



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.762 OF 2016**

**JAMES MAINA THIONGO.....CLAIMANT**

**- VERSUS -**

**PROF. FRANCIS KIMANI GATHERI.....1<sup>ST</sup> RESPONDENT**

**THE UNIVERSITY COUNCIL,**

**TECHNICAL UNIVERSITY OF KENYA.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 30<sup>th</sup> November, 2018)

**RULING**

The claimant filed an application on 08.05.2016 through J.I. Mwangi & Company Advocates. The application was under order 40 rule 1&2, order 51 rule 1 &3, Article 162 of the Constitution of Kenya 2010 and all enabling provisions of law.

The substantive prayer is for the order that pending the hearing and determination of the application the respondents by themselves, their servants, agents, or otherwise be restrained by way of an injunction from convening, discussing or taking any action against the claimant on 05.05.2016 or implementing any decision made thereof pending the hearing and determination of the claim. The application was supported with the annexed claimant's affidavit and the grounds stated in the application. The claimant's case is that without reason the 1<sup>st</sup> respondent has caused stoppage of payment of the claimant's salary for November and December 2015. The claimant states that the reason for the stoppage is so as to intimidate, harass, and cow the claimant and the 2<sup>nd</sup> respondent has convened the meeting of 05.05.2013 in breach of the CBA. The respondent's actions therefore breached the claimant's rights under the Constitution, the Employment Act, and the 2012/2013 CBA.

The respondent has opposed the application by filing on 22.06.2016 the replying affidavit of Ruth Kirwa through Tongoi & Company Advocates. The respondent's case is that the claimant attended the disciplinary hearing of 05.05.2016 and rushed to Court instead of waiting for the outcome. Further the claimant is entitled to appeal to the respondent's Council if he is dissatisfied by the decision of the disciplinary Committee. It was submitted for the respondent that the unpaid salary in the claimant's grounds supporting the application had been paid. The application had therefore been overtaken with events.

For the Court's intervention in the respondents' exercise of employers' human resource function to exercise disciplinary control over the claimant the Court follows its opinion the ruling in **Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others [2015]eKLR** thus, "The principles are clear.

**The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."**

In the instant case it is not in dispute that the claimant has a right of appeal to the 2<sup>nd</sup> respondent. The Court finds such to be sufficient mechanism to resolve the grievances the claimant may hold about the disciplinary process as initiated against him. There is also no dispute that the unpaid salaries as per the claimant's grounds in support of the application have since been paid. The claimant has not established that the disciplinary process is otherwise proceeding unlawfully or in breach of the applicable terms and conditions of the contract of service. It is also true that the prayer as made has been overtaken in so far as the meeting of 05.05.2013 and subject of the temporary injunction had already taken place.

In conclusion the claimant's application filed on 08.05.2016 is hereby dismissed with costs in the cause.

**Signed, dated and delivered in court at Nairobi this Friday 30<sup>th</sup> November, 2018.**

**BYRAM ONGAYA**

**JUDGE**