



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 87 OF 2015

KENYA UNIVERSITIES STAFF UNION.....CLAIMANT

VERSUS

VICE-CHANCELLOR, MASINDE MULIRO

UNIVERSITY OF SCIENCE & TECHNOLOGY.....1st RESPONDENT

MASINDE MULIRO UNIVERSITY OF SCIENCE & TECHNOLOGY COUNCIL....2nd RESPONDENT

JUDGMENT

1. The Kenya Universities Staff Union (the Union) instituted these legal proceedings against the Vice-Chancellor and Council of the Masinde Muliro University of Science and Technology (the University), alleging breach of contract in that the University had altered the terms and conditions of service of the named Grievants unlawfully.

2. The University filed a Response on 2 July 2015, and pursuant to leave granted on 10 December 2018, the Union filed an Amended Statement of Claim on 11 December 2018.

3. In the Amended Statement of Claim, the Union sought the following remedies:

- (i) Reinstatement of the Claimants' members to their grades as per the terms of the employment contracts and subsequent promotion.
- (ii) An order do issue compelling the Respondents to pay the Claimants' members withheld benefits with effect from 1st November 2014.
- (iii) An order for permanent injunction restraining the Respondents from reviewing the grades of the employees downwards without negotiating with the Claimant on behalf of its members.
- (iv) THAT the Respondents meet the costs of this suit.

4. As a consequence, the University filed an Amended Memorandum of Response on 13 February 2019.

5. The Cause was heard on 15 March 2021. The parties presented one witness each.

6. Pursuant to Court directions, the Union filed its submissions on 26 April 2021. The University's submissions were not on record by the agreed timeline (it had filed advance submissions with the Amended Memorandum of Response).

7. The Union identified 4 Issues for determination being:

- (i) Whether the Respondents deliberately, unprocedurally and without negotiating revised the terms of service of members of the Claimant by downgrading the members' enjoyment (sic) grades?
- (ii) Whether the Claim against the members listed in paragraph 32 of the Memorandum of Response is statutorily-barred?
- (iii) Whether the Claimants are entitled to the prayers sought?

(iv) Who should bear the costs and interest of the suit?

8. The Court has considered all the material placed before it.

Limitation

9. The University asserted in its Response that the claims by Beatrice Guvadi, Nyamwata Joseph, Milka Muthoni, Kokonya Paul, Wasike Oliver, Simiyu Richard, Keneth Murundi and Chebii Winnie were time-barred.

10. In asserting limitation, the University anchored its arguments on the fact that the Grievants named in the preceding paragraph were added to the Cause on 11 December 2018, while the wrongful acts raised arose between September 2014 to December 2014, outside the 3-years prescribed by section 90 of the Employment Act, 2007.

11. The introduction of new causes of action that may be caught up by limitation has been the subject of the courts' decisions.

12. In *Sammy Ng'ang'a Ndungu v Kenya Commercial Bank* (2021) eKLR, the High Court was confronted with a limitation argument as urged herein, and it stated:

On whether the proposed amendment will deprive the defendant of the defence of limitation, having found that there is no new cause of action that will be introduced by the proposed amendment, this argument clearly lacks traction. Moreover, **Rule 3(2) of Order 8, Civil Procedure Rules**, recognizes that:

Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.

13. In *Kuloba v Oduol* (2001) eklr, the High Court stated:

The amendments sought in this case are quite minor and designed to shed light on the claim as originally pleaded, and there is nothing new sought to be introduced that will change the case. It is the same story sought to be clarified. Even if the amendment seeks to set up a new cause of action which is outside the limitation period, I am of the view that it is an amendment that is permissible under order VIA rule 3 of the Rules as it is a claim emanating from the same set of facts.

14. From the foregoing, and considering that leave was granted after hearing arguments, the Court finds that the limitation plea raised by the University is devoid of merit.

Unfair/Unlawful alteration of terms of employment

15. Section 10(5) of the Employment Act, 2007 envisages the employer consulting with the employee and/or union (where applicable) before altering the terms of employment.

16. The Union contended that the University did not notify it of the formation of an Ad Hoc Committee, which was formed to look at the revision of terms of employment and that when it later joined the Committee, its proposals were not adopted.

17. The University constituted an Ad Hoc Committee to look into a scheme of service for non-teaching staff around 9 March 2012. The Committee did not include any representative from the Union.

18. When the Union got wind of the formation of the Committee, it wrote to the University on 23 March 2012, forwarding its proposals.

19. In May 2012, the Union and the University mutually agreed that representatives of the Union would be incorporated into the Ad Hoc Committee, and the Union made a formal request through a letter dated 7 June 2012.

20. The University acceded to the request, and the Union's chapter chairperson and a representative of another Union (KUDHEIHA) were appointed as members of the Committee.

21. The Ad Hoc Committee met for 2 days in June 2012 to prepare and validate the schemes of service.

22. The Union was represented by 2 officials, and a scheme of service was developed by July 2012 and approved on 24 July 2012.

23. Although the Union was not part of the initial Ad Hoc Committee, the records produced before the Court show that it was incorporated into the Ad Hoc Committee and that it participated in the deliberations which led to the development and approval of the scheme of service.

24. The mere fact that the proposals by the Union were not fully accepted would not, in the view of the Court, make the scheme of service unfair or unlawful.

25. The Court is of that opinion because there is nothing in the text of section 10(5) of the Employment Act, 2007 which suggests that the consultations should yield a meeting of the minds.

26. In the respectful view of the Court, where consultations envisaged under section 10(5) of the Employment Act, 2007 does not lead to an agreement, and the employer goes ahead to alter the terms of an employment contract, the option for the employee is to sue for breach of contract and not seek for orders which in their very essence amount to specific performance.

Conclusion and Orders

27. With the conclusion that the Union was involved in the consultations, the orders sought cannot be granted.

28. The Cause is dismissed with no orders on cost in light of the social partnership between the parties.

29. The Court regrets that the judgment could not be delivered as scheduled due to other official engagements.

Delivered through Microsoft teams, dated and signed in Kisumu on this 19th day of November 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For the Union Bruce Odeny & Co. Advocates

For the Respondent Mr Ouma instructed by the Federation of Kenya Employers

Court Assistant Chrispo Aura