



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 295 OF 2017

PROF CHARLES CHUNGE.....CLAIMANT

VERSUS

MASINDE MULIRO UNIVERSITY OF

SCIENCE AND TECHNOLOGY.....RESPONDENT

JUDGMENT

1. *Prof Charles Chung* (the Claimant) instituted these legal proceedings against Masinde Muliro University of Science and Technology (the University) on 4 July 2017, and he stated the Issues in Dispute as:

breach/unilateral alteration of the contract of employment, unfair labour practices, employment discrimination, intimidation and harassment, subjection to indignity and demotion of status, threatened irregular review of employment terms and constructive dismissal.

2. Filed at the same time was a Motion under a certificate. In the Motion, the Claimant sought interim protection from interference with his employment. The Motion was heard and determined.

3. The University filed a Response to the Claim on 13 September 2017, and since the Claimant did not take action to prosecute the Claim, on 26 November 2020, the Court directed that a Notice to Show-Cause why the Cause should not be dismissed be issued.

4. On 10 December 2020, the Court accepted the explanations tendered by the Claimant, and it directed the parties to file and exchange affidavits of evidence ahead of the delivery of the judgment, as the question in dispute did not require *viva voce* evidence.

5. The Claimant filed his affidavit and submissions on 21 January 2021 (should have been filed and served before 10 January 2021), while the University filed its affidavit on 8 February 2021. It filed submissions on 4 March 2021.

6. The Claimant raised 2 Issues in his submissions:

(i) Whether the Respondent's actions are unlawful, illegal, wrongful and a violation of the Claimant's terms of employment?

(ii) Whether the Claimant is entitled to general damages for employment discrimination and breach of contract of employment?

7. The Court has looked at the pleadings, affidavits and submissions. In its view, there is principally 1 Issue in contention, the question:

(i) Whether the Claimant qualified for an appointment to a professorship at the time of offer of the position of Executive Dean?

Background

8. The University advertised for several positions in January 2015. Among the positions was that of Executive Dean, School of Medicine.

9. The advertisement indicated that

The Executive Deans of Faculty/School are the academic and administrative heads of faculty/school. The Executive Deans shall, under the general direction of the Vice-chancellor through the Deputy Vice-Chancellor (Academic and Student Affairs), be expected to provide overall and strategic leadership to the faculty/school and to this extent shall have overall responsibilities for the direction, organisation, academic and administration of the programmes within the faculty.

The Dean of School of Medicine must have Candidates for this position should possess an earned PhD or equivalent and be senior scholars of at least the level of senior lecturer. They should have extensive experience in university teaching, research and administration as demonstrated by supervision of postgraduate studies and publications in scholarly journals. They should also have at least five years of experience in university management or equivalent.

The Executive Deans shall be expected to provide academic leadership in their area of specialisation and shall be required to dedicate at least forty per cent (40%) of their time to academic pursuits, including teaching responsibilities. ***The Executive Dean shall thus be simultaneously appointed to the position of professor in the teaching Department of their respective field of specialisation within the university and should thus, in addition, be qualified to be appointed as such.***

10. The Claimant was the only applicant for the Executive Dean's position, School of Medicine, and he was shortlisted on the strength of a doctoral degree and senior administrative experience. It was noted at that stage that he had not served as a chair of a department.

11. After interviews on 25 June 2015, the University Council agreed to appoint the Claimant (Dr Charles N Change) as Executive Dean, School of Medicine.

12. Consequently, the Vice-Chancellor wrote an offer letter to the Claimant on 27 July 2015 offering him Executive Dean's position, School of Medicine, and wherein the Claimant was addressed as *Prof* Charles Change. The Claimant accepted the offer and indicated that he would report on 1 October 2015.

13. However, on 10 March 2017, the Acting Registrar (Administration) wrote to the Claimant to notify him that he had been interviewed for the position of Executive Dean and not *a professor* in the School of Medicine. Therefore the inclusion of the title *professor* in the offer letter was in error.

14. The letter advised the Claimant that if he was interested in the position of Associate Professor or Professor in the School of Medicine, he was free to make an application for consideration.

15. The Claimant was not amused, and he responded to the letter on 15 March 2017 stating that he had had the designation of *professor* long before joining the University and that the offer letter was accurate in referring to him as *a professor* since the advertisement for the position of Executive Dean had indicated that there would be a simultaneous appointment to the position of *professor*.

16. The Claimant also indicated in the response that the University was attempting to alter his contract of employment mid-stream.

17. The acting Registrar fired a reply on 23 March 2017 reiterating that the Claimant had been offered the position of Executive Dean and not a professorship.

18. The Registrar also requested for proof of the Claimant's professorship, which he claimed to have acquired before joining the University.

19. The letters had taken a not so pleasant tone.

20. The Claimant reverted to the Registrar on 31 March 2017, maintaining his stance that Executive Dean's appointment went with an appointment as a professor (further correspondences were exchanged in not too civil a language).

21. The Claimant then cascaded his grievances to his trade union, the University Academic Staff Union.

22. The University then constituted an *Ad Hoc Committee* which met to review the Claimant's academic position and status to establish if he met the qualification(s) for the position of senior lecturer or professor (a score sheet was used).

23. After the review, the *Ad Hoc Committee* concluded that under the old criteria, the Claimant qualified to be appointed as a Senior Lecturer and not Associate Professor.

24. The *Ad Hoc Committee* also concluded that under the new criteria for appointment, the Claimant did not qualify for appointment to Associate Professor's position.

25. The Claimant then moved the Court.

Alteration of terms of the contract: What is in a name? Professor?

26. Those interested in literature are familiar with the quote from the Shakespearean play *Romeo and Juliet*:

What's in a name? That which we call a rose by any other name would smell as sweet.

and they would not be surprised with the dispute herein where the Claimant asserts that he was appointed as a *professor* at the same time he was appointed an Executive Dean by the University because he held the requisite qualifications, including that of being an honorary lecturer at the Royal College of Physicians and Surgeons, Glasgow.

27. As already stated, the University advertised for the position of Executive Dean, School of Medicine. The advertisement expressly

provided that the successful candidate for the position of Executive Dean would be appointed a professor at the same if the candidate qualified to be appointed as such professor.

28. The question then emerges whether the Claimant satisfied the University at the material time at the first instance that he qualified for appointment as a professor and whether he has proved in this Court to the required standard that he had the qualifications for the position of a professor.

29. Regrettably, the Claimant did not attempt to lay any evidential foundation before the Court as to the qualifications one required to be appointed as a professor in 2015.

30. Nevertheless, the Court has looked at the minutes of the *Ad Hoc* Committee's proceedings, which was to review the Claimant's position. The minutes give an inkling of some of the qualifications for a professorship.

31. Some of the qualifications that one aspiring for a professorship need to demonstrate were that one has been involved in research and innovations, has attracted research funds and has supervised at least 4 postgraduate students to completion with at least 1 doctoral student.

32. The criteria used by the University to evaluate the Claimant's qualifications for a professorship were a mirror reflection of the Commission for University Education's *Harmonised Criteria and Guidelines for Appointment and Promotion of Academic Staff in Universities in Kenya, 27 October 2014*.

33. It was incumbent upon the Claimant to satisfy the University during his interview in 2015 that he possessed the qualifications to be appointed as professor. It appears he did not. When he later raised the issue, an *Ad Hoc Committee* was formed, and it established that he did not qualify.

34. Since the Claimant did not have the qualifications for the position of professor in 2015, the Court is unable to buy his argument that the reference to him being a *professor* in the offer letter was sufficient to bestow the position upon him.

35. The position of a professor being an appointive and academic office with minimum standards, the Court agrees with the University that the use of the term *professor* in the offer letter was in error, and it was rightly corrected.

36. The Court finds that there was no unfair, unlawful, arbitrary and or unilateral alteration to the Claimant's contract.

Conclusion and Orders

37. From the foregoing, the Court finds no merit in the Cause. It is dismissed with costs to the Respondent.

Delivered through Microsoft teams, dated and signed in Kisumu on this 10th day of March 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant Mr Otsiula instructed by J.B. Otsiula & Associates Advocates

For Respondent Mr Dickens Ouma, Advocate instructed by the Federation of Kenya Employers

Court Assistant Chrispo Aura