



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 1 OF 2016

PROF. EZEKIEL K. KIPROP

PETITIONER

v

UNIVERSITY OF ELDORET

1ST RESPONDENT

THE VICE CHANCELLOR, UNIVERSITY OF ELDORET 2ND RESPONDENT

JUDGMENT

1. Prof Ezekiel Kiprop (Petitioner) was appointed as Deputy Vice-Chancellor, Administration and Finance of the University of Eldoret (1st Respondent) for a 5 year term starting from 29 July 2013.
2. The Chairman of the 1st Respondent's Council thereafter through a letter dated 5 November 2013 set out the Petitioner's terms and conditions of service.
3. On 17 July 2015, the 1st Respondent's Council suspended the Petitioner pending investigations into allegations that he had been involved in unrest at the University.
4. The Petitioner challenged the suspension in Court (*Nakuru Petition No. 8 of 2015*), and the Court in a ruling delivered on 6 November 2015 directed University to conclude the investigations and notify the Petitioner of the outcome of the investigations and of any action, it intended to take including disciplinary action.
5. As a result of the Court's directive aforesaid, the Respondents issued a show cause notice to the Petitioner on 14 November 2015, to answer to some 7 allegations, within 7 days.
6. The notice also invited the Petitioner to appear before the 1st Respondent's Council on 10 December 2015 for an oral hearing.
7. The Petitioner did not appear before the Council on 10 December 2015 as his legal advisers had raised several objections, and through a letter dated 21 December 2015, the Council informed him of a rescheduled hearing on 4 January 2016.
8. The Petitioner through a letter dated 2 January 2016 (2 December 2016 must be a typo) from his legal advisors informed the Respondent that he would attend as a matter of courtesy and not for purposes of disciplinary hearing, pending determination of Nakuru Petition No. 8 of 2015 (*in paragraph 38 of the ruling, the Court had requested the Petitioner to consider the utility of leaving the Petition remaining on the court's docket but that suggestion was not considered favourably*).
9. The hearing scheduled for 4 January 2016 aborted, and through a letter dated 7 January 2016, the 1st Respondent's Council Chair invited the Petitioner to attend a hearing on 13 January 2016.
10. The Petitioner and his legal team attended the hearing but moved to Court on 20 January 2016, seeking to interdict the Respondents from rendering a decision.
11. The Petitioner filed simultaneously a motion and Petition. After addresses from the parties, the

- Court ordered the Respondents to hold the release of the outcome of the disciplinary hearing, and also directed that the Petition be heard on the merits, as the orders sought at the interlocutory stage were in substance the same as the prayers in the Petition.
12. Pleadings and submissions were exchanged and highlighting of the submissions proceeded on 10 March 2016.
 13. The Court will examine the issues as identified by the parties in the submissions.

Whether 1st Respondent has a validly constituted Council

14. The Petitioner made much of the decision by Nduma, Principal Judge in *Joseph Mutuura Mbeeria & Ar v Cabinet Secretary for Education, Science & Technology & 2 Ors* (2014) eKLR to advance the position that the Council had no mandate to conduct disciplinary proceedings or determine the employment status of the Petitioner.
15. The Petitioner also made reference to the provisions of section 36 of the Universities Act, and Article 232 of the Constitution.
16. The Respondents in addressing the question of the validity of the Council and the legality of its actions (disciplinary) took the position that the proper and correct parties (Cabinet Secretary for Education and individual members of the Council) ought to have been joined as a parties, and therefore the Court should not make a determination on the question without granting them an opportunity to be heard.
17. In the Court's view, the legal nexus between the validity of the Council and the disciplinary process undertaken by it are intractably linked, but in the circumstances obtaining here, it would not be necessary to delve into that nexus.
18. The Court says so because the factual circumstances obtaining here are that the formal contract detailing the terms and conditions of service upon which the Petitioner is currently serving was executed by the Chair of the Council which has conducted the disciplinary proceedings being impugned.
19. Secondly, the present dispute is essentially an employment relationship and the definition given to an *employer* under the Employment Act, 2007 is so wide as to encompass the Council and the Respondents.
20. Moreover, the question of who is an employer is always one of mixed fact and law.
21. Lastly, were the position advanced by the Petitioner be taken to its logical conclusion, it would mean that the contractual rights being asserted by the Petitioner are anchored on an illegal or invalid contract, and he cannot himself benefit from or anchor rights on such a contract.
22. A determination of this question, in the considered view of the Court would not be decisive and the Court leaves the debate at that.

Interdicting release of outcome of disciplinary process

23. Article 41 of the Constitution and sections 41, 43, 45 and 47 of the Employment Act, 2007 protect ordinary employees from unfair termination of employment. Ordinary employees have both procedural and substantive safeguards/protections.
24. However, generally a Court of law may not interdict an employer from proceeding with a disciplinary process or compel it to comply with the general protections granted ordinary employees.
25. I say generally because there are circumstances where the Court can intervene in the course of the disciplinary process, but that intervention is an exception rather than the norm.
26. Those circumstances have been examined by this Court differently constituted in *Aviation & Allied Workers Union v Kenya Airways* (2012) eKLR; *Joseph Mutuura Mbeeria v Council of Jomo Kenyatta University of Agriculture & Technology (JKUAT)* (2013) eKLR and in *Kenya Plantation & Agricultural Workers Union v Finlays Horticulture Kenya Ltd* (2015) eKLR.
27. The legal principle running through the cited authorities is that the Court has the jurisdiction to intervene in a disciplinary process, but such intervention must be in very exceptional cases where compelling reasons have been given to justify the Court's intervention. The compelling reasons would include the fact that grave injustice would be occasioned to the employee and that the employee had no alternative means of attaining justice or remedies.

28. The legal reality now is that pursuant to the protections secured to employees by Article 41 of the Constitution, sections 41, 43 and 45 of the Employment Act, 2007 and more so the 3 robust primary remedies available in cases of unfair termination of employment by dint of section 49 of the Employment Act, 2007, the Court has sufficient leeway to correct any unfairness attendant to the tainted disciplinary process after a decision has been made by the employer.
29. In my view, this is not an appropriate case to interdict the Respondents from releasing the results of the process conducted however procedurally tainted as the Petitioner would still have recourse to the Court which has been empowered to grant robust remedies which were not ordinarily available under the common law.

Jurisdiction

30. The Respondents contended that the Court did not have jurisdiction to determine the Petition because it was questioning the constitution of the 1st Respondent's Council.
31. At the core of the Petition is the question of employment contractual rights of the Petitioner, and whether he has been treated fairly. The issue of the constitution of the Council was merely one of the grounds raised by the Petitioner to challenge the process of determining his employment rights.
32. The gravamen of the Petitioner's case being substantively anchored on violation of employment rights, the Court has jurisdiction.

Competency of Petition

33. In so far as the Petitioner outlined the legal basis of his cause of action and also set out the particulars of violations, the Court is of the view that he presented a competent Petition meeting the required threshold to enable the Respondents to know the case to meet and respond accordingly.

Conclusion and Orders

34. The upshot of the foregoing is that the Petition fails, and it is dismissed with an order that each party bears its own costs.

Delivered, dated and signed in Nakuru on this 3rd day of May 2016.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Kipkoech/Mrs. Kairu instructed by Gordon Ogola, Kipkoech & Co. Advocates

For Respondents Mr. Kenei instructed by Gumbo & Associates

Court Assistant Nixon