



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 884 OF 2015

PETER WANYAMA OJIAMBO.....CLAIMANT

VERSUS

THE TECHNICAL UNIVERSITY OF KENYA1ST RESPONDENT

PROF. F.W.O. ADUOL.....2ND RESPONDENT

PROF. JOSEPH KIPLANG'AT.....3RD RESPONDENT

RULING

1. The Claimant by a Motion dated 22nd May, 2015 sought orders that the respondent be ordered to pay the claimant the unpaid salary arrears from September, 2014 to April 2015 in the sum of Kshs.545,872/=. The claimant further sought directions of the Court on the appointment letter dated 12th November, 2014 vis –a - vis the prayers sought in the main suit.

2. The application was supported by the affidavit of the claimant who deponed in the main that:-

(a) That in the month of January 2007 he was employed by the 1st Respondent then operating as the Kenya Polytechnic as a part time lecturer on a contractual basis in the School of Arts and Media Technology.

(b) That between the January 2007 and February 2014, the 1st Respondent renewed his contract or engagement ostensibly via semesterial or annual appointment letters and all the while he offered his services to the 1st Respondent dutifully without any interruption or break.

(c) That as stipulated in the various appointment letters. He was to be remunerated at the rate of Kshs.6000,000/= per student contact hour.

(d) That on 17th February 2014, the 1st Respondent through the 3rd Respondent offered him an appointment as a Senior Technician on Grade VIII/IX/X in the Department of Printing and Media Technology for one semester with a remuneration of Kshs.64,703,000/= encompassing a Basic salary of Kshs.30,681,00/=. House Allowance of Kshs.29,822.00/= and House to Office Allowance of Kshs.4,200.00/=.

(e) That on 17th June 2014, the 1st Respondent through the 3rd Respondent offered me an appointment as a Senior Technician on similar grades for one semester with a remuneration of Kshs.64,703/= which he accepted.

(f) That on 12th November 2014, the 1st Respondent through the 3rd Respondent offered him an ambiguous appointment as a Part Time Lecturer (Grade IX/X) without explicitly informing him of the commensurate salary package attendant to the appointment. In the terms of the letter dated 12th November 2014, it was partly stated as follows:-

“Your compensation shall be based on the actual teaching load, details of which will be provided to you in the aforesaid letter from the executive Dean, Faculty of Social Science and Technology.”

“Please note that you will be paid on a monthly basis through the payroll for the actual teaching load. No other benefits are attached to this appointment.”

(g) That on several occasions both verbally and in written form I requested the Respondents to reconsider and revise the appointment letter dated 12th November, 2014, in view of my earlier appointment letters and in the meantime I continued to faithfully perform and carry out assigned tasks and duties including offering lecturers, setting examinations, invigilation and marking of exam scripts until the month of April 2015 when the Respondent refused to allocate him further duties.

(h) That part of the ambiguity in the appointment was in regard to the denotation or none indication whether the appointment was temporary and to which he was entitled to higher perks or whether the same would be termed as contract to which he would be entitled to gratuity for the cumulative service period as per the 1st Respondent's terms of service.

(i) That on 26th January 2015 he further requested the Respondents to facilitate and authorize his payment owing to the hardships encountered in travelling to and from work and meeting his basic economic needs.

(j) That on 18th February, 2015, the 3rd Respondent in an internal memorandum to the executive Dean was adamant that he would not be paid even for work done unless he agreed to compromise his status by signing the appointment letter dated 12th November 2014 which was still pending review.

(k) That the Respondents still continue to withhold his salary from the month of September 2014 to April 2015 which he worked for and has failed to assign him any duties since the month of May 2015.

(l) That he is now living in penury and cannot afford to pay even my daughters university fees one of whom is remaining with two semesters to complete her education at the United States International University and who has been refused registration and further continuance unless the said fees are paid yet classes have commenced.

3. The respondent through one Ruth Kirwa who deponed that she was the legal officer of the 1st respondent stated that:-

(a) That the claimant has over time been offered appointment on part time basis and has at all times had his contract renewed on a part time/temporary basis. The appointment letters were very specific as to the duration and nature of the engagement.

(b) That in 2014 owing to certain malpractices that had been pointed out to the 1st Respondent by

the Ministry of Education, Science and Technology (“the Ministry”) in relation to the recruitment and payment of part-time, sessional and/or adjunct Professors, the Ministry called upon the 1st Respondent to regularize the haphazard recruitment and create structure which directive the 1st Respondent promptly heeded and put its house in order by coming up with a standard appointment letter.

(c) That after the introduction of the new appointment letter, it was imperative for any person wishing to continue doing contractual work for the 1st Respondent as a part-time lecturer, sessional lecturer and/or as an Adjunct professors to sign the same after the completion of their then existing contract.

(d) That after the introduction of the new appointment letter, it was imperative for any person wishing to continue doing contractual work for the 1st Respondent as a part time lecturer, sessional lecturer and/or as an Adjunct professors to sign the same after the completion of their then existing contract.

(e) That contrary to the Claimant’s assertions in paragraph 6 of the supporting Affidavit, the appointment letter of 12th November 2014 was not ambiguous in any way whatsoever and need not have elaborately laid out all the nitty gritty details which were in any event to be specifically provided by the particular Dean of the concerned Faculty under a separate cover.

(f) That the 1st Respondent being a huge institution is managed administratively by Faculties and it was thought by the management of the University following the audit by the said Ministry, that the best governance module for part time lecturers, sessional lectures and/or Adjunct professors would be for the Dean to handle the details of the appointment as it would be him/her to assign the detailed responsibilities.

(g) That similarly there was nothing untoward about the clause relating to the compensation being based on the teaching load which details were to be duly supplied by the relevant Dean who in any case would be best placed to supervise/monitor how the lecturer would carry out his/her teaching duties.

(h) That the issue of contractual or temporary appointment raised in paragraph 9 of the Supporting Affidavit does not arise as the term part time in itself is indicative that the engagement was not intended to be permanent. A letter from the relevant Dean, if the Claimant had followed through to the next step, would have brought clarity to the Claimant.

(i) That having not signed the new appointment letter the Claimant was no longer legally engaged with the 1st Respondent. It was not incumbent on the 1st Respondent to give reasons for not revising the Claimant’s appointment letter, as suggested by paragraph 13 of the Supporting Affidavit, which was a decision arrived at after various consultations at top management level. The claimant’s appointment letter was not open for negotiation.

(j) That other lecturers who were offered similar appointments at the same time of the transition to the new regime, signed the new appointment letters, accepted the terms therein without any reservations and continued with their duties.

(k) That in response to paragraphs 12 and 14 of the Supporting Affidavit, the 1st Respondent had the prerogative not to assign the Claimant any further duties in spite of how long he had served. The employment contract is a contract like any other dependent on the will and intentions of both parties. In this case, the 1st Respondent exercised its right to disengage with the Claimant as it had not complied with the laid down regulations. It has no way treated the Claimant with any contempt. He brought it upon himself.

(l) That in the event that the Claimant continued to teach without the knowledge of the management

of the institution, then he cannot claim back pay for a time he was illegally conducting, teaching activities and when he was not recognized by the system. It is unknown at this time whether the Claimant taught any classes at all. Being a public institution, no one is barred from being on the premises.

4. In his submissions in support of the application, Mr. Ochola for the claimant submitted that the Court has jurisdiction to grant the orders sought since the claimant had demonstrated that he has a prima facie case with probability of success. According to Counsel the claimant had worked for the respondent continuously for 8 years through semesterial appointments or short term appointments or short term contract. Counsel further submitted that the claimant had demonstrated that he actually worked for the respondent by attaching the time tables for the time tables for the specific period and mark sheets for units he taught. Counsel contended that there was no evidence provided by the respondent to rebut the claimant's assertion that he is yet to be paid any salary from September, 2014 to April, 2015.

5. On the issue of irreparable injury, Counsel submitted that withholding salary exposes the claimant to financial embarrassment. In support of this argument counsel sought reliance on the case of **Donald C. Avude v. Kenya forest Service (2015) eKLR.**

6. Concerning the respondent's replying affidavit sworn by Ruth Kirwa. Counsel submitted that the same was contradictory and not factual in that the claimant was not accused of any culpability in the malpractices and that he was not consulted as regards the new appointment letter dated 12th November, 2014.

7. Mr. Ochola further submitted that section 10 of the Employment Act required that employment particulars be furnished not later than two months after employment. According to Counsel, the claimant started lecturing in September, 2014 hence should have received a contract specifying the details in the month of November latest. In support of this contention, Counsel relied on the case of **Chacha Muita v. Kemri (2014) eKLR.** Counsel further submitted that the general principle on change of salary premised on contract law demands that an employee be given justifiable reasons for a reduction in salary as this would connote a variation of terms of agreement between two parties.

8. Mrs. Tongoi for the respondent on the other hand submitted that the Court had power to grant mandatory orders however the power is discretionary and exercisable in exceptional cases. The Court must consider if grave injustice will be occasioned and whether no justice can be attained through any means. Counsel relied on the South African Labour Appeals Court case of **Booyesen v. the Minister of Safety and Security (2011) 1 BLL 1283 (CAC).**

9. According to Counsel, the 1st respondent in migrating to a fully-fledged University was advised by the Ministry of Education to conform to the Ministry's standards in terms of recruitment and payment of part-time, sessional and adjunct professors. One of the reforms was the issuance of formal appointment letters which the lecturers had option to accept or decline. According to Counsel majority of the lecturers signed their letters and proceeded to teach showing that the letter was not outrageous as claimed by the claimant.

10. According to Counsel the respondent was not engaging the claimant in any disciplinary matter but was effecting the necessary changes to be in consonance with the Ministry's directive.

11. This being an interlocutory application, the Court will not delve deeply into the evidence and factual issues. This is left to the trial of the main action. The concern of the Court at this point is to review the interlocutory application and consider if the order sought in the interim would be just to grant without waiting for the full trial. The applicant must therefore demonstrate that he has a prima facie case with probability of success and that the risk or loss that may occur if the orders are not granted would not be adequately compensated by an award of damages if he ultimately becomes successful.

12. The claimant/applicant herein has previously been engaged by the respondent on short time basis and in writing. His last such appointment was by a letter dated 17th June, 2014. In that letter he was appointed with effect from 5th May, 2014 to run until 15th August, 2014. The claimant contended that

upon expiry of the last written contract he was verbally requested to continue working as he awaited a new contract. One was issued to him on 12th November, 2014, which he was not happy with and asked for its review and or reconsideration before signing. The respondent on its part maintained that the issuance of the contract dated 12th November, 2014 was part of the process of streamlining its operations in line with the advise of the Ministry of Education, Science and Technology. According to the respondent, no payment could be made to the claimant before signing the contract. The respondent further contended that by declining to sign the contract its relationship with the claimant ceased to exist.

13. These are issues that can only be resolved after full hearing and not at the interlocutory stage. An interlocutory order for payment of salary arrears is by nature akin to interlocutory mandatory injunction. The principles for granting interim mandatory injunction are now settled. It can only issue in exceptional cases and where no other means of doing justice is available. The Court is not persuaded that the claimant's application presents itself as an exceptional case to warrant the making of the order.

14. In conclusion the Court declines to grant orders sought in the Motion and hereby directs that they be resolved at the full trial.

15. The application is therefore dismissed with costs.

16. It is so ordered.

Dated at Nairobi this 15th day of April 2016

Abuodha Jorum Nelson

Judge

Delivered this 15th day of April 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge