REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT KERICHO

JUDICIAL REVIEW APPLICATION NO. E1 OF 2020.

IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE A

MOTION ON JUDICIAL REVIEW FOR AN ORDER OF CERTIORARI.
AND

IN THE MATTER OF EMPLOYMENT ACT NO. 11 OF 2007

AND

IN THE MATTER OF CIVIL PROCEDURE ACT (CAP 21)

AND

IN THE MATTER OF THE CIVIL PROCEDURE RULES 2010. AND

IN THE MATTER OF THE LAW REFORM ACT (CAP 26) SECTION 8 & 9.

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT (NO 4 OF 2015)

AND

IN THE MATTER OF THE UNIVERSITIES ACT (NO 42 OF 2012)

BETWEEN

GODFFREY NAKHAYO ODEBERO...APPLICANT

-VERSUS-

THE VICE-CHANCELLOR KABIANGA UNIVERSITY

PROF. WILSON K. KIPNGENO)..1ST RESPONDENT

THE DEPUTY VICE-CHANCELLOR ‘ADMINISTRATION AND

FINANCE KABIANGA UNIVERSITY

(PROF. ERICK K. KOECH).. 2ND RESPONDENT

THE MANAGEMENT BOARD KABIANGA UNIVERSITY...3RD RESPONDENT

KABIANGA UNIVERSITY..4TH RESPONDENT

RULING

The Application

1. The Applicant, **Godffrey Nakhayo Odebero**, was employed by Kabianga University, the 4th Respondent herein on 22nd December, 2009 as an assistant accountant. On 1st July, 2020 his basic salary was increased from Kshs. 68,512/- to Kshs. 82,552/-. However, on 21st day of October, 2020 the 4th respondent through an internal memo directed that the salary increment of 1st July, 2020 has been suspended and that, the claimant will be paid his initial basic salary of Kshs. 68,512/-.

2. Consequently, the applicant filed this application by way of a Chamber Summons dated 26th October 2020, through the firm of Oboso & company Advocates under Order 53 Rule 1 (1) and 2 of the civil procedure rules, section 8 & 9 of The Law Reforms Act and all other enabling provisions, seeking the following orders:

> **a) THAT this Honourable court may be pleased to grant leave to the applicant to file a motion on judicial review for orders of certiorari removing unto this Honourable Court for purposes of being quashed forthwith the respondents' decision to reduce the basic salary of the Applicant as communicated by the 2nd respondent through an internal memo dated 21st October, 2020 together with all subsequent acts done by the respondents in fulfillment of the impugned decision, arising there from and /or connected thereof.**
>
> **b) THAT that the leave once granted do operate as a stay of the respondents' decision to reduce the basic salary of the applicant as communicated by the 2nd Respondent through an internal memo dated 21st October, 2020 until this court further directs.**
>
> **c) THAT the costs of this application be in borne by the respondents.**

3. The application was supported by the grounds set out in the verifying affidavit sworn on 26th day of October, 2020 by **Godffrey Nakhayo Odebero,** the applicant herein. It was his case that he was employed as an accountant by the respondents on the 22nd December 2009 and attached a copy of the letter of appointment marked as annexure GNO-1.

4. That until 30th June, 2020, the applicant was earning a basic salary of Kshs. 68, 512/- as evidence in the annexed pay slips marked as annexure GNO-2, which was increased to Kshs 82,552/- effective from 1st Day of July, 2020 and equally annexed his pay slips marked as annexure GNO-3.

5. He avers that on 21st October, 2020, the 2nd Respondent on behalf of the 1st , 3rd and 4th Respondents issued an internal memo through which they purported to suspend the salary increment of 1st July, 2020 and that the applicant was to earn his earlier salary of Kshs. 68,512/- and attached the said Memo marked as annexure GNO-4.

6. He contends that the respondent did not seek his consent before the said decision was made. Further that the 4th Respondent has the financial capacity to maintain the salary increment that was implemented on 1st July, 2020.

7. He averred that he has committed a significant portion of his salary to offset two bank loans that he is servicing and that if the Respondents are allowed to reduce his salary then he is likely to default in the payment of the bank loan exposing him to risks such as being listed with the credit reference bureau and failing to provide for his family.

8. That on 2nd October, 2020, all staff of the 4th Respondent were ordered to resume duty after the Covid-19 lockdown and that he has been performing his duties diligently to date.

9. It was averred further that the 4th Respondent reopened on 7th October, 2020 and are currently conducting examinations for the final year students. Further that no student is allowed to sit for exam if they have not completed payment of fees therefore he stated that the 4th Respondent has money to pay him at the scale of the salary increase.

10. He contends that the conduct of the respondents is an abuse of the powers conferred upon them by the Universities Act 2015 and the employment Act. Thus, urged this Court to allow the application herein for leave to file the motion quashing the respondents' decision of 21st October 2020.

The response.

11. The application was opposed by the respondents who filed a replying affidavit sworn by **Professor Eric Koech**, the deputy vice chancellor (Administration and finance) of the 4th respondent, on 11th November, 2020 on the following grounds:

> a) That this Honourable Court lack jurisdiction to grant leave as the applicant is an employee serving the university engaged on a contract of employment therefore, he ought to have filed an employment claim not a judicial review.
>
> b) Further that the applicant has not filed any statement of claim and served it upon the respondents as required by the rules of procedure.

c) It is averred that the issue complained of by the applicant of salary withheld should be remedied through the well-established dispute resolution mechanisms as provided for under section 25(2) of the Employment Act. Further that the applicant should have exhausted all alternative remedies before filing this suit as provided for under section 9(2) &(3) of the Fair Administrative Act.

d) It is averred that the Applicant was consulted and was well aware of the decision of 21st October, 2020 that he now intends to challenge. Further that the applicant was a member of the joint implementation committee dated 8th July, 2020 that signed the report on 2017-2021 Collective Bargaining Agreement (CBA). They annexed the report on the CBA, meeting minutes of 19th October 2020 and meeting of 21st August, 2020 marked as annexure EK-A,B & C respectively.

e) It is contended that the applicant has contradicted himself and indeed confirmed that there was consultation on the issue subject of the proceedings herein as provided for under section 10(5) of the Employment Act as evidence in the letter attached by the claimant which they equally produced and marked as annexure EK- D.

f) The Respondent contends that the salary increment was just postponed as indicated in the internal memo and the same shall be implemented when the 4th Respondent acquires funds.

g) It is averred that the 4th respondent was allocated **Kshs. 100,547,100/-** for payment of the Collective Bargaining Agreement (CBA) arrears for the year 2017/2018, 2018/2019 and 2019/2020 with an indication that another provision will be made for the financial year 2020/2021. However, the respondent states that, they have not received any provision to service the salary increment for this financial year and annexed a letter from the principal secretary ministry of education, state department of university education and research marked as annexure EK-E.

h) The respondent's affiant states that, the 4th Respondent like many other institution are undergoing difficulties brought about by the Novel Covid-19 pandemic. further that, it has been very considerate by not invoking section 40 of the employment Act on redundancy and or insolvency under part 8 of the Employment Act.

i) It is further stated that the permanent injunction sought by the applicant in his motion filed herein is not one of the prayers contemplated under Order 53 of the Civil Procedure Rules and the Law Reforms Act.

j) The Respondents indicated that the decision intended to be challenged was arrived at on merit and the 4th respondent is financially challenged that if the application herein is allowed to proceed for hearing, the university might not be able to stay afloat.

k) They thus urged this Court to disallow the chamber summons by the Applicant with costs to the respondents.

12. On 22nd January, 2021, the applicant herein filed a further affidavit and stated that this Honourable Court has jurisdiction to hear and determine this application by virtue of Article 162(2) and 165 of the constitution of Kenya. Further that contrary to the Respondent allegation, he filed his statement of claim on 26th October 2020 and annexed a copy as GNO-1.

13. He avers that the salary reduction has already been implemented as shown in his pay slip marked as GNO-2 in violation of section 17(1) of the Employment Act even though he never gave his consent whatsoever to the respondents to reduce his salary as alleged.

14. The applicant took issue with the minutes attached by the respondent and contends that it does not reflect the true position of what transpired in the meeting of 11th November, 2020. In addition, he states that the issue of implementation of 2017-2021 CBA does not reflect in the minutes of 11th November 2020 annexed to the respondents' replying affidavit.

15. It is averred that the respondents have not availed any evidence on its inability to continue paying the salary increase, neither have they given timelines within which they will pay the withheld salary as such the applicant is skeptical that the salary reduction is permanent.

16. The applicant further indicated that there are two CBAs being CBA No. 1 of 2020 and CBA No. 2 of 2020 pending for judgement in Employment and Labour relations Court at Nairobi and sought for stay of this matter till the said CBAs are determined as they are likely to affect the outcome of this matter.

17. He further stated that the respondents have failed to implement the Ruling of Honourable Lady Justice Maureen Onyango delivered on 3rd July, 2020.

Submissions

18. The application was canvassed *inter partes* by way of written submissions. The Applicant submitted that he is merely seeking leave of this Court to file a judicial review motion to quash the decision of the respondents communicated by internal memo on 21st October, 2020 that reduced his salary. He thus submitted the grounds that this court ought to consider when determining an application for leave to file a Judicial Review Application and cited the case of **Agutu Wycliffe nelly –versus- office of the registrar of academic affairs Dedan kimathi university of technology DEKUT [2016] eklr.** Where the court held:

> **"The first step in the judicial review procedure involves the mandatory "leave stage." At this stage an application for leave to bring judicial review proceedings must first be made. The leave stage is used to identify and filter out, at an early stage, claims which may be trivial or without merit. At the leave stage an applicant must show that he/she has 'sufficient interest'**

in[4]the matter otherwise known as locus standi. In other words, the applicant must demonstrate that he/she is affected in some way by the decision being challenged. An applicant must also show that he/she has an arguable case and that the case has a reasonable chance of success. The application must be concerned with a public law matter, i.e. the action must be based on some rule of public law. The decision complained of must have been taken by a public body, that is a body established by statute or otherwise exercising a public function.

Thus, at the leave stage, the applicant has the burden of demonstrating that the decision is illegal, unfair and irrational as discussed above. The applicant must persuade the court that the application raises a serious issue. This is a low threshold. A serious issue is demonstrated if the judge believes that the applicant has raised an arguable issue that can only be resolved by a full hearing of the judicial review application. If the court is not persuaded as aforesaid, leave will be denied and the matter proceeds no further."

19. He submitted that the decision of the respondents to reduce its' employee's salary was contrary to the express provision of section 10(5) of the Employment Act and Article 41 of the constitution of Kenya. Further that, the decision is unfair, illegal and irrational.

20. He further cited the case of **Kenya County Government Workers Union –versus- Wajir County Government 7 another [2020] eklr** where this Honourable court held that;

"The unilateral decision by the Respondent to initiate salary reduction to its employees without consultation offends the provision of Section 10(5) of the Employment Act 2007, which is tantamount to a constructive dismissal. It is therefore in breach of Article 41 of the Constitution, which provides for fair labour practices for every employee."

21. The applicant submitted that the Respondents have violated the values and principles of governance enshrined in Article 10 of the constitution by disregarding the court ruling by Lady Justice Maureen Onyango of 3rd July, 2020 in the case of **Inter Public Universities Councils Consultative Forum of the Federation of Kenya Employers & 2 others v Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (KUDHEIHA); Ministry of Education & 3 others (Interested Parties)[2020] eklr** which held that;

"For these reasons, the court makes the following interim orders for partial implementation: -

a. **All the three CBAs Nos. 1, 2 and 3 of 2020 are accepted for registration as presented to the court with the exception of the retirement age clause which will be determined in the final judgment and is therefore excluded from the CBAs.**

b. **The implementation will be on horizontal basis pending further orders of the court after consideration of the issues set out herein above.**

c. **The retirement age currently in force will continue until the dispute herein is finally determined.**

d. **The issue of whether to implement the CBA both horizontally and vertically will abide the final determination of the dispute herein.**

e. **All parties herein are directed to file submissions on the issues set out herein above within 30 days.**

f. These matters will be heard by way of highlighting of the further submissions to be filed together with the submissions already on record on a date to be set by the court at the time of delivery of this ruling."

22. Accordingly, the applicant submitted that the 4th respondent is a public body whose decision at all terms must be made be in adherence to the constitution more specifically Article 10 and 74 of the constitution as illustrated in the case of **Miguna Miguna –Versus- Fred Matiang'i, Cabinet Secretary Ministry on Interior And Coordination of National Governance & 8 others [2018] eklr**. He thus submitted that, the Notice of motion seeks to challenge a unilateral decision by the respondent that if allow to be argued in this Court would benefit not only the applicant but also all staff of the 4th Respondent and Kenyan universities at large.

23. In conclusion the applicant urged this Court to allow his application since the decision of 21st October, 2020 was an illegality that has already been implemented by the respondent despite the fact that they are acting contrary to this Court's decision in **Inter Public Universities Councils Consultative Forum of the Federation of Kenya Employers & 2 others v Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers (KUDHEIHA); Ministry of Education & 3 others (Interested Parties)[2020] eklr (supra)**

Respondent's submissions

24. The respondents from the onset submitted that this Honourable Court is devoid of jurisdiction to entertain this application as the matter for determination is emanating from an issue between an employer and an employee who are governed by the Employment Act as such any dispute has to be originated by a statement of claim. He cited the case of **Republic –versus- kerio valley development Authority Ex parte David Kimosop (2019) eklr** where it was held;

"21. Judicial review orders are discretionary and may not be granted even where a party has proved his case to the required standard.

22. It is not disputed that employment and labour rights have been given constitutional underpinning in the Constitution and more so through Articles 41 and 236.

23. In order to realise and enforce the rights, the legislature has put in place specific statutory instruments and of relevance in the instant case being the Employment and Labour Relations Court Act and the Employment Act, 2007.

24. Under the statutory framework in place, the manner of approaching the Court is through a Statement of Claim or Memorandum of Claim. The Court may also be moved through a Petition if the threshold is met.

25. In certain instances, it may also be appropriate to approach the Court through Judicial Review proceedings, more so if the employee has special or specific constitutional or statutory protections against removal from office, for instance, in the case of a judicial officer.

In the case at hand, and the Court so holds, this was a case of an ordinary employment and the proper avenue for the ex-parte applicant was (is) to approach the Court in the normal way so that the parties are given an opportunity to interrogate disputed facts and the applicable law."

25. It was thus submitted that, the applicant has failed to file a statutory statement of facts accompanying the Application herein as provided under Order 53 Rule 1(2) of the Civil Procedure Rule 2010 and section 8 &9 of The Law Reforms Act. It is contended that the statement of facts attached to his further affidavit does not indicated whether the same was duly filed.

26. The Respondents argued that the applicant has not exhausted all the alternative remedies before approaching this court as envisioned in section 25(2) of the Employment Act. Further that this court jurisdiction to entertain this application has been barred by section 9(2) and (3) of the Fair Administrative Act 2015 which states that;

(2) The High Court or a subordinate court under subsection shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section (1).

27. The respondent reinforced its argument by relying on the case of **secretary County public service board & another –verus- Hulbhai gedi abdille [2017] eklr** where the court held that;

"Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime."

28. It is the respondent case that the applicant was duly consulted and even participated in the joint implementation committee as evidenced in the minutes of 8th July, 2020 and meeting of 19th October, 2020, however they argue that the applicant's demands need not be adopted by the respondents as observed by Lady Justice Maureen onyango in **University academic staff union (UASU) –versus- salaries and remuneration commission & another [2019] eklr**.

29. Infact the respondent argued that the reduction of the salary was a decision made to avert more harm that would have been visited upon the applicant if they choose to declare them redundant or worse declare the 4th respondent insolvent.

30. It was argued that the applicant has failed to demonstrate that the decision was illegal, unfair and irrational as held in the case of **Agutu Wycliffe nelly –versus- office of the registrar of academic affairs Dedan Kimathi University of Technology DEKUT [2016] eklr (supra).**

31. They argued that the leave and stay sought herein ought to be dismissed as the applicant's complaint involved contested evidential matter that can only be resolved upon hearing on merit. It was however, submitted that judicial review can only be invoked when the matter in dispute is the decision making process and not the decision itself. They placed their reliance on the Court of Appeal case of **Municipal council of Mombasa –versus- umoja consultants limited [2002] eklr** where court held that;

"Judicial Review is concerned with the decision -making process, not with the merits of the decision itself. Mr. Justice Waki clearly recognized this and stated so; so that in this matter, for example, the court would not be concerned with the issue of whether the increases in the fees and charges were or were not justified. The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power, i.e. the jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision-maker take into account relevant matters or did he take into account irrelevant matters? These are the kind of questions a court hearing a matter by way of judicial review is concerned with, and such court is not entitled to act as a court of appeal over the decider; acting as an appeal court over the decider would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision – and that, as we have said, is not the province of judicial review."

32. On the issue of stay sought by the applicant, the respondents submitted that the decision arrived at was done following due process and consultations, further that the decision has already been implemented as such there is nothing capable of being stayed by this Court.

33. They thus urged this court to decline the prayer for stay, and argued that in incase the application is allowed and proceeds for substantive motion then the applicant eventually will be paid his withheld salary which in essence will not rendered the Judicial Review nugatory, if the stay order is declined.

34. I have examined the averments of the parties herein. The applicant merely seeks leave to institute Judicial Review proceedings against the respondent. In opposing this application the respondent contends that this court has no ground to handle this matter and that the applicant should first exhaust internal dispute resolution mechanisms with the respondent before moving to court.

35. On the issue of this court's jurisdiction to handle this application, the issue in my view is a non-issue as the dispute involves an employer and an employee which is basically what the law provides under Section 12 of the Employment and Labour Relations Act and therefore this court definitely has jurisdiction to handle this matter.

36. As to the speed within which the applicant moved to court seeking orders herein, the respondent cited Section 9 (2) & (3) of the Fair Administrative Act. The applicant/employee should first exhaust all internal dispute resolution mechanisms before seeking Judicial Review orders.

37. In the case of the applicant herein, the issue of reduction in applicant's salary seems to be a foregone case as the salary has already been reduced and there is therefore nothing left to consult about.

38. If the issue was pending implementation, internal resolution would have been an option however at the point where we are at there is no internal mechanism to reverse what has already been implemented.

39. The applicant has demonstrated that indeed his salary was reduced which is in itself an illegality unless parameters set out under Section 10 (5) of the Employment Act have been adhered to.

40. This can only be determined if the applicant is allowed to file his Judicial Review application and bring out his case if at all and the respondent will have an opportunity to defend the application in any case.

41. I find no reason to deny the applicant the prayers sought.

42. I therefore allow the applicant leave to file a Judicial Review application as prayed.

43. The order will however not operate as stay.

44. Costs will be in the application.

RULING DELIVERED VIRTUALLY THIS 25TH DAY OF MAY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Oboso for Applicant – present

Robai for Respondent – present

Court Assistants – Fred and Makori