



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO E002 OF 2021

PROF. THOMAS EKAMAIS AKUJA..... CLAIMANT

-VERSUS-

TURKANA UNIVERSITY COLLEGE

COUNCIL.....RESPONDENT

RULING

1. Before this Court is the Claimants Application dated 25th January, 2021 filed through the firm of Matunda and Company Advocates seeking the following Orders; -

1) THAT this Application be certified as urgent and the same be heard ex-parte in the first instant.

2) THAT pending the inter-parties hearing and determination of this Application, the Honourable court be pleased to issue orders restraining the Respondent and/or any other person or entity whether by themselves or by their agents, from accepting any applications and subsequently recruiting and substantively filling the position of Principal of Turkana University College.

3) THAT pending the hearing and determination of this Claim, the Honourable court be pleased to issue orders restraining the Respondent and/or any other person or entity whether by themselves or by their agents from accepting any applications and subsequently recruiting and substantively filling the position of the Principal of Turkana University College.

4) THAT pending the hearing and determination of this Application, the Honourable Court be pleased to issue an order directing the Respondent to unconditionally reinstate the Claimant to employment as the Principal of Turkana University College without any loss of benefits, seniority and emoluments.

5) THAT pending the hearing and determination of this Claim, the Honourable Court be pleased to issue an order directing the Respondent to unconditionally reinstate the Claimant to employment as the Principal of Turkana University College without any loss of benefits, seniority and emoluments.

6) THAT the Honourable Court be pleased to make such further Orders and/or Directions that are necessary for the ends of justice.

7) THAT the Respondent be condemned to pay the Costs of this Application.

2. This application is founded on the grounds set forth herein and in the supporting affidavit of the claimant/ Applicant **PROF.THOMAS EKAMAIS AKUJA** sworn on 25th January, 2021.

3. The claimant avers that he was appointed by the then Cabinet Secretary of Education Ambassador Dr. Amina Mohammed vide a letter of appointment dated the 27th June, 2018 as the Principal of Turkana University College for a period of 5 years.

4. The Claimant states that, he executed his roles, responsibilities and duties diligently and faithfully in accordance with the contract of employment, and staff/employee regulations until the 29th January,2020 where the Respondent unilaterally and illegally put him on an indefinite compulsory leave without any justifiable reason forcing the claimant herein to file a suit challenging the indefinite compulsory leave vide **Nakuru ELRC PET NO. E003 of 2020 Prof Thomas Akuja vs Turkana University College** filed on 2nd November, 2020.

5. That, prior to filling the said suit, the respondent through its chairman, wrote a show cause letter dated 26th February, 2020 which the

claimant herein respondent on even date and raised further concerns which required a response from the respondent but the respondent failed to respond to the said letter.

6. On 17th September, 2020, the claimant avers that, he received another show cause letter when show cause letter of 26th February, 2020 was still pending hearing, and he equally responded to the same by his letter of 25th September, 2020. The respondent immediately summoned the claimant by the letter of 12th October 2020 for a disciplinary hearing scheduled for 22nd October, 2020 which the claimant appeared. He indicates that during the said meeting he requested to be furnished with more particulars which request was declined and the hearing was adjourned to the next day.

7. On 23rd October, 2020, the claimant states that he appeared before the disciplinary committee and since he was dissatisfied with the way the said proceedings were handles and the fact that they had not furnished him with documentation he had earlier requested, he was constrained to request for another date and left the meeting.

8. It is alleged that the Respondent then hastily and illegally proceeded and conducted disciplinary proceedings on the same day, in the absence of the claimant and dismissed the Claimant from employment by a letter dated 14th January, 2021 during the pendency of the Petition aforesaid rendering the aforementioned constitutional Petition nugatory.

9. The claimant contends that, the fact that the disciplinary process went over for over Eleven (11) months made the entire disciplinary process a nullity for failure to comply with the Human Resources Manual under **Section D5.22(c)** and **section 63 of the Universities Act No. 42 of 2012**, which dictates that any disciplinary process ought to be completed within 6 months.

10. That, by a letter dated the 18th January, 2021 from the Principal Secretary Ministry of Education addressed to inter alia the Respondent herein has since advised the Respondent to start the process of replacement of the Claimant herein.

11. The claimant contends that the summary dismissal is unlawful, unfair and illegal and the same is a nullity for failure to adhere to mandatory provisions of the Employment Act 2007, Universities Act 2012 and the Constitution of Kenya 2010.

12. He alleges that the termination from employment was actuated by ill motive and was driven by malice and a keen desire to injure the Claimant's reputation and career in the most callous manner. Further that he was never accorded any genuine opportunity to be heard, neither was he furnished with the requested documentation to enable him prepare his Defence. Further that, the Respondent did not explain the true and/or genuine reasons and/or grounds for summarily dismissing the Claimant.

13. He indicated that the Respondent's conduct of terminating his employment was a demonstration of bias, bad faith, devoid of merit and/or intended for some mischievous purpose inconsistent with the mandate of the Respondent and amounts to unfair and wrongful termination within the contemplation of Section 41, 44 and 45 of the Employment Act, 2007. Which resulted to him suffering prejudice, difficulty and unnecessary anxiety at a family level, lost business partners and has been shamed by his peers.

14. It was further stated that the dismissal has had devastating financial and psychological effect on the Claimant who was a senior officer and if the Court does not intervene as a matter of urgency and reinstate the Claimant, equity and justice will be defeated.

15. Further that, the psychological injuries, emotional and financial problems sustained by the Claimant consequent to the wrongful conduct by the Respondent, must therefore, be capable of redress to avoid the law of the jungle from taking precedent.

16. The respondent vehemently opposed this application and filed a replying affidavit sworn by **Dr. S.J Muchina Munyua**, the Chairperson of the Respondent Council, on the 16th February, 2021.

17. The respondent avers that the application herein is incurably defective, incompetent, a non-starter and devoid of merits whilst his supporting affidavit is merely a misrepresentation of facts tailored to mislead and win sympathy of this court unfairly and unjustly.

18. It admitted that the Claimant was employed as the principal of Turkana University College(TUC) but contends that he is subject to the provisions of the Universities Act, The Turkana University College Order, 2017 and Turkana University College, Human Resource Manual amongst other laws.

19. It was stated that the Respondent herein was appointed as the Manager of Turkana University College and thus reserved the right to exercise disciplinary control over the Claimant as its employee.

20. It is alleged that, the claimant herein being, the respondent secretary was tasked with preparing the agenda of its meeting of the 29th January, 2020 which included staff matters and that when issues concerning the claimant's work conduct arose in the said meeting, the committee requested the Claimant to leave the meeting because the matters touched on him.

21. The Respondent states that, when the agenda against the Claimant was finalized it was resolved that the Claimant do proceed on compulsory leave and a letter to that effect was issued to the Claimant but the compulsory leave was not indefinite as suggested by Claimant. Further that the claimant challenged the said resolution vide **Eldoret ELRC 10 of 2020: Prof Thomas Ekamais Akuja –versus-Turkana University College** and a ruling was delivered on 26th June,2020 by Justice J. Abuodha dismissed the application that was challenging the Respondent's decision to place the Claimant on compulsory leave and the claimant rushed to this Court vide **ELRC Petition E3 of 2020: Prof Thomas Ekamais Akuja –versus-Turkana University college Council** which was equally declined.

22. The respondent avers that, it is empowered under section 16 of the Turkana University College Order, 2017 and section E 2.11 of the

Turkana University Human Resource Manual to place any of its members of staff on compulsory leave pending determination of disciplinary proceedings.

23. The respondent states that, the delay to handle the disciplinary proceedings was occasioned by the expiry of the former Council which expired on 9th March, 2020 and the claimant disciplinary process could not proceed till the appointment of a new council, which was done through a Gazette Notice issued on 19th May, 2020 and the said Council was subsequently inaugurated on 27th May, 2020.

24. It was indicated that when the new council resumed office it prioritized the Claimant's matter and in the process of reviewing, it unearthed additional misconducts against Claimant thereby prompting the issuance of a further Notice to Show Cause dated 16th September, 2020 which contrary to the Claimant's allegations was issued in good faith and was based on the new findings of the Council.

25. The respondent states that the claimant was given ample opportunity to respond to the notice to show cause which he did by his letter dated 25th September, 2020 and the first hearing was scheduled for 22nd October, 2020 in respect of the charges contained in the 'show cause' letters dated 22nd March, 2019, 26th February, 2020 and 16th September, 2020. In addition, the respondent states that, the applicant protested the said hearing by a letter dated 15th October, 2020 and even demanded for recusal of one of the council member known as Mr. Wambutura.

26. The respondent states that it supplied the claimant with the committee rules as requested and on 22nd October, 2020, the Claimant appeared before the Disciplinary Committee together with counsel of his choice, an employee of his choice and 2 union representatives. They were allowed ample time to justify the recusal of Mr. Wambutura through the Claimant's own testimony and that of his witnesses which the council allowed and exclude Mr. Wambutura from hearing on the said date.

27. That, being dissatisfied with the ruling of the DCC on preliminary issues the Claimant and his entourage without any justifiable basis or notice, rudely protested against the DCC and interrupted the proceedings by walking out thereby bringing the disciplinary hearing to an abrupt and premature ending and the disciplinary committee was forced to adjourned.

28. On 26th October, 2020 the claimant demanded to be reinstated to work when he knew that the disciplinary proceedings had not been concluded. Further that the respondent send a second invite for the disciplinary hearing and while awaiting a response the claimant sought to block the said disciplinary hearing vide **NAKURU ELRC PET.3 OF 2020** which application was dismissed culminating to the instant cause which according to the respondent seeks similar reliefs as such is res judicata.

29. The Respondent contends that, the Claimant has never been desirous to have the disciplinary proceeding concluded and that is why he has always and continues to frustrate the process by abusing judicial process hence the resultant multiplicity of disputes over same issues which remain pending in various courts and urged this court to take judicial notice of the Claimant's litigiousness and abuse of court process.

30. That upon the dismissal of the Claimant's application for injunction, the DCC in its resolve to conclude the process invited the claimant to a disciplinary hearing on 23rd December, 2020 which the Claimant attended the hearing with a counsel of his choice and a union representative and as the norm were afforded ample opportunity to participate in the proceedings and were supplied with all available documents but instead of proceeding with hearing they continued to raise unnecessary objections more so in an ungovernable manner. However, since the DCC was functus officio to consider the objections in view of its ruling made on the same on 22-10-2020 the Claimant and his team were ruled to be out of order and ordered to proceed to lead evidence on the matter before the DCC and instead of proceeding with their case they all once again walked out leaving the DCC with no other option but to proceed with hearing, their absence notwithstanding.

31. That having heard evidence from witnesses called in support of Claimant's dismissal and in the absence of any evidence to rebut the available evidence on record, DCC reached a unanimous verdict in which the Claimant was found guilty of the charges of gross misconduct and the DCC unanimously decided to summarily terminate his employment.

32. The Respondent avers that, the applicant was afforded opportunities to participate in the disciplinary process but deliberately failed to participate in the said hearing and deliberately, albeit with his counsel's advice, squandered these chances hence cannot blame Respondent for his indolence and high handedness. Further that the claimant was not denied vital information. On the contrary, the Respondent through the DCC availed to him available and relevant records. His insistence on documents which were not in the Respondent's possession smirks ill-will and intention to derail the process unnecessarily. In any event, the Claimant was at liberty to request for information from the relevant entities including the EACC and DCI under section 9 of the Fair Administration of Actions Act and cause them to be admitted pursuant to the amended rules of business.

33. The Respondent contends that, it facilitated a conducive environment for the Claimant to present his evidence to rebut the charges against him. Claimant was allowed to have a counsel of his choice, an employee of his choice, a union official or any other expert for his own comfort. Secondly, the rules of business were flexible and were amended as per the wishes of the Claimant to disallow production of fresh evidence at any stage of the hearing. Finally, Claimant's objections were not merely dismissed; they were determined on merit after a mini-trial.

34. The respondent states that, it did not deliberately delay disciplinary proceedings beyond six (6) months or that proceedings vitiated after six (6) months. On the contrary, the new Council once gazetted on 19th May, 2020 immediately conducted the disciplinary proceedings on priority basis within 6 months and if there was any delay it was occasioned by extraneous factors beyond Respondent's control. Further that, due to the ravaging effects of Covid-19 pandemic between March and November, 2020 and protocols that had been put in place by Government of Kenya through the Ministry of Health that limited gatherings, the respondent could not sit as usual.

35. The Respondent, further states that, the Claimant's employment was terminated lawfully and properly pursuant to the procedure set out under the provisions of the Constitution of Kenya, Employment Act, 2007; Universities Act and Turkana University Human Resources Manuals and the claimant is merely abusing court process to stifle lawful processes and this court should take judicial notice of the 2 matters pending before Eldoret Employment & Labour Relations Court and this court touching on the same subject matter as well as jurisdiction, illustrated in filing in a far flung court station considering the respondent's location and where the cause of action arose.

36. The respondent avers that it is mandated by law to carry out disciplinary action against its employees and this Honourable Court can only intervene when the process is flawed.

37. It is contended that, the Claimant intends to hold onto these proceedings indefinitely thereby holding the Respondent in ransom and this may likely affect the general operations of the Turkana University College thereby risking the academic lives and careers of the approximately 700 students enrolled at the institution.

38. Finally, the respondent stated that the claimant has failed to establish a prima facie case. Furthermore, it is alleged that public interests and scales of justice militate against the grant of the orders sought herein as the student fraternity and the general public are desirous of receiving quality and uninterrupted services from the institution and the recruitment of a substantive Principal is a means of achieving the aforesaid desire. Therefore, urged this court to dismiss the said application.

39. The claimant herein with leave of court, filed a supplementary affidavit sworn on 22nd February, 2021, reiterating his application and in addition stated that he duly attended all the disciplinary meeting by the respondent without fail and only failed to participate till the end when the respondent refused to furnish him with all the requisite document to allow him mount a formidable Defence on the issues leveled against him.

40. On whether, the suit herein is res judicata, the claimant avers that this suit was filed after he was unlawfully dismissed by the respondent and is not in any way similar to his previous suits in any event such suit has now been overtaken by events and the cause filed at Employment and Labour Court in Eldoret has since been withdrawn as per the annexed notice of withdrawal.

41. The application herein was canvassed by written submission with the applicant filing his on 2nd March, 2021 and the Respondent filed their on 11th March, 2021.

Claimant's Submissions.

42. The Claimant submitted that that he was unfairly dismissed from employment and that being the case, this court will ultimately be called upon to determine whether the summary dismissal by the respondent was lawful. He thus submitted that this in itself is a prima facie case rife for the court to grant injunctive order as illustrated in the celebrated decision in **Mrao ltd- versus First American Bank of Kenya Ltd 7 2 others [2003] eklr**.

43. He submitted that, it is undoubtedly that the claimant will suffer harm if the interim reliefs are not granted as he stands to lose his employment when under his contract of employment, he still has 2 more years before the end of the employment contract.

44. The claimant argues that the greater risk lies with him who is likely to lose employment than with his employer who has yet to fill the said vacancy and cited the case of **Amir Suleiman –versus Amboseli resort limited [2004] eklr** where the court held that;-

“A fundamental principal is that, the court should take whichever course appears to carry the lower risk of injustice if it turns out to have been wrong...”

45. On whether the court should grant the 2nd limb of the prayer and reinstate the claimant, it was submitted that the Court ought to reinstate the claimant or in the alternative stop the respondent from recruiting a substantive principal till this suit is heard and determined. Further that this Court has immense powers to intervene in disciplinary process to avert breaches of law and buttress his argument by relying on the case of **Anne Wambui Kamuiru –versus- Kenya airways limited [2016] eklr** where this Honourable court made a finding as follows;

“There is a convergence in agreement that an employer who commences disciplinary proceedings must ensure due process, fair hearing and due regard to natural justice. The Courts on their part will not interfere with proper internal disciplinary processes unless the Court is satisfied that the process is marred with irregularities or it is stage managed towards dismissal.”

46. The claimant, submitted further that the power to order interim reinstatement of an employee is granted to this court by dint of section 49(3) of the Employment Act and section 12(3)(vii) of the Employment and Labour relations Court Act. And cited the case of **Ahmed Aden hire –versus- Natif Jam and County Government of Garissa[2016] eklr** which court stated that the orders of reinstatement is a specific performance order with finality, that can only be invoked when the court is faced with exceptional circumstances warranting the same. This view was equally held in the case of **Alfred Nyungu Kimungui Versu Bomas Of Kenya[2013] eklr**. Where the court held that;

“The Employment Act 2007 places the burden of justifying termination decision, and showing the fairness of procedure, on the employer. In rare cases where interim reinstatement may be granted, the termination must be shown to be patently unfair, that even the ultimate remedies of compensation or reinstatement with back wages, would not have redressed the injury suffered by the employee in the pendency of the full hearing. Certain forms of termination grounds, the kind that result in automatically unfair termination such as pregnancy, race, gender or religious discrimination, may warrant the rare

exercise of the Court's discretion in issue of interim reinstatement. This is more so particularly under the new liberal Constitution of Kenya, which frees the hands of the Courts in administration of justice."

47. The claimant argues that the entire process which the respondent adopted in the disciplinary process was flawed and exceptional in nature since the respondent used all means possible including denying him critical document. Locking his advocate out of the meeting to frustrate the process. He thus equates these acts to exceptional circumstance that this Court should consider while reinstating him in the interim. He further urged this court to make similar finding as was this Honourable Courts decision in the case of **Walter Kiplagat Serem – versus- Turkana University College Council [2020] eklr.**

48. It was further argued that, unless the claimant is reinstated to his previous position in the interim the substratum of the whole suit would be lost considering the time the suit might take to conclude in light of the Two (2) years remaining in the claimant's contract. Further that the fact that a claimant would be entitled to damages should not be used to deny the claimant an order for reinstatement as was observed in the case of **Hedwig Nyalwal –versus- Kenya Institute of Supplies Management [2020] eklr.**

49. The Claimant thus urged this Court to consider his application and reinstate him pending the determination of the Cause herein.

Respondents Submissions.

50. The respondent submitted that this Court has been called upon to determine whether it should interfere with the respondent's internal disciplinary process that are prima facie fair, secondly, whether a party who voluntarily forfeited his right to be heard under employment Act can challenge the said decision and finally whether public institutions should be held at ransom by employees' belligerence.

51. The respondent submitted that, the applicant is mandated to satisfy the threshold for granting of injunctions set out in the locus classicus case of **Giella –versus- Cassman Brown ltd (1973) EA 358** and submitted that the claimant has not made out a prima facie case with any probability of success, neither does he stand to suffer any irreparable loss that cannot be compensated by damages. Further that the balance of convenience tilt in favour of the respondent which is at the verge of a crisis should the injunction order be granted.

52. The respondent submitted that, from the evidence brought before this Court, the court is not in any position to ascertain a prima facie case without delving into full trial, thus urged this Court to decline the interim order and allow parties to ventilate the issues herein during hearing of the main suit. He relied on the case of **Rose sang –versus- Signon Group Limited [2020] eklr** where the court held that.

"In the instant application, I find that it is not possible to determine if the applicant has a prima facie case as this would only become determinable after hearing evidence from both parties. I say this because the issues of contention, that is whether the grounds for dismissal were those in the notice to show cause or not is a matter that the parties do not appear to have a mutual interpretation. The other determinant of a fair termination, that is hearing and an opportunity to respond to the changes, appear not to be contested. Both parties agree that there was a notice to show cause that was responded to by the applicant, and that thereafter there was a disciplinary hearing."

53. The respondent submitted that, the claimant has not led any evidence to demonstrate the harm he is likely to suffer if the interim injunctive orders are not granted or whether the said harm if any cannot be compensated by way of damages as envisioned under section 49(1) of the Employment Act. The respondent to buttress his argument herein relied on the case of **Rose sang (Supra)** where the learned Judge held that;

"On the second determinant, the applicant has not demonstrated the loss she will suffer that is incapable of remedy by way of costs or monetary compensation should the orders not be granted. In the claim she has sought reinstatement or in the alternative payment of compensation."

54. Accordingly, it was submitted that the harm the claimant may be exposed to by denial of the injunction is not irreparable, on the contrary award of damages is adequate relief. Equally, the respondent is not impecunious.

55. It is the respondent's submission that, the balance of convenience tilt in favour of Turkana University College that has not had a substantive principal since 29th January, 2020 and that it is not tenable that the affairs of the respondent be held at ransom on account of the claimant private interest. He relied on the case of **Rose sang (Supra)** which court held that;

"On the third limb of balance of convenience, the applicant occupied the position of Group Human Resource Manager. This is no doubt, a very Senior Position in an organization. The applicant has not demonstrated how the roles of that position would be fulfilled if it is left vacant to await the final determination of the suit she has filed. In the opinion of the court, there is no reason for not reinstating the claimant to her original position if she persuades the court that she is entitled to the orders. It would then be the problem of the respondent to deal with the person who would then be occupying that position. I thus find that the balance of convenience tilts in favour of not granting the orders sought."

56. On the issue of reinstatement pending hearing of the main cause, the respondent submitted that as much as this Honourable Court is clothed with the powers to grant reinstatement as envisaged under section 49(3) of the employment Act, the same powers have to be exercised in exceptional circumstances as was held in the case of **Kenya Airways limited –versus- aviation workers' union Kenya & 3 other [2014] eklr.**

57. The respondent further argued that, reinstatement can at the very least be granted after the court has had an opportunity to interrogate the facts and the evidence during hearing of the main suit and not at an interlocutory stage and cited the case of **Kenya Shipping clearing freight logistics and warehouse workers union –versus- May Freight ltd [2020] eklr** which Court held that;

“The said factors, in my view can only be properly brought out by evidence during the hearing of the main suit and not at the interlocutory stage. I gather support from Kenya Tea Growers Association & another v Kenya Plantation & Agricultural Workers Union [2018] eKLR the Court of Appeal held,...In our view, the circumstances in the present case militated against granting the order for reinstatement particularly at an interlocutory stage...We agree entirely with the statement by Rika, J in Alfred Nyungu Kimungii vs Bomas of Kenya [2013] eKLR that “Ordinarily, reinstatement of an employee is a substantive remedy, not a temporary relief. The law does not contemplate that reinstatement issues (sic) as a provisional measure. It is a remedy that should normally be granted upon the full hearing of the employer, and the employee.”

58. Equally, the respondent, submitted that the claimant has not set out any exceptional circumstances contemplated before granting of reinstatement pending trial of the main suit and urged this Court to disallow he said prayer.

59. The respondent submitted that, the issue raised by the claimant that his contractual time shall have lapsed is misplaced as it is trite that pending reinstatement the contract period does not continue running therefore besieged this court not to be persuaded by the claimant line of thought and proceed to dismiss the entire application.

60. I have examined the averments of the parties herein. The applicant contends that he was unfairly terminated and wants this court to reinstate him in the interim pending hearing and determination of this claim.

61. The applicant also wants the respondents in the alternative barred from filling up the position he formerly occupied pending hearing of the main claim.

62. The respondents have opposed this application and contend that they followed due process in dismissing the claimant and no interim orders should be granted.

63. In determining if the orders sought are tenable or not, this court ought to consider if the applicant has established a prima facie case with a likelihood of success.

64. In considering this, I note the argument of the claimant the disciplinary process was flawed because it took 11 months instead of the 6 months envisaged.

65. He also avers that the dismissal was actuated by malice and a keen desire to injure his reputation and career in the most callous manner.

66. The applicant has not however demonstrated why he thinks that there was malice in his termination.

67. On the face of it, it is evident that there were some flaws on the way the disciplinary process was conducted having lasted 11 months instead of 6 months and also the respondent having failed to supply to the applicant some documents requested before the disciplinary hearing. This in itself shows flaw in the disciplinary process.

68. That notwithstanding, that would not be a good reason to have the applicant reinstated. This is so because reinstatement is not the only remedy in a case of a wrongful dismissal.

69. In any case, the applicant can be compensated in any other way including monetary if court finally finds his termination unfair and unjustified.

70. In the alternative however I find the prayer to bar the respondent from filling up the vacancy occupied by the applicant also not tenable.

71. Given that we are dealing with a learning institution and we cannot hold it at ransom not to recruit a Vice Chancellor and if the claimant's case is proved, he can be compensated in monetary terms.

72. Costs in the case.

RULING DELIVERED VIRTUALLY THIS 29TH DAY OF APRIL, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Matunda for claimant/applicant – present

Odongo for respondent – present

Court Assistant - Fred