



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC PETITION NO. E069 OF 2020

UNIVERSITY ACADEMIC STAFF UNION.....CLAIMANT

VERSUS

UNIVERSITY OF NAIROBI.....RESPONDENT

CABINET SECRETARY MINISTRY OF EDUCATION.....1ST INTERESTED PARTY

SALARIES & REMUNERATION COMMISSION.....2ND INTERESTED PARTY

KENYA MEDICAL PRACTITIONERS AND DENTIST UNION3RD INTERESTED PARTY

ATTORNEY GENERAL.....4TH INTERESTED PARTY

RULING

1. This ruling relates to the Petitioners application dated 26.10.2020 seeking the following orders:

a. THAT pending the hearing and determination of this suit, the respondent to release to the petitioner’s members the withheld clinical allowances as at the date of the order and flowing from the respondent’s letter dated 9.10.2020 whose implementation is hereby stayed.

b. THAT pending the hearing and determination of this petition the Respondent /or its agents be restrained from revising its employees’ allowances downwards.

c. THAT pending the hearing and determination of this petition the court do issue an interim order restraining the Respondent from implementing the recommendations or letters on the eligibility for an academic member of staff to earn the clinical allowances contained in the letter of the University of Nairobi, Deputy Vice-Chancellor (Human Resource & Administration) dated 9.10.2020 reference UON/CA/2/14/2.

d. THAT the costs of the Application be borne by the respondent.

2. The Application is premised on the grounds set out on the body of the Motion and Affidavits sworn by Dr. Constantine wasonga on 26.10.2020 and 15.4.2021. The Respondent has opposed the application by the Replying Affidavit sworn on 3.5.2021 by its Deputy Vice-Chancellor HR & Administration.

3. On 25.2.2021, the claimant made another application seeking to restrain the respondent from among others, recovery of the Clinical Allowances paid to its members pending the hearing of the application dated 26.10.2020 and the parties recorded a consent to that effect.

4. The application was canvassed by written submissions.

Applicant’s case

5. The claimant’s case is that its members (Grievants) are all employees of the respondent; that since 2002, the terms of service were harmonised with those of their counterparts in the public service and other public universities including payment of Clinical Allowances; that the said allowances include Risk Allowance, Emergency call allowance, Non-practicing allowance and Extraneous allowance; that the Clinical Allowances were enhanced in 2017 and funds were provided in Supplementary Budget in 2020 to sustain the said allowances.

6. The claimant further contends that the respondent has unilaterally decided to pay the said clinical allowances selectively to some staff members, has reduced the allowance for others and threatened to recover the allowance from some grievants on allegation that they are not eligible for the payment of the allowance. According to the claimant, the said action by the respondent violates the rights of the grievants by taking away or reducing their allowances which were part of their terms of service, without prior consultation. It argued that the respondent has used the names of the grievants to apply for capitation from the treasury and the funds have been provided. Therefore it prays for the orders sought in the application dated 26.10.2020 to be allowed as prayed.

7. For emphasis, the claimant relied on **Kenya County Government Workers Union v Wajir County Government & another [2020] eKLR** where the court held that the decision to reduce workers' salaries without consulting them offended section 10(5) of the Employment Act and Article 41 of the Constitution which provides for the right to fair labour practices.

8. It further relied on **Eunice Njeri Wambugu & 5 others v County Public Service Board, Kirinyaga County [2020] eKLR** where the court held that the unilateral decision by the respondent to redesign the petitioners abridged the petitioners' right under Article 28, 30, 40, 41, 47, and 50 of the Constitution and was therefore null and void.

Respondent's case

9. The respondent's case is that the suit is founded on the wrong premise by purporting that its members have duo membership as they are also represented by the third interested party (KMPDU). Further it contended that the petitioner is using some of her members who qualify for the disputed Clinical allowances to obtain sweeping orders to benefit unqualified members.

10. The respondent denied the allegation that the SRC has authorised payment of the said Clinical allowances to all the petitioner's members. It further denied that it used the names of the petitioner's members to seek capitation from the Treasury.

11. It contended that the terms of service for the petitioner's members and those of the practicing doctors are governed by distinct CBAs and no employee can belong to two trade unions. It clarified that the CBA for the petitioners does not provide for payment of clinical allowances which is only paid to doctors offering clinical services in public health facilities, and who must possess medical degree. It further contended that it continues to pay the clinical allowance to its staff who have been assigned clinical duties and are in direct contact with patients.

12. The respondent maintains that, being a public body, it must work within the ambit of the SRC advisory and guidelines. Consequently, it submitted that the petitioner has not established any cause of action against it and the petition ought to be dismissed.

13. The respondent further submits that the suit was rushed to court while it was undertaking pay roll audit, with the aim of derailing the exercise. It admitted that it wrote to the grievants demanding for reimbursement of the irregularly paid allowances and contended that it was unlawful for an officer of public university to use public resources to unjustly enrich himself. For emphasis it relied on **Prof. Joseph Mungai v Kirinyaga University [2014] eKLR** where the court ordered recovery of mileage claims irregularly paid out to the good professor.

14. Finally the respondent denied the alleged unilateral decision and contended that on 15. 9.2020, it held consultative meeting with the claimant concerning the payment of allowances and it was agreed that a mistake had been made, that pending allowances will be paid with due diligence, and that a committee was made comprising the management and the union to look into the staff who were eligible for the allowances.

Issues for determination

15. I have carefully considered the material presented by the parties. The dispute in the petition revolves about the eligibility of the petitioner's members for the said clinical allowances and whether the same should continue to be paid to them regardless of whether they render clinical services in public health facilities. In the meanwhile the petitioner has sought interlocutory reliefs pending trial. The issues for determination in the application are:

a. Whether the respondent should be compelled to release to the petitioner's members, the withheld clinical allowances and the letter dated 9.10.2020 stayed pending trial.

b. Whether interlocutory injunction should issue restraining the respondent from revising its employees' allowances downwards or from implementing the recommendations or letter dated 9.10.2020 on eligibility of the academic members of staff to earn the said clinical allowances.

Order to release withheld clinical allowances.

16. The order to compel the respondent to release the withheld allowances is tantamount to restoration of the withheld allowance to the grievants. Such an order is final in nature and it goes to the core of the dispute in the petition, hence granting the same would prejudice the respondent who has vehemently opposed the eligibility of the some of grievants for the payment of the clinical allowances. Consequently, I decline to order for the release of the withheld allowances.

Interlocutory injunction.

17. The threshold for granting interlocutory injunction as enunciated in **Giella Vs Cessman Brown [1973] EA 358** is that:

a. The applicant must show a prima facie case with a probability of success.

b. The applicant must show that irreparable harm will befall him if injunction is withheld.

c. If the court is in doubt to determine the application on a balance of convenience.

Prima facie Case.

18. Prima facie case was described by the Court of appeal in **Mrao Limited Vs The First American Bank of Kenya Ltd [2003] KLR** as follows:

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

19. The applicant contended that the respondent has breached their right to fair labour practices as envisaged by Article 41 by unilaterally withholding their clinical allowances; that the said allowances are part of the terms of their contract of service and they have enjoyed the same since 2002; that the government has provided funds to the respondent to pay and sustain the allowances; and that the said action was contrary to section 10(5) of the Employment Act which bars employer from altering terms of employment without consulting with the employee.

20. However the respondent contends that the applicant has not made out any cause of action against it because it has only withheld allowances to the staff who are ineligible for payment of the same but it continues to pay the staff who have been assigned clinical duties and are in direct contact with patients; that the allowances are not provided under the CBA; that SRC has not authorised payment of the same to the grievants; and that the decision to withhold the said allowances was not unilateral but reached after a consultative meeting with the petitioner on 15.9.2020, where it was agreed that a mistake had been made, that pending allowances will be paid with due diligence, and that a committee was formed comprising the management and the union to look into the staff who were eligible for the allowances.

21. Having considered the material presented by the two sides, I am satisfied that the members of the petitioner comprise staff who do render clinical services in public health institutions and others who do not. I am further satisfied that the clinical allowances claimed is not for public relations but ought to compensate the staff for services rendered subject to advice from the SRC.

22. However, the petitioner’s case is that all the staff should be paid the said allowance regardless of whether or not they render clinical services in public health facilities. According to the petitioner, all its members have enjoyed the same over the years.

23. The respondent, on the other hand acknowledges that the allowances have been paid to all the members of the petitioner but maintains that such payment was an error. It clarified that the parties met and acknowledged that the said payment to all the staff was an error, and further agreed that henceforth, the clinical allowance be paid with due diligence.

24. Putting all the above arguments in consideration and the fact that it is against public interest to pay remuneration for no work done, I find that the respondent cannot be faulted for failing to pay the disputed clinical allowances to members of the petitioner who do not render clinical services to public health facilities, and without the advice from the SRC. The respondent has not breached any of term of their contract of service or any of their legal rights as employees by stopping the erroneous payment of clinical allowances to staff who do not render clinical services. All that is required is a genuine Payroll Audit to identify the eligible staff. Consequently, I hold that the petitioner has not established a prima facie case with a probability of success.

Irreparable harm.

25. The other issue to consider is whether the applicant will suffer irreparable harm if the injunction sought is denied. The term irreparable harm basically refers to harm or injury that cannot be adequately compensated by any amount of monetary award or one which cannot be reversed to the state before the damage. In legal parlance, irreparable harm has been defined as follow: -

“A legal concept that argues that the type of harm threatened cannot be corrected through monetary compensation or conditions that cannot be put back to the way they were.”[\[1\]](#)

26. The concept of irreparable harm seeks to protect the prima facie case established by the applicant from being rendered nugatory. The concept advocates for the preservation of the substratum of the case from destruction so that the court does not proceed with the trial in vain. Once the substance of the suit is destroyed, the suit becomes moot.

27. In this case the dispute concerns payment of money which in my view is easy to quantify. Consequently, I find and hold that the applicant has not demonstrated that irreparable harm will be suffered by the grievants if the injunction sought is denied.

Balance of Convenience

28. The court is to consider the balance of convenience where it is doubt as to which party stands to suffer greater harm. In this case I have already made a finding that the applicant will not suffer irreparable harm if the injunction sought is denied.

29. Having found that the applicant has failed to establish a prima facie case with probability of success and that irreparable harm will be suffered if the injunction order is withheld, I decline to grant the interlocutory injunction as prayed.

Conclusion and disposition

30. I have found that the order to compel the respondent to release the withheld clinical allowances is in the nature of final relief which ought not to be granted at interlocutory stage. I have further found that the applicant has not met the legal threshold for granting interlocutory injunction. Consequently, the application fails and it is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 5TH DAY OF NOVEMBER, 2021

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

[1] <https://definitions.uslegal.com/i/irreparable-harm>