



2. Simultaneously the claimant filed an application by way of notice of motion of even date as the statement of claim seeking the following reliefs:-
 - a. The application be certified as urgent and be heard in the first instance.
 - b. That pending the hearing and determination of the main suit herein, the respondent to lift stoppage of claimant's salaries of May, June, July and August 2022.
 - c. That the respondent to process the claimant's salary for the month of August 2022 which salary should be paid to the claimant at the time the respondent will be processing its workers salary for the said month
 - d. The respondent to bear the costs of this application.
3. The application is grounded on reasons that the applicant's salary was withheld for the month of May and June despite the claimant having worked. That on July 5, 2022 the claimant received a letter appointing him as internal part-time lecturer. That on enquiry into the delay of salary remittance he was issued with show cause letter forwarded to him on the July 21, 2022 and indicating to the Finance officer to stop claimant's salary to avoid further loss.
4. The application is supported by the affidavit of the applicant sworn on the September 2, 2022 annexing the offer of employment dated August 18, 2021, pay slip for May 2022, complaint letter by applicant on non-payment of salary for May and June 2022 dated July 18, 2022, show cause letter on breach of code of conduct by the respondent dated July 15, 2022, response to the show cause letter dated July 27, 2022, letter to the applicant by the respondent being offer of internal part time appointment and check off loan application.
5. The applicant further filed a supplementary affidavit sworn on the October 17, 2022 in response to the replying affidavit wherein he stated that the investigation was done during the pendency of the suit hence not basis of the withholding of the salary, that he disclosed his employment with Kenya Methodist University during the interview as stated in his paragraph 3 of the supporting affidavit and that the employment was never an hindrance to his performance. That he was not under suspension or interdiction for his salary to be withheld and that further the investigation report does not meet the threshold of the human resources manual.
6. The application was opposed by the respondent who entered appearance through the office of the Attorney General and Department of Justice. The respondent filed replying affidavit of Professor Solomon Shibairo sworn on the October 12, 2022. In brief, the respondent avers that the claimant did accept to be bound by the terms of service under his letter of offer dated September 29, 2021, that he did not resign as an employee of Kenya Methodist University where the employer established he was a permanent employee. That the respondent being a public institution the claimant was also bound by the Public Service Code of Conduct and Ethics 2016 and the Code of Conduct and Ethics for Public Universities, 2003. That the Public Code of Conduct forbids public servants from engaging in other gainful employment that may hinder discharge of quality service due to division of the employees' loyalty. That the payment of salary for May, June, July 2022 was stopped on account of double salary. That the orders sought determines the rights of the parties in the substantive claim. That no irreparable injury that cannot be compensated by damages.
7. The court directed the application be canvassed by way of written submissions. The parties complied.

Determination.

8. The applicant addressed the merit of the application.



9. The respondent identified the issue for determination to be whether the claimant is entitled to reliefs sought.
10. The court then considers the parties are in agreement that the issue for determination is whether the applicant is entitled to reliefs sought.

Decision

11. The applicant submits that the indisputable facts are that there is a valid contract of employment of the claimant which commenced on the September 21, 2021. That none of the ways of termination of contract under the employer human resource manual has crystallized. That the claimant had not resigned nor been dismissed from employment. That salary was not paid for May, June and August and upto date. There is no decision adjudging the claimant guilty of misconduct or gross misconduct which should be by the disciplinary committee under the human resource manual. That even under suspension the claimant would be entitled to half salary.
12. The applicant submits he is entitled to order of release of the withheld salary at the interlocutory stage as the respondent has not proved the salary was not earned. That the applicant was in active employment in the month of May, June, July and August and as per the huma resource manual hence had legitimate expectation of payment of salary and is indebted for loans taken on basis of the due salary.
13. To support his application the claimant relies on the decision of the court in *Donald C Avude v Kenya Forest Service* (2015)e KLR where justice Maureen Onyango held:- ‘The respondent has in the submissions urged me to find that the claimant/applicant has not established a prima facie case to demonstrate that he will suffer irreparable damage unless the orders prayed for are granted as any withheld emoluments would be payable at the end of the suspension period, that the balance of convenience favours the respondent whom the court must not hinder in the administration of its policies. I do not agree with the respondent. Withholding salary exposes the claimant to financial embarrassment that cannot be remedied by the mere release of the withheld salary. It was also argued by the respondent that courts should not interfere in the respondent’s exercise of its disciplinary process and further that the court should not give final orders at interlocutory stage of cases. That should be the normal situation where the respondent is carrying out valid disciplinary process. The court will however intervene and if necessary, grant relief where the consequence of non-interference would be to subject the applicant to extreme hardship or irreparable harm, or in cases where the action by the respondent has no legal basis as is the case in this suit.’
14. The respondent submits that the claimant is seeking for positive injunction/ restorative injunction of reinstatement of his salary that was stopped by the respondent. That the positive injunction being sought by the applicant has higher standard of proof than normal prohibitive injunction and relies on decision in Kenya *Breweries Ltd and another v Washington O Okeya*(2002)Eklr where the Court of Appeal cited with approval *Locabail International Finance Ltd v Agroexport and others* [1986] 1 ALL ER 901 at pg 901 where it was stated:- “A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”



15. The respondent further relies on the decision of Court of Appeal in *Nation Media Group and 2 others v John Harun Mwau* (2014)eKLR where the court held that it was trite law that for an interlocutory mandatory injunction to issue the applicant must demonstrate existence of exceptional circumstances which they submitted that the applicant had not done so.
16. The respondent further submits that the principles that govern interlocutory mandatory injunctions were set out in the case of *Johnson M'Mwangera & 2 others v Wellington Sanga & 13 others* (2021)eKLR as follows:-
 - a. The applicant must have a strong case for trial and the standard is higher than that of a prima facie case that is often required for grant of prohibitory injunction
 - b. The grant of interlocutory mandatory injunction is necessary to prevent irreparable serious injury which normally cannot be compensated in terms of money
 - c. The balance of convenience is in favour of one seeking grant of relief of interlocutory mandatory injunction.
17. The respondent on the question whether the claimant has a strong case of trial, submits that he does not having admitted to drawing salary from two institutions. That the reasons for stopping the salary as explained in their replying affidavit was that the applicant was holding two permanent and pensionable positions with the respondent and Kenya Methodist University and drawing salary from both institutions which is against the Public Service Code of Conduct and Ethics 2016 as well as the Code of Conduct for Public Universities Act and offends articles 73 and 232 of the *Constitution* on leadership and integrity.
18. The respondent submits that the act of the claimant drawing salary for two institution is contravention of section 11 of the *Public Officer Ethics Act* 2003 which provides that the a public officer shall not use a public office to enrich himself. That the stoppage of the salary was stopped for the simple reason that the claimant was earning two salaries and holding two positions of permanent and pensionable terms.
19. On whether the applicant will suffer injury that that cannot be compensated by award of damages the respondent submits the salary as claimed can be quantified. That the balance tilts in favor the respondent as the claimant if paid may not be able to refund the money.

Decision

20. The award of interlocutory orders is a discretionally one which the court exercises judiciously. The applicant seeks payment of withheld salaries for 4 months. The respondent states that the claimant salary was stopped for the simple reason that he is employed in two institutions on permanent and pensionable terms which is against the Public Service Code of Conduct and Ethics, 2016, as well as the code of conduct under the Public Universities Act and his act offends provisions of articles 73 and 232 of the *Constitution* on leadership and integrity as well as section 11 of the *Public Officers Ethics Act*.
21. The applicant has admitted to working on permanent basis in two institutions the respondent being a public body. The applicant states in paragraph 3 of his affidavit that before employment by the respondent he was a full time lecturer at the Kenya Methodist University and he informed the respondent's interviewing panel and this was an advantage to being engaged as a lecturer. The claimant does not address the legality of his act of double permanent and pensionable employment. The claimant submits that the termination of his contract under the manual has not crystallized and hence he is entitled to his salary. The court agreed with the submissions but noted under his prayers the claimant was asking for declaration of constructive dismissal. The claimant to buttress his case relied



on the decision of the court in *Donald C Avude v Kenya Forest Service* (2015)e KLR related to the application where justice Maureen Onyango held:- “The respondent has in the submissions urged me to find that the claimant/applicant has not established a prima facie case to demonstrate that he will suffer irreparable damage unless the orders prayed for are granted as any withheld emoluments would be payable at the end of the suspension period, that the balance of convenience favours the respondent whom the court must not hinder in the administration of its policies. I do not agree with the respondent. Withholding salary exposes the claimant to financial embarrassment that cannot be remedied by the mere release of the withheld salary. It was also argued by the respondent that courts should not interfere in the respondent’s exercise of its disciplinary process and further that the court should not give final orders at interlocutory stage of cases. That should be the normal situation where the respondent is carrying out valid disciplinary process. The court will however intervene and if necessary, grant relief where the consequence of non-interference would be to subject the applicant to extreme hardship or irreparable harm, or in cases where the action by the respondent has no legal basis as is the case in this suit.’

22. The court while appreciating the jurisprudence in the case by Justice Maureen Onyango found that the court was clear that it could only be grant orders of payment of withheld salary where the action of the employer had no legal basis for withholding the salary.
23. The respondent was opposed to the application as the prayers sought for the payment of withheld salary was tantamount to positive mandatory injunction which if granted would determine the substantive case between the parties at interlocutory stage relying on *Kenya Breweries Ltd and another v Washington O Okeya*(2002)eKLR the Court of Appeal cited with approval *Locabail International Finance Ltd v Agroexport and others* [1986] 1 ALL ER 901 at pg 901 where it was stated:- “A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”
24. Applying the authorities cited by the parties, the court finds that it was undisputed fact that the claimant was holding two permanent and pensionable positions. The court finds that whereas it is normal for candidates to hold jobs while attending interviews, it is not normal that the employee serves two employers on permanent and pensionable terms. The court applying the Court decision in *Donald C Avude v Kenya Forest Service* (2015)e KLR finds there is legal basis for stoppage of the salary the court noting a notice to show cause was issued which is a trigger to disciplinary process. The court further applying the Court of Appeal decision *Kenya Breweries Ltd and another v Washington O Okeya*(2002)Eklr finds that this is not a simple issue which can be summarily determined. The fact of the double permanent employment had consequences which the court had to be determine on merit.
25. The court finds that the claimant being under another employment cannot be said to be under extreme hardship. Further the claimed salaries are quantifiable and can be compensated by payment of money. At this stage the court finds that the balance of convenience tilts towards not granting the interlocutory order of payment of the claimed salaries.
26. The application by way of notice of motion dated September 2, 2022 is dismissed. Each party to bear own costs.
27. It is so ordered.



DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 2ND DECEMBER, 2022.

J. W. KELL,

JUDGE.

In the Presence of:

Court Assistant: Brenda Wesonga

applicant: Balusi

respondent : Absent

