



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

EMPLOYMENT AND LABOUR RELATIONS COURT

AT ELDORET

CAUSE NO 30 OF 2019

JOHN K. KALASINGA AND 2 OTHERS.....APPLICANT

VERSUS

MOI UNIVERSITY.....RESPONDENT

R U L I N G

1. By a Motion dated 24th July, 2019 the Claimant's sought the respondent restraining the respondent from infringe surcharge against the Claimants pursuant to a decision communicated on 8th August,2018 and 11th July,2019 pending the hearing and determination of the claim.

2. The application was supported by the affidavit of one of the Claimants Mr. John Kalasinga who deponed on the main that

i. THAT I am the 1st Claimant in this cause hence competent to swear this affidavit on my behalf and that of the 2nd and 3rd claimants' with their authority,

ii. THAT we were engaged by the respondent in the employment positions of a Senior Fixed Asset Marker in the Department of Finance, Senior Computer operator and currently an acting Assistant electronic Data Processing Supervisor in the Department of Finance and Clerk in Department of Estates respectively.

iii. THAT in exercise of the rights to participate and engage in union activities as provided for in article 41 of the **Constitution of Kenya 2010** and section 4 of the Labour Relations Act, No 14 of 2007 the claimants became elected as the Chairman of the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers Union (KUDHEIHA) ; Chapter Secretary of the Universities Non-Teaching Staff Union (UNTESU) and the Secretary of the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers Union (KUDHEIHA).

iv. THAT the respondent in the month of October, 1998 launched the Private Sponsored Students Program (PSSP) and which had a policy to facilitate management of its activities such as equitable sharing and distribution of funds.

v. THAT the said program was served by 3 categories of service providers comprising of academic staff whose recognized union was the Universities Academic Staff Union (UASA), the administration under the management and council and the technical staff under the Kenya Union of Domestic Hotels, Educational Institutions, Health and Allied workers Union (KUDHEIHA) and the Universities Non- Teaching Staff Union (UNTESU).

vi. THAT the respondent initially, over and above the agreed contractual payment entitlement granted to the categories 1 and 11 staff members monthly payments and annual bonuses for service rendered to the Private Sponsored Students Program (PSSP) however this was to the exclusion of category 111 service providers.

vii. THAT the trade unions representing category 111 service providers took up the issue with the respondent which through its Council's Executive Committee meeting held on 9th September,2009 considered the proposal to bring on board the segment of staff represented by KUDHEIHA and the Kenya universities Staff Union (KUSU) formerly the Universities' Non- Teaching Staff Union (UNTESU) as service providers under category 111.

viii. THAT the respondent's Council approved the proposal and allocated 2% of the total Private Sponsored Student Program (PSSP) revenue to the category 111 service providers.

ix. THAT pursuant to the approval a committee was put in place to manage the category 111 funds which comprised of union officials and representatives from administration, Finance and the Private Sponsored Students program Co-ordinating office.

x. THAT the trade union officials were mandated to make decisions on the mode of payment in tandem with the way categories 1 and 11 managed their allocations.

xi. THAT the tasks in the said Committee were over and above the roles of union leaders as they were occasionally invited to attend Executive Inter-School Deans Committee meetings for their input in order to enrich service provision to the main stake holders and the staff in general.

xii.. THAT the members of the said Committee were entitled to allowances for facilitation, communication, travelling, subsistence, meals, snacks and stationeries.

xiii. THAT the respondent's administration approved payments to the claimants of all allowances hence they were regular.

xiv. THAT we were astonished on the 8th August,2018 when the Ag. Deputy Vice-Chancellor Administration, Planning and Development of the respondent surcharged us over sums he alleged had been paid to us irregularly as follows: -

a. 1st claimant Kshs. 848,200

b. 2nd claimant Kshs. 1,168,000

c. 3rd claimant Kshs. 158,00

Kshs. 2,174,200

xv. THAT the surcharge letters gave us until the 14th September,2018 to pay the aforesaid sums failure to which disciplinary action would be taken against them.

xvi. THAT we did on the 10th September,2018 lodge appeals with the Vice-Chancellor of the respondent but which appeals were never considered for a period of over 10 months.

xvii. THAT we were ultimately on the 11th July,2019 informed by the respondent's Vice Chancellor that the appeals had been declined and they were required to pay the full sums in the surcharge letter to the respondent without further delay.

3. The respondent through one Petronile Chepkwony respondent in the main as follows: -

i. THAT I am the Senior Legal Officer of Moi University and therefore competent to swear this Affidavit.

ii. THAT the Chief Internal Auditor conducted an audit of allowances paid to Kenya union of Domestic, Hotels and Educational Institutions, Hospitals and allied workers Union (KUDHEIHA) and Kenya universities Staff Union (KUSU) committee allowances.

iii. THAT the internal Audit findings on Kenya Union of Domestic, Hotels Educational Institutions, Hospitals and allied workers Union (KUDHEIHA) and Kenya Universities Staff Union (KUSU) committee allowances were irregularly paid to the officials to the tune of Kshs. 8,008,400/=.

iv. THAT the said audit findings further recommended that the staff members and more specifically the Claimant's be surcharged for irregular payment of their allowances.

v. THAT through the relevant office heads departments we wrote a letters to the 1st, 2nd and 3rd Claimants requesting them to reimburse us Kshs. 848,200/=, Kshs. 1,168,000/= and kshs. 158,000/= respectively.

vi. THAT the 1st,2nd and 3rd claimant wrote a response letter as depicted in the claimant's pleadings, denying being irregularly paid and appealed to the letters of surcharge.

vii. THAT we presented the response letters to our letters of surcharge to our Chief internal auditor for their response.

viii. THAT our Chief Internal auditor wrote us an analytical report with supporting documents, depicting fictitious and unspecified meetings attended by the claimants herein.

ix. THAT the said auditory concluded their report by recommending disciplinary action against and immediate refund of irregular

paid of allowances of claimants as enumerated below: -

a. 1st Claimant to refund Kshs. 848,200/=

b. 2nd Claimant to refund Kshs. 1,168,000/=

c. 3rd Claimant to refund Kshs. 158,000/=

4. The respondent further raised a preliminary objection to the effect that the Claimants failed to comply with the mandatory provisions of Order 53 of the Civil Procedure Rules and rule 792) of the ELRC Procedure and rules 2016.

5. In the submissions in support of the application, Mr. Kigamwa for the Claimants submitted in the main that a surcharge was a form of an employment sanction and the respondent in imposing it was deemed to be exercising disciplinary control over staff hence it was duty bound by stature XVII(5) of the Statures of Moi University, 2013 to accord the claimants the right to appear and be heard by the Council .

6. Further the surcharge notice dated 8th August, 2018 imposed double punishment on the Claimants as it embodied a rider that further disciplinary sanction would be taken for failure to pay. Council further submitted that the respondent failed to take into account the response gives to the show cause letter by the Claimants that the payments were made within PSSP framework as approved by the University Council and implemented by the Board of Management.

7. Mr. Kigamwa further submitted that the respondents had by a memorandum dated 15th April, 2013 approved the payments through all its authorized officers hence the issue of irregular payments should not arise. Counsel further submitted that failure to consider the representations by the Claimants invalidated the decision to surcharge.

8. On the issue of discrimination , Counsel submitted that the surcharge was discriminatory and not instructed by any good faith hence contrary article 27 of the constitution and section 5 of the Employment Act since the members of the respondents management board were in the meeting with the Claimants on 17th May,2013 but were not surcharged. According to Counsel the meetings in issue were held in the respondent's interest to curb industrial unrest and payments were even made to staff members which connoted that the respondent would have to undo the benefits gained.

9. Mr. Kigamwa further submitted that the respondent failed to address the claimant's appeal within 6 months' period prescribed under section 63(3) of the Universities Act thus the decision to surcharge was a nullity.

10. Mr. Chemoiyai for the respondent on the other hand submitted that the Claimants could not be said to have discharged their Union duties if they obtained their allowances illegally, unlawfully and under circumstances seeking of fraud and mischief. According to Counsel, the Claimants could not be seen to be hiding behind the shield of carrying out trade union activities while unlawfully receiving allowances and holding fictitious meetings.

11. According to counsel, the decision to surcharge was arrived at upon giving the claimant's a right to respond to the allegations of irregularly receiving allowances. The claimant's responses were unsatisfactory and failed to justify the allowances given. No sufficient evidence was adduced by the Claimants as proof of their meetings held in Mombasa, Kitale, Nairobi and Yala .

12. Regarding limitation Counsel submitted that section 415 of the Limitation of Actions Act gives Limitation of recovery of penalties, forfeiture or sum by way of penalty. The word surcharge does not appear in the section. Counsel further submitted that the respondent has not commenced any disciplinary proceedings against the Claimants.

13. This is an interlocutory Motion hence the concern of the Court is whether the applicant has demonstrated a prima facie case with probability of success and further whether damages would not be adequate remedy if successful. If the Court is in doubt the matter will be decided on a balance of convenience.

14. In the application and memorandum of claim, the main complaint put forward by the Claimants was that the decision to surcharge them was reached without according them an opportunity to be heard. The Claimants therefore sought permanent injunction restraining the surcharge. The respondent on the other hand has claimed that the Claimant's were called upon to explain the alleged irregular payments which they did but the respondent found the explanation unsatisfactory hence proceeded to surcharge the claimants. The claimants appealed against the surcharge but the appeal was rejected.

15. According to the respondent no disciplinary proceedings had been commenced against the claimants.

16. A surcharge is a sanction against an employee affecting such employee's salary or wages. It therefore ought to be handed down as one of the disciplinary sanctions at the conclusion of disciplinary hearing. The respondent has curiously stated that they have not commenced any disciplinary proceedings against the Claimant. They have however not shown under what process other than a disciplinary process the decision to surcharge the claimants was reached,

17. As observed earlier in the ruling, this is an interlocutory Motion hence the Court would be careful not to over analyze the facts or evidence each disputant may have in support of their respective position. This would be left for the full trial.

18. From the observations made, however the Court is satisfied that the claimants have demonstrated a prima facie case to warrant grant of interlocutory injunction pending hearing and determination of the claim herein. The interim orders issued on 25th July, 2019 will therefore

remain in force pending the hearing and determination of the claim on priority basis.

19. It is so ordered.

Dated at Eldoret this 13th day of February,2020

Abuodha Jorum Nelson

Judge

Delivered this 13TH day of February, 2020

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge