



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. 15 OF 2020

IN THE MATTER OF UNFAIR, ILLEGAL, ARBITRARY AND IRREGULAR DISMISSAL/TERMINATION OF SEVERAL EMPLOYEES, MEMBERS OF THE PETITIONER

AND

IN THE MATTER OF ARTICLES 20, 21, 22(3), 23, 24, 27, 41, 47, 165, 232, 236 OF THE CONSTITUTION OF KENYA, 2010, CAP 26 LAWS OF KENYA AND THE CIVIL PROCEDURE ACT, CAP 21 LAWS OF KENYA

AND

IN THE MATTER OF DISMISSAL/TERMINATION OF SEVERAL EMPLOYEES OF KISII UNIVERSITY WHO ARE UNION MEMBERS OF THE PETITIONER

AND

IN THE MATTER OF CHARTER FOR KISII UNIVERSITY, LEGAL NOTICE NO. 225 GAZETTED ON 30TH DECEMBER, 2013 UNDER LEGISLATIVE SUPPLEMENT NO. 77 UNDER KENYA GAZETTE SUPPLEMENT NO. 185

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACT, 2015

AND

IN THE MATTER OF KISII UNIVERSITY HUMAN RESOURCE MANUAL, 2016

AND

IN THE MATTER OF UNIVERSITIES ACT NO. 42 OF 2012

AND

IN THE MATTER OF EMPLOYMENT ACT, 2007

BETWEEN

KENYA UNIVERSITIES STAFF UNION (KUSU)

KISII UNIVERSITY BRANCH.....PETITIONER

VERSUS

KISII UNIVERSITY.....1ST RESPONDENT

THE CHAIRPERSON KISII UNIVERSITY COUNCIL.....2ND RESPONDENT

THE VICE CHANCELLOR, KISII UNIVERSITY.....3RDRESPONDENT

RULING

1. Application dated 28/4/2020 seeks for an Order in the following terms:- Pending the hearing of this petition Conservatory Orders of injunction and prohibition do issue restraining the respondents jointly and severally from prematurely terminating employment and contract/appointments of the employees of the 1st respondent and or Union members of the applicant.
2. The application is supported by grounds set out on the face of the Notice of Motion numbered A to I. The grounds may be summarized that the 1st respondent had commenced terminating the employment of its employees unlawfully.
3. That the affected employees have served the 1st respondent diligently and for several years and had legitimate expectation to fair process.
4. That the employees were dismissed while on a break imposed by national Government during COVID -19 period.
5. That the terminations be injected pending the hearing of the Petition.
6. The application is supported by an Affidavit of Moses Nyandusi, the Branch Secretary of the Petitioner/Applicant, a trade Union representing employees of the 1st respondent. He deposes that as from 17/3/2020, the 1st respondent commenced terminating contracts of employment of its unionisable employees. That a letter to the 1st respondent to halt the terminations was unheeded and the 1st respondent declined to engage the union in consultations. That employees have been treated differently with some contracts of employees employed between 2010 to 2015 being renewed whereas others not being extended without notice. Those whose contracts were extended are named in paragraph 16 of the Affidavit and those whose contracts were terminated have also been named therein.
7. That interim orders granted *ex parte* were set aside upon application by the 1st respondent dated 6th May, 2020 based on material non-disclosure of all the facts to the Court at that stage.
8. The respondents filed a replying affidavit to the application dated 28/4/2020 on 7/5/2020 in which the application is opposed on the basis that the petition is flawed in that the petitioner lacks legal standing to bring the suit. That the petition lacks basis completely in that it raises no constitutional issues for determination by the Court.
9. That all employees on behalf of whom the Petition is sought were serving at all material times on fixed term contracts, which contracts have either expired and extended and or have expired and not extended by the 1st respondent. That renewal and non-renewal of contracts is a prerogative of the 1st respondent and the Court cannot impose contracts on the respondents.
10. The respondents at paragraph 5 named 14 employees whose contracts had expired and had been renewed at the discretion of the 1st respondent and at paragraph 7 are named persons whose contracts had expired and the 1st respondent had opted not to renew their contracts.
11. That at paragraph 9 is named 14 employees in respect of whom the 1st respondent had issued 30 days' notice of termination pursuant to Section 35(1) (c) of the Employment Act, which termination has to take effect on 8/5/2020.
12. That the respondent has no obligation to retain on its payroll employees in respect of whom contracts of employment had expired.
13. That non-renewal and termination of contracts was due to financial difficulties faced by the University due to a drastic reduction of module II students. That none of the employee's contracts were terminated due to misconduct, poor performance or physical incapacity. That the application lacks merit and it be dismissed with costs.

Determination

14. It is apparent that employees in respect of whom the application was filed were on fixed term contracts which have either been renewed and or not renewed at the discretion of the 1st respondent.
15. Whether or not the respective non-renewal and/or termination was lawful and fair is a matter that will be determined upon hearing of the petition on the merits.
16. The applicant at this interim stage must establish a *prima facie* case with a probability of success in terms of the case of **Giella –vs- Cassman Brown Co. Ltd. 1973 E.A. 358**. Further the applicant must demonstrate that it will suffer irreparable loss not capable to be remedied by way of damages and/or reinstatement of the contracts upon hearing of the petition. In case of a mandatory injunction, as the present one, the test is more rigorous. **See Kenya Breweries Ltd. & Another –vs- Washington O. Okeyo (2002)**. Where in doubt the Court is to be guided by balance of convenience.
17. The Petition is pegged on alleged violation of Article 41 and 47 of the Constitution of Kenya 2010, as set out under paragraph 5 of the petition. However facts set out therein regarding renewal and non-renewal of fixed term contracts do not disclose a *prima facie* case with a probability of success.
18. The Court shall not delve in detail on these aspects of the case which fall to be determined upon hearing of the suit on the merits.
19. Accordingly the application lacks merit and is dismissed with costs in the cause.

Dated and delivered at Nairobi this 28th day of January, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

Mose Nyabega Advocate for the Petitioner/Applicant

Nyamurongi Advocate for the respondents

Chrispo: Court clerk