



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC NO. 39 OF 2021

KENYA UNIVERSITIES STAFF UNION (KUSU)

MAASAI MARA UNIVERSITY BRANCH.....CLAIMANT

-VERSUS-

MAASAI MARA UNIVERSITY.....1ST RESPONDENT

MAAASAI MARA UNIVERSITY COUNCIL.....2ND RESPONDENT

RULING

1. The Applicant herein instituted this claim on the 8th July, 2021 and together with the memorandum of claim is an Application Notice of motion, dated 7th July, 2021 filed under certificate of urgency pursuant to Article 41(1) of the Constitution, Section 41(2) and 44 of the Employment Act, section 12(1)(b) of the Employment and Labour Relations Court Act, Rule 17(1)(3) and (8) of the Employment and Labour Relations Court (Procedure) Rules and all other enabling provisions seeking Order that; -

- 1) This application be certified urgent and be heard exparte in the first instance and service thereof be dispensed with.**
- 2) Pending hearing and determination of the application, this Honourable court be pleased to direct and or compel the respondent to reinstate the aggrieved person herein SPENCER OLOLCHIKE SANKALE to his employment at the 1st Respondent's institution.**
- 3) Pending hearing and determination of this cause, this Honourable court be pleased to direct /and or compel the Respondent to reinstate the aggrieved person herein SPENCER OLOLCHIKE SANKALE to his employment at the 1st Respondent's Institution.**
- 4) Costs of this Application be borne by the Respondent.**

2. The basis upon which the claimant seeks for the following orders is that, the grievant, **Spencer Ololchike Sankale** was employed by the Respondent on 2nd November, 2012 as an assistant Account and later promoted to the rank of senior Accountant on 21st January, 2016.

3. It is stated that sometimes in September, 2019 the grievant acted as a whistle blower on suspected embezzlement of funds in the 1st Respondent which was later termed as the '**Mara Heist Expose**'. Subsequently, he was summoned by the 2nd Respondent on the 1st September, 2020 to shed light on the graft allegation and in comparing the internal auditors' report and the auditor general's report there were apparent variation confirming that full disclosure had not been made to the auditor general in respect of the 1st Respondent's expenditure.

4. The grievant was then invited for a second meeting by the 2nd Respondent on the 7th September, 2020 to provide more documentation on the alleged graft and later on 17th June, 2021 he was summarily dismissed from employment without any hearing and or due procedure being followed.

5. The Claimant also filed an affidavit in support of their claim deposed upon by **Galfen Omuse**, the claimant's Branch secretary on the 7th July, 2021, which basically reiterated the grounds of the Application.

6. In response to the Application, the Respondent raised a Preliminary Objection dated 26th July, 2021 based on the following grounds.

1) That the suit herein is sub judice and thus offends the provisions of section 6 of the civil procedure Act. There already exists a similar suit that was filed by the alleged aggrieved party herein Spencer Sankale Olochike, in Nairobi ELRC Petition No. E.097 OF 2021, Spencer Sankale Olochike V Maasai Mara University and Others.

2) That the claimant herein lacks locus standi to commence a suit seeking to enforce alleged personal private rights of another person, who has the capacity to individually institute a suit seeking to enforce his rights and who has already instituted a legal process seeking to enforce the alleged rights.

3) That the suit herein violates the privity of contract by the claimant purporting to seek for enforcement of an employment contract between a third party and the 1st Respondent.

4) That the application and the entire suit is an abuse of Court Process. The claimant and the purported aggrieved party are engaging in forum shopping after failing to obtain similar Orders in Nairobi ELC Petition Nummer.E097 of 2021 Spencer Olochike Sankale v Maasai Mara University and others.

7. The application and the Preliminary objection was disposed of by way of written submission with the claimant filing submissions on the 9th September, 2021 while the Respondent filed theirs on the 25th October, 2021.

Claimant's Submissions

8. It was submitted for the claimant that for a preliminary objection to succeed, a party raising it has to ensure that the same is raised on pure points of law as envisioned in *Mukisa Biscuit* case. They then argued that the preliminary objection raised by the Respondent is indeed on pure point of law on the basis that the application may offend section 6 of the Civil procedure Rule, however that this Court is not bound by the provisions of the Civil Procedure Act save on areas specifically provide for under this Court Rules, which according to the claimant an issue of **Sub-judice** is not one of them. To buttress their argument they cited the case of **Prisca Jepnetich V Generation careers Readiness Social Initiative Limited [2021]** eKLR where the Court held that:-

“Parties must avoid citing the Civil Procedure Act on all procedural matters before the E&LRC. These are different jurisdictions, as established in Supreme Court of Kenya decision, Republic v. Karisa Chengo & 2 Others [2017] e-KLR.13. The Civil Procedure Act applies to proceedings of the E&LRC only as a may be specifically allowed, under the E&LRC [Procedure] Rules 2016.”

9. On whether the claimant lacked locus standi to institute this suit on behalf of the grievant, it was submitted that that the grievant is a member of the claimant and the claimant have a CBA between it and the 1st Respondent therefore by virtue of the grievant joining the claimant Union, the claimant acquired the right to represent the grievant on agitating for his right including filing this Suit. They then cited the case of **Union of National Research Institutes staff of Kenya V Kenya Agricultural and Livestock Research Organization [2020]** eKLR where the Court Held that; -

“The issue of representation is a constitutional right under Article 36 and 41 of the Constitution and Section 4 of the Labour Relations Act... It is by virtue of membership that a trade union acquires the right to represent an employee on the rights of an employee”

10. On the issue of privity of contract, it was submitted that the claimant was acting on behalf of the grievant on the strength of membership between them and the CBA signed by the claimant and the 1st Respondent.

11. The claimant concluded and urged that this Court do consolidate this suit with the Nairobi ELRC Petition number E097 of 2021 as empowered under Rule 23 of this Court Rules instead of dismissing the suit as urged by the Respondents.

Respondents' Submissions.

12. The Respondent in support of their preliminary Objection, submitted from the onset that as much as there are rules governing the procedure in this Court , where this Court rules are silent then the Civil procedure Rules come in to breach the gap.in this they cited the case of **Kazungu Ngari Yaa v Mistry V. Naran Mulji & Co [2014]** eKLR where the Court held that:-

“The starting point of course should be the primary statutes governing employment and labour relations. Section 22 of the Industrial Court Act provides that in proceedings before the Court, a party may act in person or be represented by an Advocate or trade union office bearer/official. The section does not provide for how such a party or representative should come on record after judgment has been pronounced. Because of the lacuna, the Civil Procedure Rules may be invoked.”

13. It was then submitted that the civil procedure Act and the Civil Procedure Rules have been invoked by this Court severally in situation where this Court's Rules are silent. In this they cited several cases including the case of **Joseph Muriithi Njeru V COUNTY Government of Kirinyaga [2020]** eKLR and the case of **Leonard Omullo V National Land Commission [2021]** eKLR where the court relied on the civil procedure Act and the rules to address the issue of *sub-judice*, whenever the same was pleaded.

14. The Respondents then submitted that this Court does not have jurisdiction to consolidate this cause with the Petition filed in employment Court in Nairobi for the reason that once this Court finds this cause Sub-judice then its Jurisdiction is taken away which leave the court with no other option but to down its tools. They buttressed their argument by citing the case of **Leonard Omullo V National Land Commission [2021]** eKLR where the Court held that;

“It would be foolhardy for a superior court such as this one to proceed with a matter whose substance is before an appellate court. The preliminary objection succeeds to the extent that this Petition is *sub judice*. Having so found, it is clear this Court lacks jurisdiction to entertain the Petition.”

15. Accordingly, it was submitted that the consequences of holding that a matter is sub-judice, amounts to abuse of court process which will have costs implication. In this the Respondent submitted that the Application and the entire claim be dismissed with costs to them for being sub judice.

16. The Respondent also submitted that the Claimant was stripped of its authority to sue on behalf of the grievant who had already instituted similar proceedings under his own name.

17. The Respondent in conclusion submitted that the claimants suit is an abuse of Court process, a forum shopping which ought to be dismissed and cost be awarded to them.

18. I have examined the averments of the parties herein. It is indeed true that there is also another matter in Nairobi ELRC being E97 of 2021 which matter is still pending in court.

19. That notwithstanding the parties are not similar as this claim has been instituted by a union and not one Spencer.

20. In the circumstances I find the preliminary objection without merit.

21. As concern the merits of this case it is my finding that the claimants member having already been dismissed, the prudent thing would be to hear the merits of the entire case before making the final orders as sought.

22. I will therefore dismiss this application and direct the case to proceed on merit expeditiously and without any delay, costs in the cause.

Ruling delivered virtually this 23RD day of NOVEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Makokha for Respondents – present

Cheruto for claimant – present

Court Assistant - Fred