



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION 86 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF ARTICLES 22(1), 23(1), 23(3), 24(1), 24(2)(b), (c), 25(a), (b), (c), 27(1), (2), 27(5), 28, 29(D), (f), 30(1), (2), 33(1)(c), 41(1), (2)(a), (b), 43(1)(a), (b), (c), (d), (e), (f), 45(1), 47(1), (2), 48, 50 (1), (2) (3) OF THE CONSTITUTION OF KENYA , 2010

AND

IN THE MATTER OF CONSTITUTIONAL VALIDITY OF TERMINATING THE PETITIONER’S ALLOWANCES WITHOUT NOTICE, VALID REASONS AND GIVING HIM A FAIR HEARING IN TOTAL VIOLATION OF ARTICLE 47(1) AND 47(2) OF THE CONSTITUTION OF KENYA AND IN SUBJECTING HIM TO CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT CONTRARY TO ARTICLE 25(A) AND HOLDING HIM TO SLAVERY OR SERVITUDE CONTRARY TO ARTICLE 25(B) , AND REQUIRING HIM TO PERFORM FORCED LABOUR CONTRARY TO ARTICLES 30(1), (2) RESPECTIVELY

AND

IN THE MATTER OF THE EMPLOYMENT ACT 2007, LAWS OF KENYA

BETWEEN

DR. MAURICE AJWANG OWUOR.....PETITIONER

VERSUS

THE CATHOLIC UNIVERSITY OF EASTERN AFRICA.....RESPONDENT

RULING

The applicant/petitioner was appointed as a Senior Lecturer and the Dean of Faculty of Law by the respondent the Catholic University of Eastern Africa by letter of appointment dated 2nd October 2015. The appointment was for a term of three (3) years effective 1st October 2015. It is expressed to be renewable once, subject to satisfactory performance on mutually agreed targets.

Among the terms of appointment were the following –

“During this period, your salary shall be at Grade 16-8 in accordance with the current Terms and Conditions of Service. Your total package will be:

Basic salary Kshs.77,752.00

House allowance Kshs.52,800.00

Responsibility allowance Kshs.40,000.00

Entertainment allowance Kshs.10,000.00

Transport allowance Kshs.12,000.00

Telephone allowance kshs.8,000.00

Special allowance (Negotiated) Kshs.157,448.00

Total Kshs.358,000.00 (taxable)

In addition to the salary, you shall also receive the following benefits in accordance with the University Human Resource Policies: medical cover, group personal accident cover, group life cover, annual leave of 30 working days leave allowance and Provident fund benefits.”

By letter dated 30th January 2019, the applicant applied for renewal/extension of the contract. By its response dated 26th March 2019, the respondent informed the applicant of the renewal of his contract for a period of three (3) years from 1st April 2019. The terms of renewal of the contract are set out in a schedule attached to the letter dated 26th March 2019 as follows –

DESIGNATION JOB TITLE: Senior Lecturer

AREA OF SPECIALIZATION: Law

GRADE AND LEVEL: 16-8

DATE OF EMPLOYMENT (COMMENCEMENT): 1st October 2015

DATE OF EXPECTED CONFIRMATION: NA

DURATION: 1st April 2013 –

31st March 2022

(3 years)

SALARY

Basic salary Kshs.77,752.00

House allowance Kshs.52,800.00

Transport allowance Kshs.12,000.00

GROSS FIGURE Kshs.152,5552.00 (taxable)

By letter dated 18th February 2019, the applicant was informed of stoppage of Deanship allowance following the expiry of his contract as the Dean Faculty of Law. The letter is reproduced below –

“THE CATHOLIC UNIVERSITY OF EASTERN AFRICA

Office of Human Resources

Our Ref: HRM/ALL/02/2019/01

18th February 2019

Maurice Ajwang Owuor

Faculty of Law

CUEA

Dear Dr. Owuor

RE: DEANSHIP ALLOWANCES

Following expiry of your contract as the Dean Faculty of Law, we wish to inform you that your Deanship Allowances have been stopped forthwith awaiting management directive in relation to the aforesaid renewal of contract.

Yours sincerely,

SIGNED

MR ERICK OMONDI NJIRI

HUMAN RESOURCES MANAGER”

The applicant was aggrieved by this letter and by his application by way of notice of motion dated and filed on 20th May 2019 seeks the following orders –

1. That this application be certified as urgent and the same be heard ex parte and interim orders be granted in the first instance.
2. That pending hearing and determination of the application inter partes, Conservatory orders do issue staying action on the Respondent letter dated 18th February 2019, stopping the deanship allowances, including the negotiated special allowance.
3. That pending hearing and determination of the application inter partes Conservatory orders do issue restraining the Respondent from stopping the standing order between CUEA and Standard Bank in favour of the Petitioner’s loan repayment.
4. That, pending the hearing and determination of this application the Respondent be restrained from stopping the payment of the negotiated special allowance which was a precondition for the Petitioner’s appointment.
5. That pending the hearing and determination of this application, an order for mandatory injunction for the Respondent to pay the Petitioner his February, March, April and May 2019 Deanship and Special Allowances, since the contract had not been terminated.
6. That the Respondent immediately pays the Petitioner the judicial attachment allowance of Kenya Shillings 40,000 which was deducted by the bank to compensate the reduced remission of interests on the Petitioner’s loan by the Respondent from Kenya Shillings 111,000 to 102,000.
7. That the status quo subsisting before the arbitrary stoppage of deanship allowances including the special allowance be maintained pending the hearing and final determination of this suit to enable the Petitioner maintain his family and to facilitate his transport to and from the Respondent’s faculty of law.
8. That the court during the inter partes hearing confirms whether the Respondent has adhered to these interim orders
9. That the Court be pleased to make any orders within its inherent jurisdiction
10. That the Respondent bear the Petitioner’s costs of this application.

The application was filed under certificate of urgency together with the applicant’s petition and is anchored on the following –

“Under Articles 10 (2)(c), 22(1) and (2)(a), (c), 23(1), (41(1), (2)(b), 47, 48, 50(1), 165, and 258 (1) and (2)(c) of the Constitution of Kenya 2010 and Rule 23 of the Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules and all enabling Provision of the Law”

The application is supported by the applicant’s affidavit and the grounds on the face thereof in which the applicant states that –

1. That the Petitioner have continuously been working for the respondents for 11 years in total and at no time has he ever been interdicted for misconduct or insubordination.
2. That on the 18th February 2019 the Respondent without any proof of reason for stoppage of deanship allowances, including the negotiated special allowance and without notice purported to terminate the said allowances, even before the expiry of the contract of appointment as Dean/Senior Lecturer.
3. That, the deanship allowance and the negotiated special allowance were not remitted to the bank in the months of February, March and April 2019, two months before expiry of the Petitioner’s contract.
4. That the said letter of stoppage did not give any reasons as to why the Petitioner’s deanship allowances including the negotiated special allowances were being terminated and which contract agreement the Respondent were relying upon.
5. That two weeks after issuing the letter of stoppage, the Respondent, proceeded to fill the office of Dean, before despite the contract duration of the Petitioner still not having expired.

6. That the unprocedural stoppage of deanship allowances/ negotiated special allowance were aimed at creating such a hostile situation for the Petitioner which would effectively force him out of gainful employment and denying him his allowances for February, March and April 2019 and replacing him with another person before the expiry of the contract contrary to articles 27, 28 and 29 (f), 41, 47 of the Constitution of Kenya 2010 and the relevant provisions of the Employment Act 2007.

7. That the Petitioner has reliable information that the Respondent did not follow due process by notifying the Petitioner that his contract would not be renewed, that allowances were unilaterally stopped before a staff evaluation Committee met and no reasons were given for the premature termination of the contract of service, and the Petitioner was denied the opportunity to be heard and that the Petitioner's position was filled even while he was still in office.

The respondent opposes the application and filed a replying affidavit of ERICK OMONDI NJIRI, the Human Resource Manager of the respondent who deposes in the affidavit that the application is premature and the applicant did not exhaust the internal machinery for resolution of disputes before filing petition and the instant application as provided in the respondent's Human Resource Manual.

He deposes that the applicant did not apply for renewal of his contract even after the respondent reminded him of the option to renew the contract by its letter dated 19th December 2018. He further deposes that the applicant absconded duty at the end of January 2019 without explanation to the respondent and consequent thereto, the respondent appointed an acting Dean and renewed the applicant's contract as Senior Lecturer. That even after renewal of the contract, the applicant failed to resume duty and the respondent has been forced to hire another Lecturer to cover for his unit. That the respondent continued to remit the applicant's salary as Senior Lecturer even after he absconded duty.

Mr. Njiri further deposes that the applicant cannot be paid the Dean's allowance as there is another person acting as Dean.

It is the respondent's position that the prayers by the applicant are not merited.

The application was heard on 3rd June 2019. The applicant who is a practicing advocate appeared in person while the respondent was represented by Counsel Madowo.

The applicant submitted that he has been rendered destitute following stoppage of his special allowance by letter dated 18th February 2019. That the decision to stop the special allowance is in contradiction with the replying affidavit where at paragraph 11 it is averred that the applicant's contract was to expire on 31st March 2019, that the stoppage of the allowance was before the expiry of the contract.

The applicant submitted that as a result of the stoppage of his allowances, he has had no salary since February 2019.

The applicant further submitted that the special allowance was negotiated as a condition for his employment and the withdrawal thereof would make it impossible for him to remain in employment, thus he has been constructively dismissed. That what the respondent is asking him to do is to work for free as his payslip for March 2019 was zero. That this is contrary to Article 30(1) and (2) of the Constitution.

Mr. Madowo for the respondent submitted that the petition is premature, as the applicant did not comply with the Human Resource Policy on resolution of disputes, which requires that he lodges an appeal.

Mr. Madowo further submitted that the applicant's contract was to expire on 31st March 2019 but the applicant absconded duty causing the respondent to recall his appointment as Dean and the dean's allowances. That the respondent appointed another person to act as dean on a temporary capacity and the acting Dean is being paid the Dean's allowance. He referred to the letter of temporary appointment annexed to the replying affidavit,

Mr. Madowo submitted that the prayers for mandatory injunction cannot be granted at interlocutory stage as it will render the petition nugatory and create a conflict.

He argued the court to dismiss the application.

In a rejoinder, the applicant submitted that the application is not premature as he appealed to the respondent to settle this matter out of court which letter was copied to the respondent's Vice Chancellor.

The applicant further submitted that mandatory injunctions can be

granted in the interim in exceptional circumstances where there is legitimate and reasonable exceptions created by the respondent. He submitted that the respondent in the contract of service did indicate that the contract was renewable upon satisfactory performance.

He submitted that the assertion that he had absconded duty has no basis and is contradicted by the respondent's letter requesting the applicant to renew the contract in March 2019, while the respondent at the same time avers that he absconded duty in January 2019.

He urged the court to grant the orders sought.

Determination

I have considered the application and the grounds in support thereof, the replying affidavit and the submissions of the parties.

It is not contested that the applicant was appointed to the position of Dean Faculty of Law and Senior Lecturer by the respondent on a 3-year contract, which was to expire on 31st March 2019. It is not contested that by letter dated 18th February 2019, the respondent through Mr. Erick Omondi Njiri, the Human Resource Manager, wrote to the applicant informing him that his deanship allowances had been stopped awaiting management's directive in relation to the renewal of his contract.

The applicant has annexed his payslip for January 2019 which reflects that he was paid a gross of Kshs.358,000.00 for the month made up as follows –

“CATHOLIC UNIVERSITY OF EASTERN AFRICA – MAIN

FULLTIME

LAW

Month January

Payment Date 31/01/2019

Personnel No. 00442

Job Grade: 16-8

OWUOR MAURICE

SENIOR LECTURER

Basic Pay 77,752.00

RESPONSIBILITY ALLOWANCE 40,000.00

ENTERTAINMENT 10,000.00

TELEPHONE ALLOWANCE 8,000.00

HOUSE ALLOWANCE 52,800.00

TRAVELLING ALLOWANCES 12,000.00

SPECIAL ALLOWANCE 157,448.00

Gross 358,000.00

Reliefs 4,087.60

Round Down Kshs 353,912.40

Gross for tax Kshs 353,912.40

Tax Charged 100,237.98

Personal Relief 1,408.00

DEDUCTIONS

P.A.Y.E. 98,829.98

NSSF 200.00

NHIF 1,700.00

SCB LOAN 131,732.00

STAFF MEALS 125.00

PROVIDENT 3,887.60

Deductions Total 236,474.58

Net Pay 121,525.42

Paid thou bank transfer

Acc No: 0100347293000

STANDARD CHARTERED KAREN”

He has also annexed his payslip for the month of March, which reflects payment as follows –

“CATHOLIC UNIVERSITY OF EASTERN AFRICA – MAIN

FULLTIME

LAW

Month January

Payment Date 31/03/2019

Personnel No. 00442

Job Grade: 16-8

OWUOR MAURICE

SENIOR LECTURER

Basic Pay 77,752.00

HOUSE ALLOWANCE 52,800.00

TRAVELLING ALLOWANCES 12,000.00

Gross 142,552.00

Reliefs 4,087.60

Round Down Kshs 138,464.00

Gross for tax Kshs 138,464.00

Tax Charged 35,603.58

Personal Relief 1,408.00

DEDUCTIONS

P.A.Y.E. 34,195.58

NSSF 200.00

NHIF 1,700.00

SCB LOAN 102,568.82

PROVIDENT 3,887.60

Deductions Total 142,552.00

Net Pay 0.00

Paid by cheque”

The applicant’s contract does not state what items of the contract related to the position of Dean of Faculty as both contracts for 2016 and 2019 refer to the designation and job title of the applicant as Senior Lecturer. The letter dated 26th March 2019 refers to “*Renewal of contract as Senior Lecturer.*”

Further, the letter dated 18th February 2019 addressed to Ms. Margaret

Njeri Kangethe only offers her Kshs.40,000 acting allowance which is equivalent to only one item in the applicant’s original contract wherein he was paid responsibility allowance of Kshs.40,000.

A renewal of contract cannot deviate from the original contract that was being renewed.

Further, there is no evidence from the respondent that the applicant absconded duty. As pointed out by the applicant, the respondent wrote to him in December 2018 asking him to express his interest in the renewal of his contract which he did by his letter dated 30th January 2019.

The letter from the respondent dated 18th February 2019 does not refer to what the Deanship allowance that was to be stopped by the letter constituted as there is no such item in the applicant’s contract or payslip.

Further, the letter does not refer to the stoppage as a result of the applicant absconding duty. It is further stopping the allowance before the expiry of the contract.

Further, in March 2019, the respondent paid the applicant a nil salary contrary to the express provisions of Section 19(3) of the Employment Act.

For the foregoing reasons the court finds the respondent’s stoppage of the applicant’s allowances and the terms of the renewal to be unreasonable, unjustified and in contravention of the mandatory provisions of Section 19(3) of the Employment Act.

For these reasons, I find that the applicant has fulfilled the conditions for grant of injunction pending hearing and determination of the petition. I therefore grant the following orders–

1. Pending hearing and determination of the petition, the respondent is restrained from deducting the allowances of the applicant and directed to reinstate the amount so deducted in the months of February and March 2019.
2. The respondent is further directed to review the terms of renewal of applicant’s contract and reinstate all allowances with the exception of the responsibility allowance of Kshs.40,000/= pending hearing and determination of the petition herein.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF NOVEMBER 2019

MAUREEN ONYANGO

JUDGE