



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2515 OF 2017

JOSEPH SUDI NDINYO **1st CLAIMANT**

KAZUNGU MWANGO **2nd CLAIMANT**

v

KENYA UTALII COLLEGE **RESPONDENT**

RULING

1. On 15 December 2017, Kenya Utalii College (Respondent) wrote to Joseph Sudi Ndinyo and Kazungu Mwango (applicants) informing them of their summary dismissal from their positions as acting Financial Controller and Director of Research, respectively.

2. On 27 December 2017, the applicants instituted legal proceedings against the Respondent alleging that their summary dismissal(s) were unfair. They sought declarations that the dismissals were unfair, reinstatement and an order confirming the 1st applicant as the Financial Controller of the Respondent.

3. Together with the Memorandum of Claim, the applicants filed a motion dated 22 December 2017 under certificate of urgency seeking

1). ...

2). **THAT** pending the hearing and determination of the Application, this Honourable Court be pleased to grant a temporary injunction order restraining/stopping the Respondent herein – **THE KENYA UTALII COLLEGE**, its agents, servants or any other person acting through its instructions or in its name from carrying out the process of recruiting and employment of new substantive holders in the position of the Financial Controller and that of the Director of Research and Corporate Planning at the College.

3). **THAT** pending hearing and determination of this Application, this Honourable Court be pleased to grant a temporary order directing the Respondent to continue paying Claimants at least not less than half of their salary and allowances as at the 15th December 2017.

4). **THAT** upon hearing of this Application, this Honourable Court be pleased to grant an injunction order restraining/stopping Respondent herein – **THE KENYA UTALII COLLEGE**, its agents, servants or any person acting through its instructions or in its name from carrying out the process of recruiting and employment of new substantive holders in the office of the Financial Controller and that of the Director of Research and Corporate Planning at the college, pending hearing and determination of the Claim.

5.) **THAT**, based on the nature of the prayers sought in this Claim, it be directed that it be heard on a priority basis.

6). **THAT** the Honourable Court does grant any other Order that it does deem fit in the circumstances.

7). **THAT** the costs of this application be borne by all the Respondents.

4. When the application was placed before Court on 28 December 2017, the Court allowed the proposed order 2 in the motion. The applicants were then directed to serve the application for *inter partes* hearing on 11 January 2018.

5. Upon service, the Respondent filed Grounds of Opposition on 11 January 2018 and during an appearance before the Duty Judge, it secured leave to file a replying affidavit and which affidavit was filed on 18 January 2018.

6. When the application came up for *inter partes* hearing on 18 January 2018 before me, the applicants sought for 7 days to file a further affidavit, and they were directed to file and serve the further affidavit before hearing on 25 January 2018.

7. On 25 January 2018, the applicants indicated that they had not filed the further affidavit because one of them had been admitted to hospital. The Court allowed them more time and rescheduled hearing to 29 January 2018 (the affidavit was filed on the same day).
8. When the application was called out on 29 January 2018, the applicants were absent/not represented, and on the application of the Respondent, the Court dismissed the application dated 22 December 2017.
9. The dismissal prompted the applicants to file a new application seeking orders
 - 1). ...
 - 2). **THAT** pending the hearing and determination of this application, this Honourable Court be pleased to reinstate the application dated the 22nd December, 2017 plus all the interim orders granted pursuant to the application.
 - 3). **THAT** upon hearing of this application, this Honourable Court be pleased to reinstate the application dated the 22nd December 2017 plus all the interim orders granted pursuant to the application.
 - 4). **THAT** the Honourable Court does grant any other order that it does deem fit in the circumstances.
 - 5). **THAT** the costs of this application be in the cause.
10. This is the application under consideration in this ruling.
11. The Respondent filed a replying affidavit in opposition to the application on 31 January 2018, and the Court heard addresses from the parties on 8 February 2018.
12. In urging the application, the applicants' counsel asserted that on the material day, he was before Amin Farah J and therefore he detailed his clerk to come to Court and request any counsel in Court to hold his brief and request the Court to place the file aside until 10.30am.
13. According to supporting affidavit sworn by counsel, his clerk informed him that an advocate whom he had requested to hold brief declined to address the Court when the file was called out.
14. It was submitted that it was in the interest of justice to allow the application.
15. In opposing the application, the Respondent urged that the application was unmerited because the averments in the supporting affidavit were misleading/based on hearsay and that the application was not brought in good faith.
16. The Respondent also submitted that the applicants' had not come to Court with clean hands and that the application was scandalous.
17. It is not disputed that the applicants' advocate was before another Court.
18. However, as to what transpired in this Court, it is regrettable that the Court Clerk who was delegated to seek an advocate to hold brief did not swear an affidavit to detail what he informed the applicants' advocate on record.
19. Such an affidavit would have been given more weight by the Court.
20. The Court having considered that failure and the fact that the present litigation is anchored on a dismissal which is already *fait accompli*, and further that the Court is now clothed with statutory power to order reinstatement or re-engagement where a finding of unfair termination of employment has been made, has come to the conclusion that the instant application should not be allowed.
21. The Court orders that it be dismissed with no order as to costs.
22. The parties should now move to progress the Cause to hearing on the merits.

Delivered, dated and signed in Nairobi on this 9th day of March 2018.

RADIDO STEPHEN

JUDGE

Appearances

For applicants Mr. Gwaro instructed by Mang'era & Co. Advocates

For Respondent Mr. Wathuta instructed by Kiragu Wathuta & Co. Advocates

