



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT BUNGOMA**

**PETITION NO. 25 OF 2020**

**IN THE MATTER OF WRONGFUL, ILLEGAL, UNFAIR AND**

**UNLAWFUL TERMINATION OF THE PETITIONER’S EMPLOYMENT**

**AND**

**IN THE MATTER OF ARTICLES 3(1); 10(1A,B,C) (2B,D); 19(1,2,3A,B,C); 20(1), 2,3b, 4a, b,**

**5a, b); 21(1,2,3,4); 22(1,2B,3A,B,C,4); 23(1,2,3,4a,b,c,d,e); 24(3); 25(A,C); 27(5,6,7); 28;**

**29(a, d, e, f ); 41(1&2); 43(b, c ,d, e); 45(1), (47 (1); 48; 50(1,3); 54(1a, 2); 56(c), e);**

**59( c) 162(2a); 165(3a,b) AND 258 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF NATIONAL EMPLOYMENT AUTHORITY ACT, 2016 GIVING**

**EFFECT TO**

**ARTICLE 56(C ) OF THE CONSTITUTION OF KENYA, 2010 ON AFFIRMATIVE ACTION**

**AND**

**IN THE MATTER OF PERSONS WITH DISALIBTY ACT, 2003 11, (12) (1) 13,32,33,38 (4)**

**AND**

**ARTICLES 1, 2 ,3, 23, 24, 25, & 26 OF THE UNVIERSAL DECLARATION OF HUMAN**

**RIGHTS**

**AND**

**IN THE MATTER OF EMPLOYMENT ACT, 2007**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015 SECTION 3, 4, & 5**

**AS READ WITH OTHER SECTIONS OF THE ACT WHERE APPLICABLE**

ZACHARY BORI GISIRI.....1<sup>ST</sup> PETITIONER/APPLICANT

SIAMBE NYAMIMA.....2<sup>ND</sup> PETITIONER/APPLICANT

TIMOTHY NYAKI GITUNYO.....3<sup>RD</sup> PETITIONER/APPLICANT

SAMWEL NYANG'AU.....4<sup>TH</sup> PETITIONER/APPLICANT

**VERSUS**

KISII UNIVERSITY.....RESPONDENT

**RULING**

1. The applicant in the Notice of Motion Application dated 8<sup>th</sup> July, 2020 prays for an order *inter alia*:-

(a) Compelling the Respondent to admit the applicants back into her payroll.

(b) Restraining the Respondent from removing the applicants from the payroll of Kisii University and cause her to pay the applicants their respective salaries from the termination until the substantive petition is heard and determined.

2. The application is anchored on grounds set out on the face of the Notice of Motion marked (a) to (s) the nub of which is that the respondent unfairly, illegally, wrongly, irregularly; and unprocedurally terminated the employment of the applicants as evidenced in annexures marked MNS 5(a-d) MN6 (a-d) and MN7) (a-g).

3. The particulars of alleged unfair termination are outlined in items, (a) to

(b) in the application and buttressed in the supporting affidavit of the Petitioners sworn on 8/7/2020.

4. The respondents filed a replying affidavit on 5/8/2020 sworn to by Mr. Seth Ayunga Owiti an Assistant Legal Officer of the respondent University who deposes *inter alia* that the interim orders sought are substantive and final in nature and may not be granted until the Petition is heard and determined.

5. That the Court cannot descend to the arena and rewrite the contracts of the petitioners which contracts have been terminated.

6. That there is therefore nothing to be restrained and the application has been overtaken by events.

7. That the terminations were lawful, procedural and fair and any dispute of fact shall be heard and determined during the hearing on the merits.

8. The Court has considered the deposition by the applicant and that by the respondents and their respective submissions. The Court has taken into account the Court of Appeal decision in **Pius Kimaiyo Langat –vs- Co-operative Bank of Kenya Ltd. [2017] eKLR** where the Court held: -

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their employments contracts, unless coercion, fraud or undue influence are pleaded and proved.”

9. The Court has also considered the case of **Vivo Energy Kenya Limited – -vs- Maloba Petrol Station Ltd & 3 Others [2015] eKLR** where the Court stated:-

“As regards the exercise of discretion to grant an injunction, this Court reiterated as follows in **Nguruman Limited –vs Jan Bonde Nielsen and 2 Others:-**

In an interlocutory 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.

10. In the present case termination of employment of the Petitioners having happened prior to the filing of the suit and the application, the fairness or otherwise of the action taken by the respondent shall be determined upon hearing the suit on the merits.

11. The Applicants have multiple remedies available to them at the end of the hearing of the petition, if they be successful in their claims.

12. Accordingly, the application lacks merit and is dismissed with costs in the cause.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of February, 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 15<sup>th</sup> 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**

**Zachary Bori Gisiri & Co. Advocates for the Petitioner/Applicants**

**Nyamurongi & Co .Advocates for the respondent**

**Chrispo: Court clerk.**