



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 352 OF 2016

JOSEPHAT K. Z. MWATELAH.....CLAIMANT

VERSUS

1. TECHNICAL UNIVERSITY

OF MOMBASA COUNCIL.....1ST RESPONDENT

2. THE CABINET SEC. MINISTRY OF EDUCATION,

SCIENCE & TECHNOLOGY.....2ND RESPONDENT

3. THE PRINCIPAL SECRETARY, STATE DEPARTMENT

OF HIGHER EDUCATION MINISTRY OF EDUCATION,

**SCIENCE AND TECHNOLOGY AND TECHNOLOGY.....3RD
RESPONDENT**

RULING

INTRODUCTION

1. The Claimant brought this Suit on 16.5.2016 seeking orders to nullify his dismissal from employment as the Vice Chancellor of the 1st Respondent and further seeking injunction to restrain the Respondents from recruiting another person to take over the office of Vice Chancellor of the 1st Respondent. Simultaneously with the Suit, the Claimant filed a Notice of Motion seeking injunction to restrain the Respondents from recruiting a new vice chancellor pending the hearing and determination of the Suit. After hearing the Notice of Motion ex parte, on 19.5.2016, the Court granted the injunction sought but on interim basis pending inter partes hearing of the Motion.
2. The 1st Respondent has filed defence, replying affidavit plus Notice of Preliminary Objection (P.O) to Motion and the entire Suit on grounds that she lacks legal capacity to be sued in her own name. She therefore prays for the Motion and the Suit against her to be struck out with costs. The Preliminary Objection was argued on 27.5.2016.

Respondent's Submissions

3. Mr. Mugambi and Mr. Munyao, both Counsel for the Respondents submitted that the Motion and the Suit by the Claimant against the 1st Respondent ought to be struck out for the reason that the 1st Respondent lacked the legal personality and as such she is not capable of being sued in her own name. The Counsel relied on the decision in **HCC 304 of 2012. Professor Kiema Wangai Vs. Dr. Pamela Tsimbiri and 7 others [2014]eKLR** where the court struck out the Council of Egerton University on ground that the Council lacked legal capacity of suing or being sued.

Claimant's Submissions

4. Mr. Ashiruma Learned Counsel for the Claimant submitted that the Preliminary Objection by the 1st Respondent has no merits and it is founded on legal technicalities. That section 2 of the Employment Act defines employer widely and this case the Council is properly sued because she is the one who signed the contract of employment for the Claimant. That under clause 1 of the University's Statutes 2013, the Council is the organ empowered to deal with employment of the University staff. That the **Professor Kiema Wangai Case** is distinguishable from the present case because the person sued in that Case was a committee of the Egerton University Council and not the Council itself. That in deciding the said Case the Court never referred to the University Statutes. He prayed for Preliminary Objection to be dismissed and the Suit be left to proceed as it is.

Respondent's Rejoinder

5. The Mr. Munyao submitted that the issue of legal personality is not a mere legal technicality but a substantive issue that if ignored would make the court to act in vain by continuing with the Suit. He maintained that only University enjoyed the Statutes of a body Corporate.

Analysis and Determination

6. The issue for determination herein is whether the 1st Respondent is a body Corporate with legal capacity of being sued. The answer to the foregoing question is in the Statute and the Charter that establishes the University. Whereas section 15 and 20 of the University Act, 2012 grants legal personality to Universities established under the Act, all the administrative organs of the Universities established by the said Act, the university charters and the University Statutes do not possess any legal personality. If the legislature intended that the University Councils should possess legal personality, the same should have been expressly provided. The High Court was faced with a similar Preliminary Objection in the **Professor Kiema Wangai Case**, cited by the Respondent and upheld it the Preliminary Objection on grounds where it held that:

“The bodies set up under section 35 of the Act merely assist in the administration and governance of the Institution but cannot be sued nor can they sue in their own capacities”.

7. The law has not changed since Wendo J. made the foregoing decision. This Court therefore agrees with the said decision and the submissions by Counsel for the 1st Respondent that there is no legal person known as “Technical University of Mombasa Council”. The Suit against her is therefore a nullity because she lacks any legal capacity of being sued. There is however, no doubt that the Claimant intended to sue his employer who happens to be the Technical University of Mombasa but his Counsel made a mistake and sued the University Council. The purpose of the Court is to do justice and in this Case, it deems fit to do so by sustaining the proceeding rather than sending the Claimant away from the Seat of Justice. The Court therefore is of the view that the Technical University of Mombasa should be enjoined as a defendant in order for the dispute herein to be effectively resolved. Consequently, leave is hereby given to the Claimant to amend the Claim and the Notice of Motion and serve the Respondents within 5 days. Thereafter the Amended Notice of Motion will be heard on a date to be fixed today. The conservatory orders

made by the Court on 16.5.2016 remains in force till the next hearing date.

Disposition

8. For the reasons stated above, the P.O is upheld subject to the leave given to the Claimant to amend the Claim and the Motion to enjoin and/or substitute the Technical University of Mombasa as the 1st Respondent. No costs are awarded since the 1st Respondent is not a legal person and no right or obligation can accrue in her favour. Status quo as directed above to remain until next hearing date.

Dated, Signed and delivered this 24th day of June 2016.

O. N. MAKAU

Judge