



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 1380 OF 2013

PROFESSOR MWANIKI SILAS NGARI.....CLAIMANT

VERSUS

KISII UNIVERSITY.....RESPONDENT

JUDGMENT

1. The claimant was and still is employed as an Associate Professor by the Egerton University. On 24.9.2010, he was employed by Kisii University College as the Deputy Principal Academic Affairs (DPAA) under a 5 years contract and obtained a leave of absence from the University. The college was the predecessor of the respondent and a constituent college of Egerton University. During the pendency of his contract, the Universities Act 2012 was passed repealing the all the Acts by which public universities including Kisii University college were established, and re-established the same under the new Act. The Act also made provisions on the governance and management structures of the public universities and therefore impacted on colleges, which were transiting to full university status and also their staff including Kisii University College.

2. In February 2013, Kisii University College was granted a charter by the president of Kenya and acquired full university status. As a result, the position of Deputy Principal Academic Affairs (PDAA) became redundant by the operation of the universities Act which did not provide for that position in the governance structure of the public universities in Kenya. A decision on the fate of the claimant was not made immediately but he was appointed Acting Deputy Vice Chancellor Academic Affairs (DVCAA) for a period of 4 months effective from 6.2.2013 but he continued acting until 26.8.2013 when he was directed to hand over the office of DVCAA to the substantive DVCAA who was appointed through a competitive process vide a letter dated 8.8.2013.

3. The claimant was aggrieved by the manner in which the respondent was treating him through her correspondences which were bidding him farewell before his fixed term contract of 5 years had lapsed. He therefore brought this suit contending that the respondent was not only intending to terminate his said contract constructively but also violating his constitutional rights and prayed for the following reliefs:-

- (a) A declaration and finding that the respondent's actions since 21.8.2013 amount to attempted constructive unlawful dismissal of the Claimant.
- (b) A declaration that the claimant is/was entitled to payment of the benefits set out in the claim totaling to kshs. 9,029,790.
- (c) Declaration that the respondent has contravened the claimant's rights under Articles 27,28,30,41 and 47 of the constitution of Kenya.
- (d) Permanent injunction restraining the respondent from breaching its contract of employment with the claimant dated 20.9.2010.
- (e) Permanent injunction restraining the respondent from terminating the claimant's services, or victimizing him in any way, for filing this suit.
- (f) An Order that the Respondent pays the Claimant general.
- (g) Any other or further relief that the court deems fit to grant.

4. The respondent denied the alleged attempted unlawful constructive dismissal and violation of the claimant's constitutional rights and averred that the position of DPAA held by the claimant in the defunct Kisii University College was abolished by operation of the law namely

section 72 read with 76, 80 and 81 of the Universities Act 2012 and the Kisii University charter. She further averred that the Charter brought about new structures in the governance and management of the new university as the successor of the said university college. She further denied the reliefs sought and averred that if anything was owing to the claimant, it was a total of kshs 170,308 made up of passage and baggage allowance, and responsibility allowance for acting as DVCAA for 4 months from 6.2.2013. She therefore prayed for the suit to be dismissed with costs.

5. On 29.8.2013 the claimant obtained conservatory orders to restrain the respondent from engaging in acts of constructive termination of his contract as the DPAA but the order was disobeyed prompting contempt proceedings against the Vice chancellor and the chairman of the respondent's university council. The result of the said proceedings was that the contemnors were fined kshs 100,000 each. In addition, the claimant was paid his salary and some allowances due to him from 1.7.2012 and 31.10.2015. However, he was not called back to work until 2 months before the lapse of his contract term, which he opted to treat as part of his accrued leave.

6. The suit was heard on 25.9.2018 and 5.11.2018 when the claimant testified as Cw1 and the respondent called her legal Assistant to testify for her as Rw1. Thereafter both parties made oral submissions which I have carefully considered herein alongside the evidence tendered.

Claimant's case

7. Cw1 testified that he entered into a contract of service with the predecessor of the respondent on 20.9.2010, then a constituent college of Egerton university, for a period of 5 years starting 1.11.2010 and expiring on 31.10.2015. That during the pendency of the contract, new developments took place and the respondent threatened to constructively terminate the contract but he obtained a court order to restrain the respondent on 28.8.2013.

8. Cw1 further testified that despite the court order, he was not allowed back to work however from August 2013 to 31.10.2015 he was paid his salary and some allowances but she withheld some allowances. That on 15.8.2015, the court found the respondent's Vice chancellor and Chairman of the council guilty of contempt of court and fined each kshs.100,000 or serve 14 days jail term. That on 22.8.2015, he prepared a schedule of his entitlements totaling to kshs.9,029,790 but the respondent ignored it and instead on 2.9.2015, she requested him to report to the university for assignment of duties. However considering the time left before the expiry of the contract term, he offered to spend the remaining days as part of the accrued leave of 72 days and the rest of the accrued benefits be settled amicably.

9. Cw1 further testified that due to the disobedience with the conservatory orders, he suffered mental torture and could not plan his time; he was denied an opportunity to develop his career and his curriculum vitae got a gap that could not be positively explained. That he suffered low self-worth or his dignity was hurt; and he was discriminated against as an employee of the respondent by being denied allowances like the other employees. He contended that he served as acting DVCAA for 7 months but he was never paid acting allowance totaling to kshs.254,290 and other allowances totaling to kshs.8,625,000 based on the salary scale and house allowance that became effective on 1.7.2012 plus other allowances under the letter dated 30.5.2013 which appointed him to act as the DVCAA.

10. He contended that due to the foregoing treatment by the respondent, his career as a scholar was severely damaged and he has stagnated at the level of Associate professor even after resuming his job at Egerton University. He concluded by stating that the Universities Act protected the university scholars but he was victimized by the respondent and denied salary and allowances at the new rates and for that reason he prayed for the reliefs sought.

11. On cross examination, Cw1 admitted that Kisii University College was administratively under Egerton University and independent from the respondent who was entitled to have her own VC and DVCAA. He further admitted that he was appointed acting DVCAA on 30.5.2013 but backdated to 6.2.2013 when the respondent got her Charter. He further admitted that the law required that the new positions be advertised including DVCAA in which he was acting. He further admitted that under the University College, the DPAA was the head of the Academic Division but under the University charter, the DVCAA is the Head of the Academic Division.

12. He also admitted that he applied for the position of DVCAA but he lost to Professor Amutabi who was appointed vide the letter dated 21.8.2013 and to whom he handed over as the Head of Academic Division. He however contended that he reverted to his position of Deputy Principal Academic Affairs (DPAA) and he continued receiving his salary from the respondent pursuant to the court orders granted in August 2013. He therefore denied that the position of DPAA was abolished by the Universities Act but admitted that when he prepared his handing over report, he drew an organogram of the Academic Division, which did not include the position of DPAA.

13. He further admitted that his 5 year contract as DPAA expired on 31.10.2015 and that he was paid the salary and allowances of the DPAA until that date but contended that it was not as required under the Terms of Service approved by the respondent's University Council in 2014. He contended that as DPAA job grade XVI he fell in same position as Principal of a college or campus. He further contended that the salary scale approved by the university council provided for the position of Deputy Principal of a university college or campus. He however admitted that he was not claiming basic salary but some unpaid allowances for acting as the DVCAA. He admitted that the allowances he was paid as DPAA conformed to the scale approved by the council on 10.8.2012.

14. He further admitted that by the respondent's letter dated 2.9.2015, he was required to report back as DPAA but it was impossible because his leave of absence from Egerton University was ending on 31.10.2015 and he has since resumed his duties there as an Associate Professor. He maintained that the respondent owes him some money.

15. On re-examination, he maintained that he was not paid the salary and allowances for acting as DVCAA. He further contended that his contract term of 5 years was never varied but the other terms were varied. He further stated that after receiving the letter dated 2.9.2015, he responded that he was sick and had a family issue in addition to the accrued leave days, which he requested to be allowed to utilize before the

lapse of the contract. He contended that he was paid salary under grade XVI but he was denied the increments approved in 2014 like the other employees of the university.

Defence case

16. Rw1 testified that the respondent was initially a university college under Egerton University until it was given its own charter. He further stated that the claimant was appointed DPAA of the college by the letter dated 20.9.2010 under rule 9 of the Kisii University College Order. That in 2012, the Universities Act was passed and it repealed the Egerton University Act and re-established Kisii University College which was later given a charter to become a full university with a new governance and management structure.

17. He further testified that the under the new structure, the position of DPAA was abolished and the claimant was therefore appointed the acting DVCAA pending appointment of a substantive DVCAA. That after the appointment of professor Amutabi, the claimant handed over to him and prepared a Handing over Report bearing an organogram which did not include the position of DPAA.

18. Rw1 further testified that by the minutes dated 19.8.2014, the University Council approved new Terms of Service for the Senior Management Staff but contended that the same did not apply to the position of DPAA because it had already been abolished. He however admitted that the Terms of Service approved on 10.8.2012 on allowances applied to the claimant when the institution was still a college and contended that the claimant was paid all his allowance under the 2012 Terms of Service.

19. As regards the allowances for acting as the DVCAA, Rw1 admitted that the Claimant was entitled to 10% of the basic pay of the DPAA. He therefore computed the 10% allowance being kshs.36327 per month for 4 months to be kshs.145,308. He further admitted that the claimant is entitled to passage and baggage allowance of Kshs.25,000 to make the total allowances due to the claimant to be Kshs.170,308 only.

20. As regards the contempt of court proceedings, Rw1 testified that the claimant was called back to work but he declined and wrote back on 24.9.2015 seeking leave for the remaining part of his contract. That the leave was never granted because it was not sought through the laid down procedure for seeking leave through leave application forms. He maintained that the claimant was entitled to nothing more than what he admitted herein and prayed for the suit to be dismissed.

21. On cross examination, Rw1 admitted that Article 34 of the respondent's university charter repealed the Kisii university college order 2007 but saved all the appointments except Principal and the DPAA. He admitted that although the claimant was appointed acting DVCAA for 4 months, he continued up to August 2013. He further admitted that the claimant did not hand over the office of the DPAA but that of DVCAA but contended that under the university charter the roles of the DPAA were taken over by the DVCAA.

22. He also admitted that the terms of service approved in 2014 was for senior management and that the claimant held a senior management position. He further admitted that the claimant was not paid as per the 2014 terms of service and maintained that the claimant's contract was frustrated by operation of the law. He further admitted that the respondent owed the claimant 72 leave days but maintained that the claimant's request for leave instead of reporting back to work in September 2015 was never granted by the respondent.

23. He denied the alleged discrimination against the claimant and maintained that the claimant's contract of 5 years was with the defunct college and not the respondent and maintained that the respondent council never appointed him as a DPAA because that position did not exist in the establishment created by the University Charter.

Claimants Submissions

24. Dr. Kamau Kuria senior counsel, for the Claimant submitted that the claimant had proved his case on a balance of probability; that his contract was varied without his consent; that he was subjected to unfair treatment in the cause of handing over as the acting DVCAA; that although terms of service for senior management were enhanced in 2014 and backdated to 2012, he was denied the said salary and allowances increments; that his right to protection from discrimination, to be treated with dignity, to fair labour practices, and to fair administrative action under Article 27, 28, 41 and 47 were violated by the respondent. He therefore prayed for compensatory damages of kshs 2 million for the said violations plus the accrued employment benefits totaling to approximately kshs 9 million.

25. He further observed that the respondent never cross examined the claimant on the contention of violation of his constitutional rights and submitted that the said violations are not contested. He urged that the claimant's contract was breached through constructive termination, he relied on Canadian Authority to urge that when the employer substantively changes the contract of service and the employee resigns, the resignation is equal to constructive termination.

26. He further submitted the plain meaning of the section 76 of the Universities Act provided in mandatory terms that the principals of the former university colleges were not to lose their jobs. He submitted that a contract of employment is a property right and relied on article 40 (2) of the constitution of Kenya to urge that any Act of parliament that takes away contractual right to employment is unconstitutional. He submitted that the Universities Act did not intend to abolish the position of Deputy Principal but it continued the same and as such, the claimant was discriminated against by the respondent

Respondent's Submissions

27. Mr. Nyairo learned counsel for the respondent submitted that save for what has been admitted in evidence, the suit should be dismissed with costs. He further submitted that it is a fact that the claimant was employed by the Kisii University College as DPAA under Rule 7 of Kisii University College Order on a 5 year contract. That in 2012 the Universities Act was passed after which the college was granted a Charter and became a university. That as a result of the new status, the respondent's senior management had to conform to the provisions of the Universities Act. That section 76 of the Act did not provide for the continuation of the position of the DPAA and as such that position

ceased to exist and its roles taken over by the DVCAA. That the claimant corroborated the foregoing by the organogram drew in his handing over report in August 2013 excluding the position of the DPAA.

28. In view of the foregoing facts, the counsel urged that the claimant's contract of employment as DPAA was frustrated by operation of the law, which abolished the said position in the respondent after the grant of the University charter. He further urged that when a contract is terminated through operation of the law the rights of the parties are discharged. He relied on *Halsbury's laws of England page 650,653 and 656* and *Justice Philip Tunoi and Another vs Judicial Service Commission and Another [2015] eKLR* to fortify the foregoing submission.

29. He further submitted that after the claimant obtained injunction to stop termination his contract, he continued to be paid the salary of the DPAA until the 5 year contract term lapsed. He further urged that the post of DPAA was not part of the terms and conditions of service approved in 2014. He concluded by observing that all the payments made to the claimant after obtaining injunction order was erroneous and as such it should be refunded because the contract was frustrated by operation of the law.

Analysis and determination

30. After careful consideration of the pleadings, evidence and the submissions presented by the parties and their respective counsel, there is no dispute that the Claimant was employed by the respondent's predecessor as DPAA under a fixed term contract of 5 years starting 1.11.2010 and scheduled to lapse on 31.10.2015 pursuant to the written contract dated 24.10.2010. There is further dispute that the Kisii University College was a constituent college of Egerton University under the Egerton University Act, which was repealed by the universities Act 2012.

31. It is also common knowledge that the respondent is the successor of the Kisii University college from February 2013 by dint of the Universities Act and the Kisii university charter with a different governance structure and staff establishment; that the claimant's position became redundant after the position was excluded from the respondent's establishment by the Act and the university charter, and its roles and functions given to the DVCAA; and that the claimant was appointed acting DVCAA on 6.2.2013 for 4 months but continued till August 2013 when the substantive DVCAA was appointed.

32. There is further no dispute that the claimant obtained conservatory orders that restrained the respondent from terminating his 5 year contract prematurely but he was not allowed back to work until September 2015, two months before the lapse of the contract, when he was called back but opted to treat the remaining days as part of his accrued leave. Finally, the claimant was paid his salary plus some allowances during the said period he was forced to stay away from work starting August 2013.

33. The issues for determination are therefore summarized as follows:

- a) Whether the respondent breached or unlawfully constructively terminated the claimant's contract of employment, or it was frustrated by an operation of the law.
- b) Whether the respondent violated the claimant's constitutional rights between August 2013 and 31.10.2015.
- c) Whether the claimant is entitled to the reliefs sought.

Constructive termination or frustration of the contract

34. The claimant contended that his appointment as the DPAA and the position were continued in the respondent's establishment by dint of section 76 of the Universities Act and Article 34 of the Respondent's charter that repealed the Kisii University College order 2007 and saved all the appointments. It is therefore his case that the actions and treatment by the respondent were all in breach of his contract and an attempt to constructively dismiss him.

35. The respondent has however denied the alleged breach of the contract or constructive dismissal and maintained that the contract was frustrated through an operation of the law and therefore all the rights under the contract were discharged. She further contended that the claimant was paid his rightful salary and allowances as provided by his contract as a DPAA and as such he has nothing to claim save for the items admitted in evidence.

36. I have carefully considered the documentary evidence produced and the Universities Act. Part III of the Kisii University College order 2007 set out the membership and the government of the university college, which included the claimant's position of Deputy Principal (DPAA). Section 7 thereof provided as follows:

"7. The members of the University College shall be-

a) The Chancellor of the university;

b) The Vice Chancellor of the University;

c) The Principal;

d) The Deputy Principals

e) The members of the Council

f) ...”

37. Section 74 of the Universities Act states that all the constituent colleges of universities were to continue as such upon commencement of the Act. Section 76(2) of the Act also continued the appointments of the Vice- Chancellors of public universities and the Principals of constituent colleges of public universities for the remainder of their term. However section 80(4) and 81(1) of the Act provides as follows concerning members of staff:

“80(4) Except as the institutions established under the repealed Acts otherwise direct, all persons who were members of staff of the institutions established by the repealed Acts shall be members of staff of the respective institution established under this Act and shall be deemed to have been appointed under this Act on the terms and conditions of service applicable to them immediately before the commencement of this Act”

“81(1) All acts, directions, orders, appointments, requirements, authorizations, other things given, taken or done under and all funds, assets and other property acquired by virtue of the repealed Acts shall, so far as they are not inconsistent with this Act be deemed to have been given, taken, done or acquired under this Act.”

38. Section 40 of the Universities Act provides that the staff of a University shall be as provided in its Charter. Article 34 of the Respondent’s Charter that repealed the Kisii University College order 2007 provides as follows:

“34 Repeal and savings

i. The Kisii University College order 2007 is revoked.

ii. Notwithstanding the revocation of Kisii University College order 2007, all acts, directions, orders, appointments, requirements, authorizations, other things given, taken or done under... that order, shall , so far as not inconsistent with this charter, be deemed to have given, taken, done or acquired under this Charter.”

39. Article 25 of the Charter fortifies the foregoing sunset provision, thus:

“25. Staff of the University

i. The staff of the Kisii University College existing prior to the commencement of this Charter, including those on secondment and contract, shall be deemed to be employees of the University subject to the provisions of the Act and Statutes.”

40. The Respondent’s charter then sets out the membership and the government of the University in Part III thereof. Article 12 of the charter lists down the following as the members of the University with no mention of the claimant’s position of DPAA:

“12 Membership of the University

(1) The members of the University are:

a) The Chancellor;

b) The Chairman of the Council;

c) The Vice-Chancellor;

d) The Deputy Vice- Chancellor;

e) Principals of Constituent Colleges;

f) The principals of Colleges and Campuses within the University;

g) Registrars;

h) The University Librarian;

i) The finance officer;

j)The chief legal officer

k) The members of the council;

l) The members of the Senate;

m) The lecturers;

n) The students;

o) The non-teaching staff of the University;

p) The members of the Alumni Association; and

q) Such other members of staff as the University or other body formerly admitted into the association with the University, as the Council may from time to time determine”

41. In view of the foregoing analysis, it is quite clear that the position of the DPAA, which hitherto was held by the claimant in the defunct university college, was abolished from the respondent's staff establishment by dint her Charter read with section 40 of the Universities Act. The said position was not expressly provided for in the Charter, which was granted by the president pursuant to the Universities Act, and the only way to incorporate it in the respondent's staff establishment was by determination by the Council pursuant to Article 12 (q) of the Charter. The claimant has however not adduced any evidence to prove that the Council made a resolution to create the position of DPAA and provided a budget for the same.

42. In view of the foregoing observation that the Charter given to the respondent by the president did not provide for the position of the DPAA, I find that the claimant has not proved on a balance of probability that the respondent's acts against him from August 2013 amounted to constructive dismissal. On the contrary I am satisfied that the respondent has proved on a balance of probability that the claimant's contract was frustrated by operation of the law, which rendered the contract impossible to continue. In other words, the contract was overtaken by events after the roles/ functions of the DPAA were taken over by the DVCAA effective 6.2.2013 when the defunct university college was delinked from Egerton University and acquired university status.

43. As correctly submitted by the defence, a contract of service can be terminated through frustration due to an operation of the law.

The forgoing is fortified by *Halsbury's laws of England 4th Edition volume 9(1)page 650, 653 and 656, paragraph 897, 900 and 902* the gist of which is that the doctrine of frustration of contracts applies to all contracts including employment contracts and its effect is to kill the contract and discharge the parties from further liability under it. That the cause of the frustration must not be an initial impossibility or mistake but one that is not reasonably foreseeable like subsequent legal changes that render performance of the contract impossible.

44. In *Justice Philip Tunoi and Another vs Judicial Service Commission and Another [2015]eKLR* the High Court dealt with the issue of change of the retirement age of a judge who under the repealed constitution was 74 years while under the new constitution the retirement age was lowered to 70. The court held that the petitioners had been reappointed under the new constitution and as such they were bound to retire at age 70 provided by the new constitution and not 74 as provided by the repealed constitution.

Violation of constitutional rights

45. In view of the finding herein above that the Claimant's contract was frustrated by an operation of the law, I am of the considered opinion that the claimant did not prove on a balance of probability that his rights under Article 27,28,41 and 47 were violated as alleged.

Reliefs

46. In view of the foregoing finding that the claimant has not proved violation of his rights, I decline to make declaration in terms of prayer (a), (a)(vi), and (b) in the Amended Memorandum of Claim. Flowing from the foregoing, I dismiss the prayer for general damages.

47. I further decline to grant permanent injunction to restrain the respondent from breaching the claimant's contract of service dated 20.9.2010 or terminating his services, or victimizing him in any way, for filing this suit because the said reliefs are overtaken by events. There is however sufficient evidence on record to prove that after the court gave interlocutory injunction, the claimant was paid his salary and some allowances for the whole contract period as provided under the contract dated 20.9.2010 and the Terms and Conditions of service approved in 2012.

48. I however find merits in the claim for the arrears in some of his benefits for the period between 1.10.2010 and 31.10 2015. The respondent has admitted the claim for 4 months when the claimant acted as the DVCAA from 6.2.2013. However, the claimant has adduced documentary evidence, including letters and handing over report, to prove that he acted as the DVCAA until 26.8.2013 when he handed over the office. In that regard I find that he acted as the DVCAA for 7 months and not 4 months. I therefore declare that he is entitled to the responsibility allowance for acting as such under the respondent's Terms and conditions of Service for Senior Management as approved by the Council in 2014. The parties are unanimous that the allowance was 10% of the claimant's basic pay, being kshs.363,272 equaling to kshs.36,327.20 which multiplied by 7 months works to kshs.254,290.40.

claim for passage and baggage allowance of kshs.25,000 has also been admitted and I therefore allow it as prayed.

50. The claimant has also prayed for leave travelling allowance for the year 2015 being kshs.20,900. However, under paragraph 25B of the Amended Claim filed on 20.2.2018, the claimant pleaded that he was paid all his leave travelling allowances and nothing was outstanding. I therefore dismiss the prayer for the same.

51. The claimant has further prayed for declaration that he is entitled to increments in salary from 1.10.2010 to 30.10.2015. I have however perused the appointment letter dated 20.9.2010 and noted that it provided for a starting basic salary of Kshs.239,217 and a maximum of Kshs.290,122. From the pleadings filed by both parties, the claimant's salary had been increased to kshs 363,272 per month as at the time he exited in 2015. I therefore grant the declaration that the claimant was entitled to the said undisputed salary increments.

52. Finally, and on the basis of the foregoing analysis of the reliefs sought I decline to grant the order for payment of kshs 9,029,790 by the respondent to the claimant. He will have to content with the prayers granted herein above.

Conclusion and Disposition

53. I have found that the Claimant's contract of service as a DPAA Kisii University college was frustrated by operation of the law and not constructively terminated by the respondent. I have further found that despite the said frustration of the contract, the court protected the contract from termination and the claimant enjoyed his full benefits till its 5 years term lapsed on 31.10.2015.

54. I have further found that the respondent did not violate the Claimant's constitutional rights by treating his said contract as frustrated and purporting to bid him farewell. I have however found that the respondent breached his contract as the acting DVCAA by failing to pay his acting allowances for the 7 months served in that capacity and also by failing to pay his Passage and Baggage allowance at the end of his service to the institution.

Consequently, I enter judgment for the claimant against the respondent as follows:

a) Acting allowance for 7 months	Kshs. 254,290
b) Passage and baggage allowance	Kshs. 25,000
Total	Kshs.279,290

55. The said awards shall be paid subject to statutory deductions. The Claimant is also awarded costs and interest at Court rates from the date of filing suit.

Dated, Signed and Delivered in Open Court at Nairobi this 31st day of January, 2019

ONESMUS N. MAKAU

JUDGE