



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

PETITION NO. E002 OF 2020

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 22, 23, 25, 27, 28, 30, 41, 47, 48, 50, 162, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 4 OF THE FAIR ADMINISTRATIVE ACTIONS ACT OF 2015

AND

IN THE MATTER OF SECTIONS 18, 40, 43, 45, 47, 49 AND 50 OF THE EMPLOYMENT ACT

BETWEEN

DOMNIC OMBAGI.....1st PETITIONER

JOSHUA OGUCHA.....2nd PETITIONER

EUNICE MONGINA ONGUTI.....3rd PETITIONER

ISAIAH OMWOYO MASITA.....4th PETITIONER

FELISTER KERUBO ONYANDO.....5th PETITIONER

ROSE KERUBO MARANGA.....6th PETITIONER

& 115 OTHERS

VERSUS

KISII UNIVERSITY.....1st RESPONDENT

CHAIRPERSON, UNIVERSITY COUNCIL OF

KISII UNIVERSITY.....2nd RESPONDENT

PROF JOHN S AKAMA.....3rd RESPONDENT

PROF JOSEPH T MAILUTHA.....4th RESPONDENT

PROF FREDRICK WANYAMA.....5th RESPONDENT

DR JOASH KERONGO.....6th RESPONDENT

CHARLES MAINA MWANGI.....7th RESPONDENT

PROF ALFRED SHITANDI.....8th RESPONDENT

ROSE OGATA.....9th RESPONDENT

JUDGMENT

1. On 30 September 2020, Prof John Akama (Vice-Chancellor) of Kisii University (the University) issued a redundancy notice addressed to the Secretary, Kenya Universities Staff Union, Kisii chapter (the Union).
2. The 1-month notice indicated that 204 named employees who were members of the Union would be affected. 5 reasons were given for the intended redundancies.
3. The University also addressed 2 redundancy notices on 1 October 2020 to some named employees.
4. On 13 October 2020, the Petitioners moved the Court alleging that the intended redundancies were not supported by valid and legitimate reasons as the University intended to outsource labour to replace the affected employees; that the selection criteria for the affected employees did not consider the statutory criteria outlined in section 40(1)(c) of the Employment Act; there was no prior warning nor individual consultations; the process was procedurally and substantively unfair and that the University had breached its Human Resource Manual on termination of employment on account of redundancy.
5. Filed together with the Petition was a Motion under a certificate of urgency seeking interim conservatory orders.
6. The Court certified the Motion urgent and directed that it be served upon the Respondents for *inter-partes* hearing on 3 November 2020 (the Respondents filed an affidavit in reply to the Motion and Reply to the Petition on 3 November 2020).
7. However on 19 October 2020, the Petitioners filed another Motion seeking that the first Motion be heard before the expiry of the redundancy notices.
8. The Court considered the Motion on the same day and it issued a conservatory order preserving the Petitioners contracts pending the hearing and determination of the first Motion.
9. Again, the Petitioners filed yet another Motion on 2 November 2020 seeking leave to join some 68 named persons as additional Petitioners.
10. When the parties appeared before this Court on 3 November 2020, the Court allowed the application to join an additional 68 persons as Petitioners.
11. The Court further directed that an amended Petition including these new Petitioners together with written submissions be filed before 17 November 2020 while the Respondents were directed to file and serve their submissions before 24 November 2020.
12. The Petitioners filed an Amended Petition and submissions on 20 November 2020 whilst the Respondents filed their submissions only today morning.
13. The Petitioners identified 2 primary Issues in their submissions
 - (i) Whether the redundancy effected upon the Petitioners is unprocedural, unlawful and substantially unfair.
 - (ii) Whether the redundancy notice amounts to unfair and unlawful termination.
14. The Court has considered the pleadings and the submissions and isolated the following questions as being pertinent.

Misjoinder of 2nd – 9th Respondents

15. The Respondents asserted that the joinder of the 2nd to 9th Respondents was misconceived because no liability would attach to them in their official capacities and because no relief could be enforced against them in their (individual) capacities as they had no authority to act on behalf of the University.
16. The Respondents also objected to the inclusion of these Respondents to the Petition on the ground that no cause of action had been disclosed against them in the Petition.
17. The Court has keenly examined the Amended Petition and affidavits and has not found any allegations of wrongdoing on the part of the 2nd to 9th Respondents.
18. Equally, the Court has not discerned any remedy sought against them.
19. The Court would therefore agree with the objection by the Respondents and hold that the 2nd to 9th Respondents were not necessary

parties in this Petition.

20. Their names are struck off from the proceedings.

Exhaustion of statutory dispute resolution mechanisms and *sub judice*

21. The Respondents also objected to the competency of the Petition herein on the ground that similar questions concerning the lawfulness of redundancy had been presented before the Court by the Petitioners in Kisumu Petition No. E009 of 2020, *Kenya Universities Staff Union v Kisii University* and Nakuru Petition No. of 2020, *Kenya Universities Staff Union v Kisii University*.

22. The Court has looked at Kisumu Petition No. E009 of 2020, *Kenya Universities Staff Union v Kisii University*.

23. It was filed by the Union of which the Petitioners appear to be members. The cause of action is the redundancies declared by the University on 30 October 2020.

24. The Labour Relations Act has elaborate provisions on dealing with disputes where employees have organised under the ambit of a trade union.

25. The redundancy notices under challenge herein were directed to the Kenya Universities Staff Union which has a recognition agreement with the University.

26. Since the subject was an (apprehended) dispute between the trade union and the employer concerning the employment of employees, members of the Union, the first port of call should have been the Union reporting a trade dispute to the Cabinet Secretary, Labour as contemplated by Part VIII of the Labour Relations Act.

27. Instead of allowing their trade union to invoke the dispute resolution mechanisms under the applicable Act, the Petitioners opted to move the Court directly, bypassing their representative trade union.

28. It is now widely accepted in this jurisdiction that where a statute has set out a particular dispute resolution mechanism, the disputants should attempt and exhaust those mechanisms before moving Court.

29. In the *Speaker of the National Assembly v Karume* (1992) KLR 21, *the Court of Appeal had this to say*

Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.

30. *And in Geoffrey Muthinja Kabiru & 2 Ors v Samuel Munga Henry & 1756 Ors* (2015) eKLR., *the Court of Appeal opined*

It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts...This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.

31. The Supreme Court in *Benson Ambuti Atega & 2 Ors v Kibos Distillers Ltd & 5 Ors* (2020) eKLR was faced with the question of the jurisdiction of the Environment and Land Court. It held

Judicial abstention, as with judicial restraint, was a doctrine not founded in constitutional or statutory provisions, but one that had been established through common law practice. It provided that a court, though it could be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as could be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism.

32. When the Petitioners joined the Kenya Universities Staff Union, they were exercising their constitutional rights but at the same time reserving to the Union the exercise of their rights in disputes with their employer guided by certain statutory provisions as well as under the dispute resolution mechanisms agreed in the recognition agreement.

33. In the view of the Court, the decision of the Petitioners, to move the Court directly without even disclosing why they were bypassing the Union served to undermine the constitutionally recognised role of their trade unions as well as statutorily ordained dispute resolution mechanisms.

34. Such a course does not augur well for the administration of justice and the Court should observe restraint.

35. The Court, however, notes that the Kenya Universities Staff Union has commenced a legal challenge to the redundancies signalled by the notices which the Petitioners anchored the Petition on.

Conclusion and Orders

36. From the foregoing, the Court declines to entertain the Amended Petition and orders it dismissed.

37. The Petition did not raise any constitutional issues. The dispute should have been brought in the normal way as contemplated by Rule of the Employment and Labour Relations Court (Procedure) Rules, 2016.

38. The Respondents did not file or serve submissions within the agreed timelines. Each party is therefore ordered to bear own costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 11th day of December 2020.

Radido Stephen

Judge

Appearances

For Petitioners Mr. Omaari instructed by Musyoki Mogaka & Co. Advocates

For Respondent Mr. Nyamurongi instructed by Nyamurongi & Co. Advocates

Court Assistant Chrispo Aura