



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1177 OF 2018

KENYA PRIVATE UNIVERESITIES

WORKERS UNION.....CLAIMANT/APPLICANT

- VERSUS -

KENYA METHODIST UNIVERSITY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 14th December, 2018)

RULING

The applicant filed a notice of motion on 11.07.2018 under section 12 of the Employment and Labour Relations Court Act, Rule 17 of the Employment and Labour Relations Court (Procedure) Rules 2016, section 73 & 74 of the Labour Relations Act, 2007 sections 2, 35, 40, 42, 43, 44, 45, 46, 48, 49, 50, and 51 of the Employment Act, 2007 and any other enabling provisions of the law. The applicant prayed for:

- a) The application be certified as urgent, service be dispensed with and the same be heard ex-parte in the first instance.
- b) The honourable Court to issue an order of declaration that the termination of the 15 former employees of the respondent covered under the application was irregular, unlawful, and unprocedural.
- c) The declaration that the 15 former employees of the respondent did not participate in consolidated causes of 211 of 2017; 221 of 2017 and 222 of 2017 at Nyeri which were earlier brought before the Court covering 64 former employees and where a decision was made.
- d) The declaration that the grounds of termination of the 15 former respondent's employees are similar to those that were determined by the Court in a ruling and subsequent judgment delivered on 28.07.2017 at Meru in causes 211of 2017; 221 of 2017 and 222 of 2017 at Nyeri as were consolidated.
- e) The order that the respondent to pay her former 15 employees their terminal dues and awards in similar terms and style of the Court's judgment delivered at Meru in causes 211of 2017; 221 of 2017 and 222 of 2017 at Nyeri as were consolidated.
- f) The Honourable Court be pleased to give any other orders and reliefs that will actualise the ends of justice.
- g) Costs of the application to be in the cause.

The application was supported by the affidavit of Peter Emisembe Owiti filed together with the application and upon the following grounds:

- a) The suit and application relate to 15 former employees of the respondent whose employment was terminated unfairly vide notices dated 22.05.2017. The 15 employees are members of the applicant trade union at all material time.
- b) The circumstances of the termination of the contracts of service of the 15 former employees in issue was similar to that of termination of the employees in the earlier and determined suits being as per the judgment delivered at Meru in causes 211of 2017; 221 of 2017 and 222 of 2017 at Nyeri as were consolidated.
- c) The termination was irregular, unprocedural, unfair and unlawful because the termination as per the termination notice dated 22.05.2017 violated the provisions of section 40 of the Employment Act, 2007 on redundancy.
- d) The respondent will suffer no prejudice because the matters in dispute have already determined as per the judgment in the earlier

suits as consolidated.

The respondent opposed the application by filing the grounds of opposition on 26.07.2018 through Patricks Law Associates. The grounds of opposition were as follows:

- a) The respondent is based in Meru hence the Court sitting at Nyeri is best suited to hear the application.
- b) The application as well as the memorandum of claim dated 11.07.2018 is a direct attempt at forum shopping, noting that the claimant has been previously filing similar matters against the respondent at the Court at Meru and Nyeri and the claimant only opted to start filing matters at Nairobi when the presiding judge at Meru and Nyeri Courts was transferred.
- c) That the claimant's application is vexatious as the same has been brought in bad faith and it will cause unnecessary anxiety, trouble and expenses to the respondent.
- d) Thus the orders sought should not be granted to the detriment of the respondent.
- e) The application is fatally incompetent to be entertained by the Honourable Court and is therefore an abuse of Court process.

The applicant filed on 10.09.2018 the affidavit of Peter Emisembe Owiti to respond to the grounds of opposition. It was stated that the suit and application was with respect to the 15 employees who at all material time served at the respondent's Nairobi campus or station. Further it was urged that the respondent had failed to establish a valid opposition to the present application. The application should therefore be allowed as prayed for.

The respondent has filed on 16.11.2018 the affidavit of Caroline Ndumia, the respondent's Legal Officer where it is urged that the 15 employees have been paid their final dues whereby the same was applied to settle the employees' loans with KEMU Sacco. Further, it is urged that the claimants have also failed to disclose to the Court that they had been paid final dues which were paid to the KEMU Sacco. Thus the claim should be determined on its merits.

The parties filed their respective submissions. The Court has considered all the material on record and makes findings as follows:

- 1) There is no dispute that the 15 former employees subject of the present suit were deployed to serve at the respondent's Nairobi station or campus. In such circumstances the claimant was entitled to file the suit in the Court registry at Nairobi.
- 2) The respondent has raised important triable issues and in particular whether the respondent has paid the 15 employees' terminal benefits following the redundancy and whether such payment had been applied to settle the employees' loans with KEMU Sacco. Thus the Court returns that the circumstances in the instant case would be substantially different from those in the earlier decided cases being the judgment delivered at Meru in causes 211 of 2017; 221 of 2017 and 222 of 2017 at Nyeri as were consolidated. As submitted for the respondent it will be fair that the suit goes for full hearing on its own merits.
- 3) Accordingly the claimant's application will be disallowed.

In conclusion the application dated 11.07.2018 is hereby dismissed with orders as follows:

- 1) Costs of the application in the cause.
- 2) The response to the memorandum of claim, the respondent's list and copies of documents, and the respondent's witness statements be filed and served by 20.01.2019 and the reply to response with the claimant's further list and copies of documents or witness statements may be filed and served by 10.02.2019.
- 3) Parties to fix a date for pre-trial conference on priority basis once the pleadings have closed.

Signed, dated and delivered in court at Nairobi this Friday 14th December, 2018.

BYRAM ONGAYA

JUDGE