



**GJN v Multimedia University of Kenya & another (Cause 1200 of 2012)
[2018] KEELRC 574 (KLR) (23 November 2018) (Judgment)**

Gitile J. Naituli v Multimedia University of Kenya & another [2018] eKLR

Neutral citation: [2018] KEELRC 574 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1200 OF 2012
B ONGAYA, J
NOVEMBER 23, 2018**

BETWEEN

GJN CLAIMANT

AND

MULTIMEDIA UNIVERSITY OF KENYA 1ST RESPONDENT

WOO 2ND RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on July 16, 2012 through ZN Gathara & Company Advocates. The claimant prayed for judgment against the respondent for:
 - a) An order of permanent injunction restraining the respondents by themselves, their servants, agents or any other person purporting to be acting on the respondents' behest and behalf from interfering with the claimant's performance of his duties as Deputy Principle (Finance and Administration) Multimedia University College of Kenya for remaining period of the five year term commencing February 17, 2011.
 - b) Costs of the Claim.
 - c) Interests on Costs.
2. The response to the claim was filed on January 21, 2015 through Achach & Company Advocates. The respondent prayed that the claimant's claim be dismissed in its entirety with costs.
3. At the hearing on July 18, 2018 it was applied for the claimant that the title to the memorandum of claim be amended to reflect the 1st respondent as Multimedia University because the initial 1st respondent had since been chartered as a full university. For the respondent there was concurrence



and the Court ordered thus, “By consent all pleadings are amended so that the 1st respondent is “Multimedia University” and not “The University Council, Multimedia University College of Kenya.” In the opening remarks at the hearing, Council for the claimant stated that prayers were made as per the memorandum of claim.

4. At the close of the hearing, parties agreed to file written submissions. For the claimant, written submissions were filed on August 6, 2018 together with a purported amended statement of claim filed through the claimant’s advocates, Kamau Kuria & Company Advocates. The record shows that the claimant did not seek and obtain leave to file and serve an amended statement of claim with prayers completely different from those in the memorandum of claim. For the respondent the written submissions were filed on November 5, 2018. It was submitted for the respondent that the amended memorandum of claim was unlawful as it was filed and served after the close of the hearing and without the leave of the Court obtained in accordance with the rules of the Court. The respondent submitted that the amendments introduce new causes of action against the respondent by shifting goal posts and trying to fill gaps exposed in the cause of the hearing. It was submitted for the claimant that the amendments were without leave and were prejudicial to the respondent. The Court agrees with the respondent’s submissions and returns that the purported amended statement of claim filed on August 6, 2018 is liable to dismissal. Orders will issue accordingly.
5. It is submitted for the respondent that the substantive prayer in the statement of claim is a permanent injunction which has been overtaken by events upon the following grounds:
 - a) The contract between the 1st respondent and the claimant has since lapsed.
 - b) The injunction seeks to preserve employment in the office that no longer exists.
6. The claimant was at all material time employed by the 1st respondent as Deputy Principal, Finance and Administration. The employment was on fixed term contract of 5 years renewable. By the letter dated February 8, 2011 the claimant was appointed to the same position for 5 years’ term commencing February 17, 2011. The contract was therefore ending on or about February 16, 2016. The claimant by the letter dated September 2, 2011 reported the loss of Kshs. 64.7 million to the Director, Criminal Investigation Department with a view that corrupt transactions at the 1st respondent being investigated. The report was based upon information the claimant had become aware of and based on reports he had come across in the course of his duties. The claimant’s case was that his position at the 1st respondent as Deputy Principal, Finance and Administration became threatened. The 2nd respondent as per the statement of claim, engaged in levelling unfounded allegations against the claimant and the claimant became apprehensive that the respondents would lay him off at any time. Thus, the claimant moved the Court seeking the permanent injunction as prayed for.
7. As submitted for the respondent, the position of Deputy Principal (Finance and Administration) Multimedia University College of Kenya no longer exists following the undisputed elevation of the former college to a fully fledged university. The Court finds that in view of that material fact, an injunction as prayed for will not issue and cannot issue to restrain the removal of the claimant from an office that has ceased to exist. The Court follows the holding in Professor *Elijah Biama v University of Eldoret & 2 Others* [2014]eKLR thus, “The 1st issue for determination is whether the petitioner has valid claims under the contract of service as the Principal of Chepkoilel University College. The court finds that upon the elevation of the Chepkoilel University College to a fully fledged university under the name University of Eldoret, the office of Principal as held by the petitioner was thereby abolished. The abolition of the office, in the opinion of the court, was an overriding circumstance that superseded any claims by the petitioner to continued employment in the office of Principal.”



8. The Court also follows the holding in *Professor Joseph Mungai v Kirinyaga University College* [2018]eKLR, thus, “Further, as submitted for the respondent, the respondent has since been chartered to a fully fledged University so that the position held by the claimant has since been abolished and there would be no vacancy in that regard.”
9. As per the testimony made for the respondents, as at the date of the grant of the university charter to the respondent on March 1, 2013, the claimant was thereby rendered redundant as the Deputy Principal (Finance and Administration) Multimedia University College of Kenya and is entitled to the relevant redundancy pay as per the contract of service and section 40 of the Employment Act, 2007 and similar to that paid to the other college officers holding similar positions at the material time.
10. Further, the injunction was prayed for the remaining period of the 5 year term commencing February 17, 2011 so that it would serve only up to about February 16, 2016. The Court finds that the prayer as made has indeed been overtaken by events. The submissions made for the respondent in that respect will be upheld.
11. The Court has considered all the circumstances of the case including that the claimant has otherwise established that there was instigation of unfounded allegations to be brought against the claimant through trying to persuade the 1st respondent’s employees to falsify allegations of misconduct against the claimant. There is no reason to doubt the evidence by Jane Igandu Ieri (CW2) that she was asked to falsify allegations of sexual harassment against the claimant but she declined to do so. The Court has further considered that the claimant has established that he was in genuine pursuit of anti-corruption initiatives at the 1st respondent’s establishment then known as the Multimedia University College. The Court returns that in consideration of all such circumstances, each party shall bear own costs of the suit.
12. In conclusion the claimant’s suit is hereby dismissed with orders that each party shall bear own costs of the suit; and the amended statement of claim filed on August 6, 2018 is hereby expunged from the record. A decree shall issue accordingly.

SIGNED, DATED AND DELIVERED IN COURT AT NAIROBI THIS FRIDAY 23RD NOVEMBER, 2018.

BYRAM ONGAYA

JUDGE

