



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 718 OF 2019**

**DR. ERICK ONYANGO K'OMOLO..... CLAIMANT**

**-VERSUS-**

**KENYATTA UNIVERSITY.....RESPONDENT**

**- AND -**

**UNIVERSITIES ACADEMIC STAFF UNION (KU CHAPTER)...INTERESTED PARTY**

**(Before Hon. Justice Byram Ongaya on Friday 5<sup>th</sup> June, 2020)**

**RULING**

The claimant filed an application on 29.10.2019 in person and by the notice of motion brought under section 12 of the Employment and Labour Relations Court Act, rules 7, 17, & 28 of the Employment and Labour Relations Court (Procedure) Rules, 2016; Constitution of Kenya (Protection of Rights and Fundamental Freedoms & Enforcement of the Constitution) Practice and Procedure Rules, 2012; Article 22 of the Constitution of Kenya 2010; the inherent power and jurisdiction of the Court and all other enabling provisions of the law. The claimant prayed for orders:

- 1) That the application be certified urgent and heard ex-parte in the first instance.
- 2) That a conservatory order by way of injunction be and is hereby issued barring or prohibiting the respondent from in any way removing or terminating the employment of the claimant pending the hearing and determination of the instant cause filed herewith.
- 3) That a conservatory order by way of injunction be and is hereby issued barring or prohibiting the respondent from in any manner proceeding with any disciplinary action against the claimant pending the hearing and determination of the instant cause filed herewith.
- 4) That a conservatory order be and is hereby issued directing the respondent to reinstate the claimant's monthly salary and all benefits and the former be paid at half rate in terms of Clause 26 (g) of the Collective Bargaining Agreement (CBA) and relevant statutes pending the hearing and determination of the instant cause filed herewith.
- 5) That a conservatory order be and is hereby issued directing the respondent to pay the claimant all and any salary, allowances and emoluments, backdated to March 2019, that is wrongfully and unlawfully withheld by virtue of the impugned suspension pending the hearing and determination of the instant cause filed herewith.
- 6) That a conservatory order be and is hereby issued directing the respondent to pay in full the claimant's overdue salary and benefits for the month of February 2019 before the impugned pension, that is currently wrongfully and illegally withheld by its officers.
- 7) That a conservatory order be and is hereby issued directing the respondent to pay the claimant Kshs.9, 620.00 being overdue reimbursement for judicial attachment supervision irregularly deducted from his September 2018 payslip.
- 8) Any other orders or relief the Honourable Court may deem just and fit to grant or as may be necessary to meet the ends of justice at any stage of the proceedings.
- 9) The costs of the application be in the cause.

At the ex-parte proceedings on 29.10.2019 the Court granted interim orders in terms of prayer (2). The application was based upon the

following grounds:

- a) The respondent without notice or warning suspended the claimant from duty on 04.03.2019 and has withheld the claimant's salary and all benefits effective February 2019 to date and in a manner that can be equated to unlawful constructive dismissal.
- b) Since the suspension and withholding of salary and benefits the respondent has held the claimant in abeyance in contravention of the contractual and constitutional rights.
- c) The respondent has subsequently convened a disciplinary committee meeting on 15.08.2019 and dismissively and with appalling hostility declined and failed to give the claimant all necessary statements and documents they sought to rely upon and openly failed to accord the claimant an opportunity to interrogate or cross-examine two witnesses that only learnt during the session to have been invited and interviewed by the committee.
- d) The complainants and witnesses were allowed by the respondent to sit as members of the disciplinary committee against notions of fair administrative action and rules of natural justice and dismissed contemptuously and with appalling hostility the claimant's efforts to bring this to their attention, in apparent actuation of its premeditated plan to profile, discriminate and eventually unlawfully terminate the claimant.
- e) The respondent breached its own institutional practice to determine and communicate the outcome of the disciplinary process within 1 days and continues to unlawfully hold the claimant in abeyance for over 80 days after its purported disciplinary committee meeting in perpetuation of its premeditated plan to profile, discriminate and eventually maliciously, unlawfully and unjustly terminate him from employment.
- f) In view of the history of pre-meditated, malicious and discriminatory practices against the claimant by the respondent, the claimant is reasonably and justifiably apprehensive that the respondent and its officers may unlawfully and illegally terminate him from employment on the basis of the impugned unlawful disciplinary committee proceedings without meaningful recourse, unless the Honourable Court intervenes.
- g) In any event, the decision to suspend the claimant without pay and withholding his benefits was illegal, unlawful, un-procedural, null and void ab initio for the reasons that, the decision was without notice; the claimant was not given an opportunity to respond to many allegations; the disciplinary committee was unlawfully convened and conducted in violation of fair administrative action and rules of natural justice; the disciplinary committee proceedings violated the claimant's legitimate expectation to equal treatment and benefit of the law; the suspension was taken in furtherance of illegal or unlawful and malicious objective to profile, abuse, discriminate and deprive the claimant of his lawful income and employment; and the suspension was discriminatory and was designed to subvert and circumvent due process and fair administration of justice.
- h) It is in the interest of justice that the reckless action of the rogue decision makers of the respondent is checked and nipped in the bud instantly

The application stated that it was based on the attached claimant's supporting affidavit but no such affidavit had been attached. The claimant subsequently filed his supporting affidavit on 08.11.2019 and it was allowed on record by the leave of Court granted on 16.12.2019. Parties attempted compromise but failed to arrive at a consent.

The interested party filed on 12.11.2010 the supporting of Peter Letotin Lemoosa, the Chairperson of the respondent. He confirmed that he was the trade union representative at the Senior Board Disciplinary Committee held on 15.08.2019 and that at the proceedings the claimant was never accorded the courtesy of being availed with documents and or witness statements or testimony that the Committee relied upon against him and the claimant's persistent requests beforehand for the same was repeatedly denied or ignored. Further it was his case that the complainants or witnesses were allowed to sit as jury during the Committee's proceedings and the claimant's efforts to have the same rectified beforehand was not granted against the notions of fair administrative action and natural justice. As union representative he raised similar objections but which the Committee ignored. The withholding of the claimant's full salary while on suspension is against the CBA which requires that half salary is paid. Further the respondent has breached clause 26(d) (v) of the CBA requiring the outcome of the disciplinary hearing to be communicated to the claimant within 14 days and in presence of the union representative.

The respondent opposed the application by filing on 27.11.2019 the replying affidavit of Professor Fatuma Chege, Deputy Vice Chancellor (Administration). The affidavit was filed through Njoroge Regeru & Company Advocates. The affidavit urged as follows:

- a) There was delay to file the replying affidavit because the claimant had not filed his supporting affidavit as alleged in the application.
- b) The application is defective, incompetent and should be dismissed because the prayers made have been overtaken by event and because the application does not meet the criteria for grant of the prayers sought. The claimant will suffer no prejudice if the application is not granted.
- c) The application is an abuse of process and based on misapprehension of the law and has no proper grounding in law.
- d) The application is contrary the cardinal principle of law that Courts do not make contracts for parties.
- e) The application is a disguised prayer for reinstatement of employment which has already been terminated and such an application cannot be granted at this stage.

- f) The application was filed after unreasonable delay and the applicant is not entitled to the Court's discretion.
- g) The claimant has concealed material facts and comes to Court with unclean hands so that he does not deserve the Court's discretion.
- h) The claimant was employed by the respondent, initially, by the letter of appointment dated 27.09.2016 as a Lecturer in the Department of International Law. He successfully served the probationary period of 6 months and was confirmed to permanent and pensionable terms.
- i) However, by the letter dated 07.02.2017 the claimant tendered his resignation from the respondent's employment pursuant to section 43(5) of the Elections Act, 2011 with a view to contest the Rangwe Parliamentary seat. The respondent accepted the resignation. Prior to resignation the respondent had raised issues about the claimant's performance such as not meeting deadlines in setting examinations.
- j) In January 2018 the claimant approached the respondent for employment and he was given a one-year contract per letter dated 2.01.2018. The letter shows that the claimant was employed as a Lecturer on a one-year renewable contract in the Department of International Law. The appointment was effective 17.01.2018 (so that it was lapsing on or about 17.01.2019).
- k) During the one-year service the claimant continued with poor performance such as absence from class without permission; absence from work without permission; failure to attend notified departmental meetings; leaving students unattended and unsupervised; and making haphazard internal arrangements for teaching of his classes without informing the respondent. The Chairman of Department of Public Law raised concerns in that regard and the matters were considered serious to warrant suspension and a disciplinary process.
- l) By the internal memo dated 18.01.2019 (essentially a day after end of the one-year contract) the Chairman of the Department of Public Law one reported to the Deputy Vice-Chancellor (Administration) that the students continued to suffer because the claimant had failed to carry out the assigned duties such as teaching LPL 403: Mooting in 2018/19/Sem.1 Academic Year. The Deputy Vice-Chancellor (Administration) subsequently suspended the claimant from duty and upon those allegations as per the letter dated 26.02.2019. The suspension was with immediate effect and pending appearance before the Senior Board of Discipline where the claimant would be invited to defend himself. By that letter the Chief Finance Officer was instructed to stop the claimant's salary and the medical cover was also cancelled but the claimant and his dependants could access the respondent's health services.
- m) The claimant responded to the suspension letter by his letter of 05.03.2019. He urged that his contract had lapsed on 01.03.2019 and being out of the respondent's employment he could not be subject of the purported suspension or disciplinary process. The claimant partly wrote, "**(c) That it is unheard of in law to purport to suspend or terminate an employee who is potentially out of contract on what was technically supposed to be his last day of service. A logical construction of such a move is that it was designed to deny me my last month salary and other end-of contract benefits This offends basic human rights and is unconstitutional.**" The claimant further wrote about his defence on merits of the allegations.
- n) The claimant's contract was for one year and it had lapsed. In the claimant's words the contract had lapsed on 01.03.2019 per his letter of 05.03.2019. There was no provision for renewal. The claimant is misleading the Court in urging in the present case that he is still in the respondent's employment. The claimant has no basis to pray that the salary be backdated to March 2019.
- o) The claimant was invited to show cause why he should not be dismissed even though his contract had already lapsed and he attended in presence of the union representatives. On 23.08.2019 the respondent terminated the claimant's employment as per the Senior Board of Discipline Committee minutes for meeting of 15.08.2019. The letter of termination was dated 23.08.2018 and termination was effective a date not stated in the letter. The letter states that the claimant could appeal against the dismissal within 14 days upon receipt of the letter. The claimant having been terminated way back on 23.08.2019 it was clear that the subject application which was filed on 29.10.2019 and indeed the entire suit as currently framed has been overtaken by events.
- p) The claimant was not denied any information or documents required in his defence at the disciplinary hearing. The order by the Court on 29.10.2019 prohibiting the termination of the claimant was in vain and of no effect as the same was issued after termination.
- q) The procedure of terminating the claimant was fair and in accordance with the law.
- r) The disciplinary procedure has already been concluded and no appeal has been lodged.
- s) Taking proportionality into account the application should not be granted.
- t) When invited for disciplinary hearing the claimant sought an adjournment which was allowed on the grounds that he was busy elsewhere. Further the Senior Board of Discipline was chaired by the Vice Chancellor and members included some Council Members so that there had been no unreasonable delay.

The claimant filed a supplementary affidavit on 06.12.2019. He states that Dr. Tom Ratemo and one of the witnesses Dr. Faith Kabata sat as panel members and even asked him questions and took part in decision making against the rules of natural justice and fair administrative action. The minutes of the disciplinary hearing show that Mr. Kodiyo and Mr. Mwaura appeared as witnesses but the claimant was invited in the meeting after they had left. There was no evidence that he had failed to set exams or students had failed to sit for exams as was assigned to the claimant. The contract had been renewed and the claimant only handed over after he received the suspension letter of 04.03.2019 and before then he had been assigned duty and been actively involved at work. The termination letter was never served upon him and only saw it

in Court as exhibited on the replying affidavit.

The court has considered the parties' respective cases and the submissions on record and makes findings as follows:

1) The material on record shows that the claimant was serving on a fixed term one-year contract which was lapsing on or about 17.01.2019. The claimant's case is that thereafter he continued in employment until he was suspended by the letter dated 26.02.2019 and which he received by email on 04.03.2019. The Court has considered the parties' mutual position that the contract was lapsing about 17.01.2019. Thereafter it is clear that the respondent initiated disciplinary proceedings. It is also clear that the claimant submitted himself to those proceedings. The disciplinary proceedings flew from the report of alleged poor performance against the claimant by the Chairman of Department of Public Law in the memo dated 18.01.2019. The Court has considered the flow of events after 18.01.2019 and returns that the relationship obtaining between the parties after 17.01.2019 can only be determined after taking of evidence at the full hearing of the suit. By such evidence it would then be clearer why the disciplinary proceedings were initiated despite the one-year contract lapsing on 17.01.2019 and whether after the lapsing and up to when the claimant received communication about the suspension by email on 04.03.2019 the claimant had been employed and assigned duties or not. In view of that finding prayer 4 on reinstatement of claimant's monthly salary; prayer 5 on payment of salary, and allowances and emoluments backdated to March 2019; prayer 6 on payment of salary and benefits for February 2019 are declined at this stage. Further prayer 7 for payment of Kshs.9, 620.00 overdue reimbursement allegedly withheld by the respondent with respect to alleged claimant's supervision of judicial attachment will be declined as the same is a final or permanent remedy that may be available only after taking full evidence at the full hearing. The respondent's submission is upheld in that regard.

2) While making the foregoing findings in (1) above the Court considers that the remedies therein as declined are in the nature of a mandatory injunction requiring the respondent to specifically perform the contract of service by paying the claimant the amounts of money claimed and all that in circumstances whereby after 17.01.2019 it is not clear whether the parties continued in a contract of employment and whether the claimant was assigned duty and actually worked for the respondent. Such is a situation that is not obvious as to justify an order of specific performance or a mandatory temporary injunction as prayed for. Thus the Court is guided by the holding in **Moses C Muhia Njoroge & 2 Others –Versus Jane W. Lesaloi & 5 Others [2014]eKLR** where Gacheru J held, “**In prayer No. 8, the applicants have sought for a mandatory injunction. I have considered all the facts of this case and have taken into account that granting of a mandatory injunction as an interlocutory relief is a very exceptional form of relief to grant but it can be granted (See Canadian Pacific Railway –Versus- Rand (1949) 2KB 239 at 249. I also refer to the case of Locabail International Finance Ltd –Versus- Afro-Export (1988) ALL ER 901 where the Court held that the principles governing the grant of Mandatory Injunction are as follows: “A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the defendant attempted to steal a march on the plaintiff mandatory injunction will be granted on an interlocutory application.”**

3) The Court has considered the material on record. It is clear that the disciplinary proceedings were initiated and the claimant was informed culminating in the hearing before the Senior Board of Discipline and subsequently a letter of termination which the claimant says has seen for the first time as exhibited in Court. The Court finds that even if the claimant disputes the service of the letter of termination, he admits that he participated in the entire process leading to the termination letter. The Court finds that as submitted for the respondent, prayer 2 seeking a temporary injunction to prohibit termination or prayer 3 to prohibit further disciplinary action have clearly been overtaken and the Court cannot act in vain in purporting to prohibit or restrain that which has already taken place. Thus the two prayers will equally be declined. It was in **Giella –Versus- Cassman Brown & Company Limited [1973] EA 358 at 17 – 20**, that it was held that in considering to grant a prohibitory injunction, the applicant must show the court a *prima facie* case with a probability of success; if the injunction is not granted, the applicant stands to suffer irreparable harm which would not adequately be compensated by an award of damages; and if the Court is in doubt, then the Court will decide the application on a balance of convenience. In the instant case the Court returns that in view of the evidence that the disciplinary process was initiated, continued and concluded as per the letter of termination, the claimant cannot be said to have established a *prima facie* case with a likelihood of success with respect to the claim that the disciplinary proceedings ought to be stopped or stayed as the Court returns that there is nothing left to be arrested by a prohibitory injunction as prayed for. In any event, the claimant has prayed for payments at this interlocutory stage and it should be obvious that damages would be available as an adequate remedy.

4) The Court has considered the claimant's case that the disciplinary panel included the complainant and witnesses; that he was not accorded an opportunity to cross-examine the witnesses; and he was not provided information and documents to prepare his defence. The Court has considered his concerns that he was suspended without due notice or hearing. The Court returns that such are matters to be considered at the full hearing towards the determination of the main suit. The application was to prohibit the disciplinary proceedings and the claimant's lamentations and concerns confirm that the disciplinary proceedings have since taken place so that in the opinion of the Court the concerns and lamentations go to challenging the outcome or decision made and not the proceedings which have since been continued and concluded. Further, as submitted for the respondent, whether the disciplinary hearing was necessary at all as against whether the contract had lapsed on 17.01.2019 is a matter which impairs the claimant's establishment of a *prima facie* case.

5) As the respondent offered the claimant room to appeal and there is no evidence that the letter of termination was served except as exhibited on the replying affidavit, the Court considers that it should be possible within parties' considered compromise to permit the claimant to appeal belatedly if both parties acknowledge propriety of the disciplinary proceedings or better still compromise the entire suit one way or the other. In that consideration costs of the application will be in the cause.

In conclusion, the claimant's application filed on 29.10.2019 is hereby dismissed with orders:

1) The parties are encouraged to compromise the main suit one way or the other with a view of recording a consent in court accordingly and failing, parties to take steps towards the expeditious hearing and determination of the main suit.

2) The costs of the application in the cause.

**Signed, dated and delivered in court at Nairobi this Friday, 5<sup>th</sup> June, 2020.**

**BYRAM ONGAYA**

**JUDGE**