



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT KISUMU

INDUSTRIAL CAUSE NO. 214 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

DR FRANCIS OKELLO ODUNDO.....CLAIMANT

VERSUS

JARAMOGI OGINGA ODINGA UNIVERSITY

OF SCIENCE AND TECHNOLOGY.....RESPONDENT

JUDGMENT

The Claimant Dr. Francis Okello Odundo is employed by the Respondent Jaramogi Oginga Odinga University of Science and Technology as a lecturer. He avers in his claim that according to his terms of service he is entitled to a fee waiver of 50% if he undertakes his studies at the university according to the Staff Training Policy. The Claimant undertook a PhD program at the university for which the fee payable was Shs.385,000. Based on the 50% waiver he paid Shs.105,000 and had fee arrears of Shs.87,000. On 14th May 2014 he received a demand notice from the university for arrears of fees of Shs.280,000 which the letter of demand stated would be recovered from the Claimant's salary by installments of Shs.30,000 per month if no settlement was made by 15th May 2015.

The Claimant avers that in his payslip for the month of May 2015 a sum of Shs.30,000 was recovered on account of "Fee Recoveries" while the payslip for June 2016 had a recovery of 18,888.90.

In his Memorandum of Claim dated 29th June 2015 the Claimant seeks the following orders:-

- (a) The Honourable Court be pleased to find and declare that the deductions of the Claimant's salary is erroneous.***
- (b) The Honourable Court be pleased to order that the respondent ceases to further deduct any monies from the Claimant.***
- (c) The Honourable Court be pleased to find and declare that the failure to implement the Staff Training Policy and depriving the Claimant to draw the benefits therefrom is illegal, unlawful and erroneous.***
- (d) The Honourable Court be pleased to order that the respondent restitutes to the Claimant the salary of Kshs.60,000 deducted so far.***
- (e) The Honourable Court be pleased to order that the respondent pays to the Claimant Kshs.192,000 which he is entitled to under the Staff Training Policy.***

The Respondent filed a Statement of Response in which it denies that the Claimant was entitled to a 50% fee waiver under his terms of employment or at all. The Respondent states that the fee payable by the Claimant for his PhD studies at the respondent's institution was Kshs.385,000/-. It states that the Terms of Service for Senior Administrative and Academic Staff which the claimant signed on the 3rd of October, 2011 provided at Article 17(1) that:

"... the respondent shall always fully implement the training and develop policy for the purpose of education and training of the employee, their legitimate spouse and children studying at the University College"

The said Terms of Service further provided at Article 17(2) that the method of awarding tuition fees waiver shall be provided for in the Staff Training Policy. That Article 17 of the Terms of Service for Senior Administrative and Academic Staff generally provides that any fee waiver that the claimant may obtain while studying at the respondent institution shall be as per the University Training Policy. That Article 17.8 of the Staff Training Policy implicitly provides that any employee who is interested in benefiting from the fees waiver while studying at the employer institution shall follow the following procedure:

(i) Make an application to the Staff Training and Development Committee.

(ii) The Committee shall then sit and consider the applications.

(iii) In making its decision on whether to grant such waiver, the committee shall give due consideration to the principle of equity and availability of funds allocated for training.

The respondent avers that it is in compliance with the provisions of Article 17.8 of the Staff Training Policy. It states that the claimant made an application to the Deputy Vice-Chancellor in charge of Planning, Administration and Finance, who is the chairperson of the Staff Training and Development Committee, to be considered for a fee waiver vide a letter dated 8th January, 2014. The claimant thereafter made a follow up to his fees waiver application vide a letter dated 29th January, 2014 wherein he passionately requested for the tuition fees waiver to enable him progress in his studies and defend his PhD thesis. That considering that the claimant was an employee of the University in a Management position; and considering that the Staff Training and Development Committee had not been able to sit and deliberate on the claimants application because it needed to consolidate the claimants application with the other fees waiver applications, the chairperson of the Committee through a letter dated 17th March, 2014 advised the claimant to clear his fees arrears to enable him graduate because his application for fees waiver was yet to be considered.

The Respondent states that the Staff Training and Development Committee finally deliberated on the fees waiver applications and once the funds were made available it wrote a letter dated 28th May, 2015 to the claimant informing him that he had been granted a fees waiver of Kshs.80,000, and that he was expected to clear his outstanding tuition fees balance within a period of nine (9).

The Respondent avers that only Kshs.1,500,000 was allocated and available to all applicants who had applied for the tuition fees waiver, and yet the amount of money requested by all the tuition fees waiver applicants far exceeded the resource envelope available. The Respondent avers that the Staff Training and Development Committee applied the principle of equity and fairness in awarding tuition fees waiver whereof the claimant was among the applicants who was awarded the highest amount of money in the form of tuition waiver of Kshs.80,000/- as reflected in the minutes and the full list of the applicants who were awarded tuition fees waiver by the staff development committee, a copy whereof has been exhibited by the Respondent.

The respondent confirmed that the claimant had paid Kshs.105,000 and thereafter obtained a tuition fees waiver of Kshs.80,000/-. This meant that the total fees that had been paid by the claimant was Kshs.185,000/-. Considering that the total fees for the entire PhD course was Kshs.385,000/-, the Claimant therefore owed the respondent Kshs.200,000/-.

The respondent avers that as at the date when the Finance Officer issued a demand notice to the claimant directing him to clear his fees arrears, the Staff Training and Development Committee had not notified the Finance Department and the claimant that it had granted the claimant a tuition fees waiver of Kshs.80,000/-, hence the reason why the Finance Officer demanded for Kshs.280,000/- as tuition fees arrears from the claimant.

Submissions

When parties appeared before me on 2nd December 2015 for the hearing of the application they informed the Court that they were in the process of negotiating an out-of-court settlement. The parties agreed that should no settlement be reached they will argue the substantive case by way of written submissions. The Claimant subsequently filed written submissions on 22nd February 2016. No submissions were filed on behalf of the Respondent.

I have considered the submissions filed by the Claimant and note that the same are in respect of the application and not the main claim as directed on 2nd December 2015. Since the prayers in the application are substantially the same as those in the Claim, I will deem the submissions filed by the Claimant to be in respect of the claim.

Determination

Having considered the pleadings, affidavits and annexures thereto, the issues that arise for consideration by the court are the following:

1. *Whether the Claimant's terms of appointment provided for a 50% waiver of fees for training undertaken by the Claimant through the Respondent.*
2. *Whether the Respondent breached the Claimant's terms of service by awarding him a waiver of Shs.80,0000 instead of 50% of fees which in his opinion is Shs.192,500.*
3. *Whether the Claimant is entitled to a refund of Shs.60,000 recovered from his salary.*
4. *Costs.*

Fee Waiver Policy

According to the **Terms of Service For Senior Academic and Administrative Staff for Bondo University College (2011)** annexed as Claimant's Annexure 1, paragraph 17 provides for Education and Training as follows:-

"17. EDUCATION AND TRAINING

- (i) *The University College shall always fully implement the training policy for the purpose of education and Training of the Employee.*
- (ii) *The member of Staff their spouses and children studying at the University College shall be given a 50 per cent tuition waiver."*

The Respondent has however also produced a document with the same title but paragraph 17 thereof provides as follows:-

"17. EDUCATION AND TRAINING

- (i) *The University College shall always fully implement the Training and Development Policy for the purpose of education and training of employee, their legitimate spouse and children studying at the University College.*

(ii) This shall be as provided for in the University College Training and Development Policy in Consultation with the Council.

The Staff Training Policy (December 2013) Annexed as Appendix 2 of Respondent's bundle of Documents provides for waiver of fees as follows:-

17.1 Sponsorship by the University

(a) The University shall grant scholarship to employees on staff development programmes, undertaking postgraduate training at the University. Fee waived shall only include registration fee, tuition related fees and examination fees and research money.

(b) Fee waiver shall be renewable annually upon submission of a satisfactory progress report submitted to the Staff Training and Development Committee by the Board of Postgraduate Studies (BPS) or the Chairman of the Staff Training and Development Committee.

17.8 Tuition Fee Waiver

The Staff Training and Development Committee shall consider requests for fee waiver for staff, legitimate spouse and children studying at the University in consultation with the Council from time to time.

This will be subject to:

- (a) availability of funds allocated for training and development; and
- (b) equity.

The Claimant applied for fee waiver by the letter dated 8th January 2014 which reads as follows:-

Odundo Francis Okello

W/161/4199/2012

School of Mathematics and Actuarial Science

8th January, 2014

To.

DVC, PAF

JOOUST

Dear Sir,

RE: APPLICATION FOR FEE WAIVER

I am an employee of JOOUST (PF No.217) in the School of Mathematics and Actuarial Science undertaking my PhD degree course (Admission No.W/161/4199/2012).

I hereby kindly request for a PhD fee waiver to enable me meet the fee requirements.

Thanking you in advance and looking forward to a favorable response.

Yours Faithfully,

P. F. NO.217

By letter dated 29th January 2014 the Claimant sent a reminder for fee waiver in which he states that he had paid Shs.192,500 being 50% of total fees and was seeking a waiver of the other 50% to enable him attend the scheduled PhD defence. The Respondent replied to the letter on 17th March 2014 advising the Claimant to clear the fee balance as his application for waiver had not yet been considered. By letter dated 28th May 2015 the Claimant was informed of approval of Tuition fee waiver of Shs.80,000. By letter dated 14th May 2014 (which I presume to be a typographical error and should read 14th May 2015) the Respondent reminded the Claimant of outstanding fees of Shs.280,000/= and informed him that the same would be recovered by installments of Shs.30,000/= per month should he not have communicated with the Respondent for an amicable settlement arrangement or settled by 15th May 2015.

As I have pointed out above, the Terms of Service annexed to the Claimant's affidavit sworn on 29th July 2015 is substantially different from the one submitted by the Respondent. The Claimant's copy provides for a 50% waiver on tuition fees while the Respondent's copy does not make any reference to a fee waiver and instead refers to the Training and Development Policy.

Written submissions are not evidence and cannot be used to controvert facts or allegations in pleadings. It therefore means that the Claimant has not controverted the averments of the Respondent in both the Response and Replying affidavit leaving the Court with conflicting evidence on the issue of waiver.

According to Section 107, 108 and 109 of the Evidence Act, it is the burden of the person who wishes the Court to believe a set of facts to persuade the Court to the satisfaction of the court. The Claimant has not adduced any evidence to prove that his copy and not the Respondent's is the authentic version.

Secondly the Claimant has not made any reference to or commented on the Staff Training Policy which provides for the Staff Training and Development Committee to consider requests for fees waiver and make decisions thereon after considering the available funds and applying equity.

The Claimant also did not comment on the minutes of the Staff Training and Development Committee at which the fee waiver he applied for was approved. The minutes for the meeting held on 24th April 2014 shows that among all the 28 applications for waiver there were 3 PhD applications among them the claimant and all were granted a fees waiver of Shs.80,000/= which was the highest.

Lastly, the Claimant's application for fee waiver does not state how much fee waiver he applied for, nor for which year.

From the foregoing I find that the Claimant has not proved that his terms of service provided for a fee waiver of 50% of fees or that he applied for waiver of 50% of tuition fees. He has thus not proved that he is entitled to a fee waiver of Shs.192,500 as alleged.

Whether the Claimant Entitled to a Refund of Shs.60,000/=

Under Section 19(1)(h) of the Employment Act an employer is entitled to deduct from the wages of his employee-

an amount due and payable by the employee under and in accordance with the terms of an agreement in writing, by way of repayment or part repayment of a loan of money made to him by the employer, not exceeding fifty percent of the wages payable to that employee after the deduction of all such other amounts as may be due from him under this section;

As stated by the Respondent in the Response, the Claimant was allowed to graduate in May 2014 before paying full fees and as has been pointed out at paragraph 18 of the Response, the Claimant admitted in Paragraph 7 of the Claim that he had outstanding fee arrears of shs.87,500.

Thirdly, the Claimant produced two pay-slips for May and June 2015 with a total deduction of Shs.48,888.90 and not Shs.60,000 which he seeks to be refunded.

From the foregoing it is clear that the Claimant owed the Respondent outstanding fees as at the date of filing this suit, that the Respondent had the legal authority to recover the same from his salary and that the Claimant was granted ample notice to either settle or make amicable arrangements for settlement before the 15th May 2015 failing which the same would be recovered from his salary.

I therefore find that the Claimant is not entitled to a refund of Shs.60,000 or any other sum recovered by the Respondent on account of fee balance as at the time of filing this suit. On the contrary it is the Claimant who owes the Respondent fees arrears which the Respondent has authority to recover from his salary and has given him ample notification of the intention to make the recovery.

For the foregoing reasons the Claimant's claim herein has no merit and is dismissed. There shall be no orders for costs.

DATED SIGNED AND DELIVERED THIS 19TH DAY OF JANUARY, 2017

MAUREEN ONYANGO

JUDGE