



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION 42 OF 2019

IN THE MATTER OF ARTICLE 22 (1) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL

FREEDOMS UNDER ARTICLES 10,41,47,232

AND 248 OF THE CONSTITUTION OF KENYA 2010

UNIVERSITIES ACADEMIC STAFF UNION (UASU).....PETITIONER/RESPONDENT

-VERSUS-

CABINET SECRETARY, MINISTRY OF EDUCATION....1ST RESPONDENT/APPLICANT

ATTORNEY GENERAL.....2ND RESPONDENT/APPLICANT

RULING

Introduction

1. The Petitioner herein filed both a Notice of Motion and a Petition on 12th February 2019. It contends that the 1st Respondent has commenced a process of implementing the Sessional Paper dated December 2018 whose effect is breaching and derogating from the duly executed Collective Bargaining Agreement between the Petitioner and Public Universities. It further contends that the Sessional Paper deviates from the existing pay structure and salaries provided in the Collective Bargaining Agreement and that it is imperative that the 1st Respondent carries out its mandate consultatively by involving persons in policy making accountability and transparency. The Petitioner seeks inter alia that a Conservatory Order be issued against the Respondents from implementing the Sessional Paper dated December 2018 Reforming Education Training for Sustainable Development for Academic Staff in all Public Universities in Kenya without the inclusion of the Petitioner's input.

2. In response, the Respondents filed a Preliminary Objection dated 20th February 2019 seeking to have the petition struck out with costs on the following grounds:

(a) THAT the issues raised in the Petition are already law as seen in section 54 (4) (d), (e) and Section 53 of the Universities Act Cap 42 of 2012.

(b) THAT the suit is an abuse of the Court Process.

(c) THAT the suit is incompetent and ought to be struck out with costs.

3. The PO was disposed of by written submissions which were highlighted on 28.3.2019 by the counsel for the petitioner and the respondents. The issues for determination are whether the PO raised herein meets the threshold of a valid PO and, whether it has merits.

Respondents' submissions

4. The respondents submitted that the impugned Sessional Paper seeks to put into effect law as set out under section 54 (4) (d) and (e) of the Universities Act which has not been challenged. That the Sessional Paper provides that the Government will adopt policies to introduce Discipline Differentiated Remuneration (DDR) for academic members of staff and empower public university councils to determine their own terms and conditions of service for their staff. They denied that the said policies disregard the Petitioner's constitutional rights under Article 41(5) of the Constitution to engage in Collective Bargaining though it seeks to move negotiations from the Ministry to individual university councils.

5. The respondents further submitted that the Petitioners were not only party to the drafting of the sessional paper but were also instrumental to the recommendation that the sessional paper seeks to advance. According to the Applicants, the then Secretary General of the Petitioner Dr. Muga K' Olale was part of the taskforce that was mandated to come up with the Sessional Paper on Reforming Education Training for Sustainable Development for Academic Staff in all Public Universities in Kenya thus the views of the Petitioner were taken into consideration especially matters on University Academic Staff Salaries, benefits or other terms.

6. It is the respondents' submission that by virtue of the then Secretary General of the Petitioner, Dr. Muga K'Olale having attended the Taskforce on the Alignment of Higher Education Science and Technology Sector with the Constitution, it suffices that the Petitioner was accorded reasonable level of participation. To fortify the foregoing submissions, the respondents relied on **Robert N. Gakuru & Others v Governor Kiambu County & 3 others [2014]eKLR** and **Nairobi Metropolitan Psv Saccos Union Limited &25 others v County of Nairobi Government & 3 others [2013] eKLR**.

7. It therefore submitted that the Sessional Paper seeks to neither segregate and discriminate any members of the Petitioner nor take away the Constitutional rights to Collective Bargaining and urged the Court to dismiss the Petitioner's Application.

Petitioner's Submission

8. The Petitioner submits that the Petition is not an abuse of the provisions of section 54 of the Universities Act and contended that petition is with regard to the establishment of the Universities Fund as per section 53 of the said Act and the management of the same in section 54 of the Act. It further submits that the Petition does not circumvent around the trustees and their functions but rather questioning the breach of constitutional provisions by the respondents in relation to the process of drafting and implementation of the Sessional Paper, which touches on service of staff among other particulars challenged in the Petition.

9. Flowing from the foregoing, the petitioner argues that the its Petition is properly in court because it is challenging the implementation of the sessional paper without the participation of the Petitioner and because its effect will be segregation and discrimination among its members. It relied on **Kenya Human Rights Commission v Attorney General & another [2018] eKLR** where the Mwita J cited the decision in **Olum and another v attorney General [2002] EA**.

10. The Petitioner further submits that the respondents' contention that the Sessional Paper is already law and that it cannot be challenged in any court of law is invalid and avers that the law can be challenged if it is unconstitutional. It contends that any party can file proceedings in Court to challenge a statute.

11. Finally, the petitioner submits that the issues raised by the PO require facts and documentary evidence to support it and it is therefore an abuse of the process of the court. The Petitioner argued that the Preliminary Objection lacks merit and should therefore be dismissed.

Analysis and determination

(a) Threshold for a valid PO.

12. A P.O was defined by **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696** as follows:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law and it is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact needs to be ascertained or if what is sought is the exercise of judicial discretion."

13. The PO by the respondents is on the ground that the Petition herein is challenging a matters that have already been passed into law, namely section 54 (4) (d), (e) and section 53 of the Universities Act of 2012. That the petitioner's right to public participation in making the impugned Sessional Paper was granted through appointment of its General Secretary to the Task Force by a Gazette Notice; and the effect of the Sessional Paper does not disregard the petitioner's right to Collective Bargaining by moving negotiations from the Ministry to the individual University Councils.

14. The petitioner has contended that the issues raised by the PO require evidence to substantiate and prayed that it be dismissed because it is an abuse of the process of the court. It contended that the petition before the court is challenging the constitutionality of the sessional paper dated December 2018 for among other things its denial of the right to participate in it making as a major stakeholder, and secondly, its effect on its members' rights under Article 41 of the Constitution.

15. After careful consideration of the petition, interlocutory Application, supporting affidavits, the PO and the rival submissions, I am of the considered view that the PO by the respondents does not raise pure points of law as per the holding in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696**. The allegation that the petitioner was granted the right to participate in the making of the impugned Sessional paper and that its implantation does not disregard the Collective Bargaining of the petitioner's members are all factual matters which can only be proved by evidence.

16. The respondents' counsel purported to avail a copy of the gazette notice dated 23.9.2011 to prove that Dr. Muga K Olale was appointed among the members of the taskforce that purportedly made the Sessional Paper. Such evidence cannot be accepted at this stage but at the trial. Consequently, I agree with the petitioner that the PO herein is an abuse of the process of the court since it does not meet the threshold of a PO, namely, raising a pure point of law.

(b) Merits

17. In view of the finding herein above that the PO does not raise a pure point of law, I decline to consider its merits.

Conclusion and disposition

18. I have found that the PO by the respondents does not raise a pure point of law. Consequently, it is dismissed with costs and the respondents given 14 days leave to file and serve their responses to the Notice of motion dated 11.2.2019 and the Petition dated even date.

Signed, dated and delivered at Nairobi this 14th day of May, 2019.

ONESMUS N. MAKAU

JUDGE