



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 94 OF 2018

(Before Hon. Justice Mathews N. Nduma)

KENYA UNIVERSITIES STAFF UNION.....CLAIMANT

VERSUS

MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY.....RESPONDENT

JUDGMENT

1. The issue in dispute in this matter is alleged refusal by the respondent to grant the claimant union officials reasonable access to its premises to conduct lawful activities.
2. Dispute arose from a letter dated 26th September 2016 addressed to the Respondent's Deputy Vice Chancellor in which the union sought permission for the respondent to allow the secretary Mr. Ronald Wamalwa to attend a scheduled Staff Disciplinary and Staff Medical Insurance scheme meetings scheduled for 29th and 30th September 2016 respectively. The request was not approved.
3. Further on 15th February 2018, the respondent wrote to the claimant union informing the claimant that it will not allow dismissed employees to discharge official union activities as they are strangers who purport to act for the claimant. Mr. Ronald Wamalwa and Cosmas Ruto Cheptoo are ex-employees of the respondent and were summarily dismissed on 15th September 2016.
4. The two filed a suit for unlawful termination in cause No. 94 of 2017. The court held on 1st February 2018 that the termination was not unlawful. An Appeal has been filed to the Court of Appeal.
5. That respondent has continued to deny the two officials entry to its premises to conduct lawful union activities on 21st March 2018, and 28th March 2018.
6. Claimant states that the two are lawfully elected officials of the union and the respondent has no business choosing who should represent the union in its official activities.
7. That the conduct by the respondent violates provisions of Labour Relations Act 2007.
8. The claimant prays for orders restraining the respondents from disbaring officials of the claimant access to its premises to conduct lawful union activities.

Response

9. Respondent filed memorandum of response on 19th July 2018 in which the responded pleads that the dispute is Resjudicata in that it has been determined in Kisumu ELRC No. 94 of 2017 between Ronald Wamalwa and another vs Masinde Muliro University of Science and Technology.
10. That the officials lack capacity to represent the claimant at the respondent's place following the termination of their employment by the respondent on 15th November 2016. Since they were no longer employees of the respondent and by dint of *Article 5(a)* of the claimant's Constitution they could not be recognized officials of the union since they were no longer employees of the respondent.
11. The refusal to allow request by the union to attend union activities at the respondent's premises are not disputed.
12. It is submitted for the respondent that only employees of the respondent held union positions at the shop floor as they are better placed to

represent employees.

13. That *Section 56 (1) of Labour Relations Act 2007* enjoins employers to grant reasonable access of union officials by the employer to the premises. *Section 56(2)* provides that the access shall not be unreasonably withheld.

14. That the said union officials are using their positions to run rough shod on the respondent and their participation is inimical to good labour relations at the respondent's employ.

15. Wherefore the respondent pray the suit be dismissed with costs.

Determination

16. The issues for determination are:-

(i) Whether the suit is resjudicata.

(ii) Whether respondent has violated *Section 56 of Labour Relations Act 2007* in denying access to the two union officials.

(iii) Whether the claimant union is entitled to the reliefs sought.

Issue 1.

17. The dispute determined in Kisumu ELRC No. 94 of 2017 was between Ronald Wamalwa and Cosmas Ruto Cheptoo against Masinde Muliro University of Science and Technology regarding the termination of their employment. The claimant union in the present matter was not a party to that suit.

18. The issue of access of union officials to the premises of the University to conduct lawful union activities was not for determination in Case No. 94 of 2017. That is the issue in dispute in this matter. The court in Cause No. 94 did not deal with the provisions of *Section 56 of Labour Relations Act* but instead canvassed a purely employment matter and whether the termination was lawful or not. The suit before court is therefore not resjudicata since issues that fall for determination herein were not canvassed nor determined in the earlier suit.

Issue 2.

19. It is not in dispute that the respondent has refused the two officials of the union Ronald Wamalwa and Cosmas Ruto Cheptoo access to its premises to conduct lawful union activities on the basis that the two are no longer employees of the respondent and therefore cannot represent the union and its employees in matters to do with the respondent.

20. Respondent's attitude is based on the interpretation of Article 5(a) of the union's constitution which reads:

“(a) Membership of the union shall be open to non-teaching employees and other allied workers who are employed or engaged by universities and/or their subsidiaries as defined in Article three (3) above”

21. It is not in dispute that Ronald Wamalwa was elected Branch Secretary of the claimant union and Cosmas Ruto Cheptoo was elected organizing secretary of the claimant union on 18th February 2016 in an election presided over by the County Labour Officer in charge of Kakamega.

22. It is also not in dispute that the two were dismissed from employment of the respondent on 15th November 2016.

23. That notwithstanding, the two remain lawfully elected officials of the claimant union until they are lawfully replaced by other elected officials.

24. It is not for the employer to determine eligibility of elected union officials of the union to conduct official business activities of the union. The constitution of the union is for the internal operations and regulation of the union and not for the employer to use that constitution to interfere with lawful activities of the union.

25. The conduct admitted by the respondent is in direct violation of *Article 41 of the Constitution of Kenya 2010 as read with Section 5 of the Labour Relations Act, 2007*.

26. *Article 41 of the constitution* provides:

“(4) Every trade union and every employers' organization has the right:-

(a) To determine its own administration, programmes and activities”

27. It is clear that an employer cannot determine which officials to represent or not to represent the union.

28. Once those officials have been elected their employer has no choice but to abide by the provisions of *Section 56(1) and (2) of Labour Relations Act 2007* which provides for the employer to grant a trade union reasonable access to employer's premises for officials or authorized representatives of trade union "to pursue the lawful activities of the trade union that are enumerated in subsection (a) – (d) thereof.

29. *Subsection (2)* permits the employer to impose reasonable conditions as to "the time and place of any rights granted" but not as to the officials to attend to such activities.

30. Accordingly, and in answer to the issues for determination (ii) and (iii), the court finds that the respondent is in violation of *Section 56 (1) and (2) of the Labour Relations Act and Article 41 (4) of the constitution* by denying the two (2) officials of the union access to its premises to conduct its lawful activities.

31. Therefore the court makes the following order in favour of the claimant as against the respondent:-

(a) The action by the respondent of denying Ronald Wamalwa and Meshack Mulongo Onzere access to its premises and meetings to conduct lawful activities of the union is unlawful and a violation of *Article 41(4) of the constitution of Kenya 2010 as read with Section 56(1) and (2) of the Labour Relations Act 2007*.

(b) The respondent is restrained from denying the claimant's officials and its authorized representatives unconditional and reasonable access to its premises to pursue its lawful activities.

(c) The respondent to pay costs of the suit.

Judgment Dated, Signed and delivered this 21st day of March, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Odeny for Claimant Union.

Mr. D.N. Ouma for Respondent

Chrispo – Court Clerk