



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION NO. 2 OF 2016

HOSEA SITIENEIPETITIONER

v

UNIVERSITY OF ELDORET.....1ST RESPONDENT

THE VICE CHANCELLOR,

UNIVERSITY OF ELDORET.....2ND RESPONDENT

JUDGMENT

1. Hosea Sitienei (Petitioner) was appointed as Finance Officer by the University of Eldoret (1st Respondent) through a letter dated 26 July 2011.
2. 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.
3. The Petitioner and some 8 other employees who were suspended at the same time challenged the suspension in Court, (*Nakuru Petition No. 8 of 2015*) and the Court directed the 1st Respondent in a ruling delivered on 6 November 2015 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.
4. As a result of the Court's directive aforesaid, the Respondents issued a show cause notice to the Petitioner on 17 September 2015, to answer to some 6 allegations, within 7 days.
5. The notice also invited the Petitioner to appear before the 1st Respondent's Council on 21 October 2015 for an oral hearing.
6. The Petitioner through his legal advisers challenged the invitation through a letter dated 9 October 2015, and the Respondents postponed the hearing, awaiting further clarifications from the Court.
7. On 14 November 2015, the 1st Respondent's Council Chair invited the Petitioner to attend a hearing on 10 December 2015. He was also invited to show cause within 7 days why disciplinary action should not be taken against him.
8. The hearing scheduled for 10 December 2015 aborted, and the Respondents invited the Petitioner to appear for a hearing on 4 January 2016, but the hearing did not proceed even on this day. The hearing proceeded 13 January 2016.
9. However, before the decision on the hearing could be announced, the Petitioner moved Court on 20 January 2016, seeking to stop the release the decision.
10. The Petitioner filed simultaneously a motion and Petition. After addresses from the parties, the Court ordered the Respondents to hold the release 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.
11. Pleadings and submissions were exchanged and highlighting of the submissions proceeded on 10

March 2016.

12. The issues arising for determination in this Petition are similar to those in Nakuru Petition No. 1 of 2016, *Prof. Ezekiel Kiprop v University of Eldoret & Vice Chancellor of University of Eldoret* which proceeded on the same day and the Court will examine them as hereunder.

Legality of the 1st Respondent's Council

13. 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 1st Respondent's Council had no mandate to conduct disciplinary proceedings or determine his employment status, because it was not legally constituted.

14. The Petitioner also made reference to the provisions of section 36 of the Universities Act, and Article 232 of the Constitution.

15. 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.

16. In the Court's view, the legal nexus between the validity of the 1st Respondent's 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.

17. The Court is of that view because the question of who is an *employer* is always one of mixed fact and law.

18. The present dispute is essentially anchored on an employment relationship and the definition given to an *employer* under the Employment Act, 2007 is so wide as to encompass the 1st Respondent's Council and the Respondents.

19. Under section 21 of the Charter for University of Eldoret (made pursuant to the Universities Act, 2012), the 1st Respondent's Council has the mandate to appoint and determine terms and conditions of service for all staff.

20. A determination of this question therefore, in the considered view of the Court would not be decisive at this stage, and the Court leaves the debate at that.

Interdicting release of outcome of disciplinary process

21. 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.

22. However, generally a Court of law may not interdict an employer from proceeding with a disciplinary process or compel it to comply with the statutory or contractual protections.

23. I say generally, because there are circumstances where the Court can intervene in the course of the disciplinary process but such intervention is an exception rather than the norm.

24. 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.

25. 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 has no alternative means of attaining justice or remedies.

26. The legal reality now is that pursuant to the protections secured to employees by Articles 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 in the disciplinary process, after a decision has been made by an employer.

27. The Petitioner also relied on Article 47 of the Constitution which envisages that those taking administrative action would act in a way which is expeditious, efficient, lawful, reasonable and procedurally fair.
28. The right has now been content through the Fair Administrative Action Act.
29. Because the process commenced by the Respondents has not been concluded, it is not necessary in my view to delve into a determination of whether the Petitioner's right to fair administrative action is implicated in employment contracts, or has indeed been violated. The outcome of the process as of now is unknown.
30. Similarly, this is not an appropriate case to interdict the Respondents from releasing the results of the process conducted however procedurally tainted, for the reasons outlined above.
31. That the Petitioner has alternative remedies which include reinstatement were the Court to find the process tainted is beyond doubt.

Jurisdiction

32. 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.
33. 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, but not the gravamen of his case.
34. The gravamen of the Petitioner's case being grounded substantively on employment rights, the Court has jurisdiction.

Competency of Petition

35. 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

36. 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