



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC PETITION NO. E023 OF 2021

UNIVERSITIES ACADEMIC STAFF UNION,

EGERTON UNIVERSITY CHARTER.....PETITIONER

-VERSUS-

EGERTON UNIVERSITY.....1ST RESPONDENT

EGERTON UNIVERSITY COUNCIL.....2ND RESPONDENT

THE VICE-CHANCELLOR,

EGERTON UNIVERSITY.....3RD RESPONDENT

RULING

1. Before me for determination is the Petitioner/ Applicant's Application Notice of Motion filed dated 6th September, 2021, filed on 9th September, 2021 seeking the following Orders;

a) Spent

b) **THAT pending hearing and determination of this Application inter-partes, the Honourable Court be pleased to issue an order of temporary injunction pursuant to Article 23 of the Constitution of Kenya 2010 restraining the Respondents from, further implementing the Egerton University staff workload policy, 2019 and their decision lifting the waiver of tuition fees for the staff with effect from 1st July, 2021 and instead the Respondents be required to revert to teaching workload determined by FTSE formula. FTSE of 1.0 to be the maximum load, which is 6 C.F's per semester or 18 C.F's per year(3 courses per semester) and any other teaching load over and above that the maximum load be regarded as the part-time teaching and be paid separately.**

c) **That pending hearing and determination of the Petition filed herewith, the Honourable Court be pleased to issue an order of temporary injunction pursuant to Article 23 of the Constitution of Kenya 2010 restraining the Respondents from, further implementing the Egerton University staff workload policy, 2019 and their decision lifting the waiver of tuition fees for the staff with effect from 1st July, 2021 and instead the Respondents be required to revert to teaching workload determined by FTSE formula. FTSE of 1.0 to be the maximum load, which is 6 C.F's per semester or 18 C.F's per year(3 courses per semester) and any other teaching load over and above that the maximum load be regarded as the part-time teaching and be paid separately.**

d) **That the costs of this application be provided for and be borne by the Respondents.**

2. The Application is supported by the grounds on the face of the Application and the supporting Affidavit sworn by **Dr Grace W. Kibue**, the Petitioner's Secretary. The said application is based on the followings grounds; -

a) That by a memorandum of agreement the petitioner and the 1st Respondent herein of October, 2012, the Petitioner and the 1st Respondent entered into a Collective Bargaining agreement (CBA) on various terms of employment of the Petitioner members.

b) Pursuant to clause 24.13 of the said CBA, the teaching workload was determined by FTSE formula. FTSE of 1.0 to be the maximum workload, which is 6 CFs per semester or 18 CFs per year and the teaching load over and above the maximum load to be regarded as the part time teaching and to be paid separately. Subsequently, the CBA was implemented and had been in operation since.

c) In the said CBA, Clause 21 provided that members of staff, their spouses and children (aged 25 years and below) studying at Egerton University shall be given students waiver of 100% for staff on regular programs, 70% for males and 75% for females with respect to SSP Programs.

d) In 2019 the Respondents without seeking approval or views of the Petitioner developed a the Egerton University staff workload policy,2019 which in effect reviewed the teaching workload as per the CBA and increased 18 CFs per year to 24 CFs which meant that the teaching courses increased from 3 to4 courses per semester.

e) That the Respondents sneaked in the said clauses to avoid paying for the extra courses which were to be paid as part time teaching and paid separately.

f) That the actions of the Respondents breached section 5(1) of the Fair Administrative Actions Act as no notice of intention to develop the said policy was served upon the Petitioner. The Petitioner learnt of the said policy through the Respondents website which policy took effect in March, 2021.

g) That the Petitioner concerns were raised vide its letter of 5th March, 2021 however that the Respondents did not engage the Petitioner leading to the Respondent issuing industrial action notices and appeal on the said implementation of the policy in issue.

h) While the issues raised in the workload policy was yet to be resolved, the Respondent consultation withdrew tuition waivers under clause 21 of the Collective Bargaining Agreement of 2012 vide a notice dated 25th August, 2021.

i) That these decisions by the Respondents to unilaterally change the terms of the CBA were done in contravention of Article 10(1) (c) of the Constitution of Kenya 2010.and the fact that they were not consulted the Respondent contravened Article 41(1) of the Constitution as to fair labour Practices and right to engage in collective bargaining under Article 41(5) guaranteed under the Constitution.

j) Further that Article 47 on fair administrative actions Act and Article 232 of the Constitution on involvement in policy making process were also infringed and therefore the Petitioner prays that the Application be allowed as prayed

3. In response to the Application, the Respondent filed grounds of Opposition dated 6th October, 2021 on the 7th October, 2021 which came out as follows;'

a) The Notice of Motion dated 6th September, 2021 statutory and judicial precedents thresholds upon which this Honourable court can exercise the discretion to grant the injunction orders sought therein.

b) The Egerton university staff workload policy 2019 came into effect in March, 2021july 2021 and the Petitioner have worked under and pursuant to it since its coming into effect.

c) That a grant of conservatory injunction Orders sought will determine the petition at an interlocutory stage and the Respondents will have been denied due process of the law, the right to fair hearing and equal protection of the law if that happened.

d) The Egerton university staff workload policy 2019 is lawful and consistent with the statutory applicable instruments and agreements.

e) The orders are being sought against the 2nd and 3rd Respondent erroneously as there is no privity of contract in law between them and the petitioners and the Petitioner is non-suited against the Respondents.

f) That it is not in public interest to grant the orders sought as they will adversely and irreversibly impact on thousands of students who are not parties to this Petition.

g) The petitioners made an appeal vide a letter dated 11th august, 2021 which is yet to be concluded therefore these proceedings are premature.

h) The application herein together with the Petition do not meet the threshold of s constitutional matter to warrant there being so adjudicated and therefore no interlocutory are grantable in the circumstances

i) Damages are adequate remedy if the petitioner succeeds in the petition and they are capable of being quantified and therefore this court is divested of jurisdiction to grant the interlocutory injunctive Orders.

j) The Notice of Motion is in the premises for dismissal with costs as it is devoid of factual and lawful and an abuse of Court Process.

4. About a week after, the Respondents filed a replying affidavit deposed upon on the 26th October, 2021 by **Prof. Issac Kibwage**, the 3rd Respondent and the vice chancellor of the 1st Respondent on his behalf and behalf of the other Respondents.

5. The Respondents' affiant avers that the 1st Respondent was established by a charter dated 1st March, 2013 under section 13(1) of the Universities Act and empowered under section 35 of the Universities Act to establish organs of governance such as Council, senate and the

management Board.

6. The Universities Council or the senate is empowered under section 23 of the Universities Act to make statutes and regulations to regulate the running of the university. pursuant to those power the Respondent made the Egerton University statutes 2013 which merely repealed the Egerton University statute of 1998 and 2008.

7. That the University Council was empowered under section 47 of Egerton university Charter to determine all terms and conditions of service for all staff and academic administrative and further review the said terms as per section 47(4) of the said Charter.

8. That the Petitioner preferred an appeal against the policy and before the same was determined the Petitioner filed this Petitioner which the Respondent contends that the same was filed prematurely.

9. It also contended that the Petition does not meet the threshold for the Petition to be determined as a constitutional issue and in that basis the Injunctive Orders sought to be declined.

10. It is the Respondent case, that the Policy which the Petitioner now seeks to injunct its operation has been in force since March, 2021 and the Petitioner members have been working in compliance with.

11. The Respondent Affiant avers that there is another CBA between the 1st respondent and UASU Egerton university charter entered in June, 2016 which does not provide under clause 24.13 for 18CFs per year but leaves it open to be determined by FTSE formula.

12. It was therefore contended that the amendments to the 2012 CBA were already made by the coming into force of the 2016 CBA signed by the parties herein therefore the allegation that the Egerton staff work Load Policy, 2019 amended the 2012 CBA is without basis.

13. It was also averred that CBAs have an effect of binding parties to the terms therein as provided for under section 59 of the Labour Relations Act, 2007 and no party is allowed to renege such an agreement

14. The Respondent also contended that the petitioner has not demonstrated any prejudice that will be visited on its members if the injunction is not granted. With regard to the tuition waiver the Respondent avers that the same was to take effect to new students joining the university and the students who were already enjoying the waivers were allowed to continue as such, this according to the Respondent was for austerity measures which took effect from 1st July, 2021 and the same communicated to the 1st Respondent staff vide a notice dated 25th August, 2021.

15. That the increased work load and reduced expense was a measure used by the Respondent to curb its operating deficit which had ballooned to 1,310,675,495 as at the end of 2020/2021 financial year which ended in June, 2021. Further that the said measures are less drastic as compared to retrenchment which the Petitioner's members are likely to lose their source of income.

16. In response to the Replying affidavit, the Petitioner filed a further affidavit dated 12th November, 2021 reiterating its supporting affidavit and in addition stated that the CBA 2016 made amendment on allowances such as commuter, dental and leave allowance and the issue of work load was never mentioned, discussed or amended. in addition that there was further negotiation to have the teaching staff retirement age raised to 70 which matter was approved by salaries and remuneration commission and that during that time the issue of work load was not raised either.

17. The Petitioner then maintained that the new changes were made by the Respondents unilaterally therefore the same ought to be injunct till the petition is heard and determined.

18. This application was canvassed by way of written submissions.

Petitioner's/ Applicant's Submissions.

19. The Petitioner submitted that the Respondent failed to carry out public participation before formulating and implementing the Egerton university staff workload Policy, 2019, which had effect of increasing workload from 18CFs to 24 CFs per year translating to 4 courses instead of the agreed 3 courses per semester. That the policy affects the terms of the Respondents employees which were imposed upon them without consultation or Notice contrary to the right under constitution in Articles, 47(2), 10(2) and 232. In this they cited the case of **University Academic Staff Union (UASU) V Technical University of Mombasa [2019] eKLR**.

20. It was further submitted that section 5 of the Fair Administrative Actions Act, envisage the need to consult affected group, of any proposed administrative action that is likely to affect them materially. Equally, that the Respondent failed to consult its staff when the decision to review the work load and the tuition waiver affected them materially. the Petitioner in support of its argument cited the case of **Robert N Gaturu & others V Governor Kiambu County and 3 others [2014] eKLR**

21. It was argued that section 10(5) as read with section 13(1) of the Employment Act requires that the employer should consult the employee before making any changes to the terms of employment and the changes ought to be communicated to the employee in written. In this they cited the case of **Universities Academic Staff Union V Technical University of Mombasa [2019] eKLR**.

22. The Petitioner then submitted that the law requires that any party ought to exhaust all internal dispute resolution mechanism before approaching the Court. Ostensibly, that the Petitioner tried on several occasion through the letters dated 13th July, 2021, 6th August, 2021 and the Appeal on the policy dated 11th August, 2021, which were all thwarted by the Respondent leaving the petitioner with no other option but

to file this suit.

23. The Petitioner submitted that their application is merited in that it is seeking to merely maintained the status quo before the introduction and implementation of the Staff Work Load Policy, 2019. It argued that it is necessary for the injunctive orders to be granted at this stage to alleviate on the injury already visited upon the petitioner's members who have been forced to adhere to new terms of services which terms were unilaterally decided upon. the Petitioner then cited the supreme Court case of **centre for Human Right education and awareness(CREAW) & 7 others V Attorney General [2011] eklr.**

24. On whether the Petitioner has a prima facie case, it was submitted that the issue of introduction of a policy which changed the terms of service for the Respondent employees without consulting is the issue in dispute which the petitioner has high chances of succeeding in. On irreparable Loss it was submitted that the Respondent through the said policy added more work to its staff without compensating them for the extra work done, therefore to allow the state of affairs to stand as they are will immensely prejudice the Petitioners members. Further that the benefits initially enjoyed by the Petitioner staff in form of Tuition waivers which have been removed meant that the Respondent staff will be forced to cater for their entire tuition fees demotivating them and costing them financially.

25. The Petitioner in conclusion prayed that the application be allowed as prayed with costs.

Respondents' Submissions.

26. The Respondent on the other hand submitted that the suit herein emanated from dispute on teaching workload and tuition waiver which are terms of services provided for in the CBA between the 1st Respondent and the Petitioner which claim can be sought under the employment laws and not the constitution. It was argued that the Petition and the Application herein does not meet the threshold of a constitutional matter to warrant their being so adjudicated and therefore no Interlocutory orders are grantable in the circumstances. They supported their argument by citing the Court of Appeal case of **Summaya Athmani Hassan V Paul Masinde Simidi and another [2019] eklr.** The Respondent also cited the case of **Kenya National private security workers Union V G4S Kenya Limited & 2 others; central organization of Trade Unions COTU(K) & 4 others (Interested parties) [2021]eklr.**

27. Accordingly the Respondents submitted the court ought to be guided by the doctrine of avoidance explained in the supreme Court decision of **Communication Commission of Kenya and other V Royal Media services Limited & 5 others [2014] eklr** and decline to decide this suit as it was instituted as a constitutional petition when the same ought to have been filed as an Ordinary Employment Cause.

28. It then submitted that having been filed as a constitutional petition instead of an ordinary claim this Court lack jurisdiction to hear and determine the Petition alongside the Application herein.

29. It was argued that the prayed in the Notice of Motion are similar to the prayers in the Petition, and to allow the orders sought at this stage will have an effect of determining the Petition without according the Respondent hearing. In this they cited the case of **Platinum distillers Limited V Kenya Revenue Authority [2019] eklr.**

30. It was further argued that the Applicant has not established a prima face case as envisage in the case of **Mrao Limited V First American Bank of Kenya Limited & 2 others [2003] eklr.**

31. It was then submitted that the basis of the application is a non-existent CBA of 2012 which was replaced by the 2016 CBA. Further that the University acted in accordance with clause 47 (1) and (4) of the Egerton University statues 2013 which empower the council to determine the terms and conditions of service of its staff and to review the said terms if need arises. That the workload clause that was allegedly changed by the Respondent was infact left open as per the CBA of 2016 and that the same was to be determined by FTSE formula which was merely clarified in the Egerton University Staff Workload Policy 2019. In addition that the amendments does not in any way increase the working hours over the normal 8 working hours. He submitted further that 1 CF is equivalent of 15 hours and the maximum 24 CFs indicated in the policy translates to 360 hours in a year which is less than 1720 a full time employee would work in a year.

32. It was also submitted that the applicant had not demonstrated any harm that has been visited upon its members or is likely to be visited upon it members if the injunction is not granted at this stage, in any case, it was submitted that damages was an adequate remedy and they cited the case of **Nguruman Limited V Jan Bonde Nielsen & 2 others[2014] eklr.**

33. With regard to the tuition waiver, the Respondents submitted that all its employees were informed by a Notice dated 25.8.2021.

34. The Respondent in conclusion urged this Court to disallow the Application.

35. I have examined the averments and submissions of the parties herein. This application seeks an injunction to stop execution of directives already in force and if determined now, the entire petition will be determined without giving the parties an opportunity to demonstrate the merits or otherwise of their case in full.

36. I will therefore decline to grant any injunctive orders at this stage and direct that the parties proceed with the main petition to the fullest.

37. Costs in the petition.

RULING DELIVERED VIRTUALLY THIS 15TH DAY OF DECEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mwathi Wairimu for Petitioner/Applicant – present

No appearance for Respondent

Court Assistant - Fred