



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU
PETITION NO. 16 OF 2016
(Before Hon. Lady Justice Maureen Onyango)
DR.NYANGA'U NYACHIEO TOM MONGARE.....CLAIMANT

-VERSUS-

- 1. KISII UNIVERSITY**
 - 2. PROF. JOSEPH T. MAILUTHA**
 - 3. ANAKALO SHITANDI**
 - 4. THE CHAIRMAN UNIVERSITY COUNCIL**
- (KISII UNIVERSITY.....RESPONDENTS**

R U L I N G

The application before me for determination was filed by the petitioner on 25th May, 2016 under certificate of urgency seeking the following orders;

1. That pending the hearing of this application **inter-partes**, this Honourable Court be pleased to issue conservatory orders setting aside the decision of the Respondents suspending the Petitioner from work vide the letter dated the **9th day of May 2016**, and/or allow the Petitioner/Applicant to continue discharging his duties as the Acting Registrar, lecturer and other portfolios he is currently holding, in his employment at Kisii University, without any interference, harassments and/or intimidation from the Respondents, together with the continued of payment of the Petitioner's salary and any other allowance ordinarily payable by virtue of the Petitioner's status until further orders of this Court.
2. That this court be pleased to issue an order of injunction restraining the Respondents from authoring, publishing, disseminating and/or distributing defamatory remarks and/or publication whether through print media, orally and/or any other form, whether directly or otherwise, pending inter-partes hearing of this application or further orders of the Court.
3. That pending the hearing and determination of this Constitutional Petition, this Honourable Court be pleased to issue conservatory orders setting aside the decision of the Respondents suspending the Petitioner from his work vide the letter dated the **9th day of May 2016**, and/or allow the Petitioner/Applicant to continue discharging his duties as the Acting Registrar, lecturer and other portfolios he is currently holding in his employment at **Kisii University**, without any interference, harassments and/or intimidation from the Respondents, together with the continued of payment of

the Petitioner's Salary and any other allowance ordinarily payable by virtue of the petitioner's status until further orders of this court.

4. That this Court be pleased to issue an order of injunction restraining the Respondents from authoring, publishing, disseminating and/or distributing defamatory remarks and/or publication whether through print media, orally and/or any other form, whether directly or otherwise, pending the hearing and determination of this Petition.

5. That the Court be pleased to direct that the Petitioner's terms of employment as they existed prior to the acts the subject of this Petition, to remain in place until further orders of Court.

6 Costs of this application be borne by the Respondents.

7. Such further and/or other orders be made as the court may deem fit and expedient.

The application is made under Article 21, 22(1), 23, 27, 28, 41(1), 47(2), 50(1) and 165 of the Constitution and Rules 4, 8, 10, 19, 23 and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 and all enabling provisions of the Law. The application is supported by the affidavit of the Petitioner sworn on 23rd May, 2016 and the grounds on the face thereof.

The applicant filed a further affidavit sworn on 16th June, 2016.

The Respondents oppose the application and filed replying affidavits of Prof. Joseph T. Mailutha 2nd Respondent, Prof. Anakalo Shitandi 3rd Respondent and Dr. Eng. Sabastian M. Mwarania, the 4th Respondent, all sworn on 6th June, 2016.

The application was argued in court on 4th July, 2016.

Facts

The applicant is an employee of the 1st Respondent. He was appointed by letter dated 30th July, 2012 as a lecturer of Environmental Studies following his application dated 5th August, 2011. Among his qualifications was a PhD (Education) from North London College, England. During his employment he was appointed to various positions.

The 2nd Respondent is the Deputy Vice Chancellor Administration and Finance of the 1st Respondent while the 3rd Respondent is the Acting Deputy Vice Chancellor, Academic and Student Affairs of the 1st Respondent. The 4th Respondent is the office of the Chairman of the University Council, Kisii University.

Sometime in April 2016 the 1st Respondent received an anonymous letter alleging that the Applicant's PhD Certificate is not authentic. The letter which is addressed to the Vice Chancellor of the 1st Respondent is dated 31st March, 2016 and is signed off by "CONCERNED ACADEMICIAN." Upon receipt of the anonymous letter the 2nd Respondent on behalf of the 1st Respondent wrote to the Applicant asking him to respond to the issues raised in the letter. The letter dated 26th April, 2016 required the Applicant to respond by 29th April, 2016. At the same time the 2nd Respondent convened a meeting of the Council Committee on Human Resources and Appointments to discuss how to handle the issue.

The applicant responded to the letter on 28th April, 2016. In his response the Applicant explained that he obtained his PhD from North London College after a 3 year programme and he graduated in February 2010. He further explained that North London College is a collaboration with Clayton University in the USA and the programme is recognised by the government of the United Kingdom.

At a meeting of the 1st Respondent's Council Committee on Human Resource and Appointments Special

Meeting held on 6th May, 2016 it was resolved that the Applicant be suspended from duty while investigations were carried out to establish the authenticity of his PhD certificate and that the investigations be concluded within one month. The Applicant was consequently suspended by letter dated 9th May, 2016. The letter stated that the suspension was for a period of 30 days during which the 1st Respondent would carry out investigations on the Applicant's academic qualifications. The 2nd Respondent tasked the 3rd Respondent to carry out the investigations.

The outcome of the investigations were that;

- (a) There is no institution by the name Clayton University as indicated in the Petitioner's certificate.
- (b) There is however an institution by the name Clayton State University in the United States of America.
- (c) The said Clayton State University does not have a collaborative program with North London College.
- (d) That the said Clayton State University only offers programmes up to the master's level.
- (e) The said Clayton State University does not have an education degree program.
- (f) The seal appearing on the Petitioner's doctorate degree certificate does not tally with that of Clayton State University.
- (g) North London College only offers certificate and diploma program but does not offer undergraduate programs.

Aggrieved by the suspension the Applicant filed this petition together with the motion before me for determination. It is the applicant's case that the anonymous letter and disciplinary proceedings against him are premeditated, discriminatory and a violation of his constitutional rights.

The Applicant argues that the Respondent had sought confirmation from a university known as "CLAYTON STATE UNIVERSITY" while he undertook his studies at "CLAYTON UNIVERSITY" and the information obtained by the Respondent is therefore not correct. He states that the process of authentication of documents in the United States of America is contained in the Hague Convention of 1961, a fact that is within the knowledge of the Respondents yet the Respondents did not use the said procedure. The Applicant further states that the information obtained by the Respondents from the Commission for University Education is also inaccurate as the Commission was also looking for Clayton State University instead of Clayton University where the applicant studied.

The Applicant attached to his Further Affidavit email Communication from one Mrs. Gloria Anyanwu (College Secretary) addressed to Miriam Momanyi stating that the Applicant was a PhD candidate from 1st January, 2005 to 30th June, 2009 at North London College, a centre for Clayton University, Missouri, United States of America.

Determination

I have considered the pleadings and oral submissions made on behalf of both the applicant and the Respondents. The issues for determination at this stage is whether the applicant meets the threshold for grant of conservatory orders. For the court to grant conservatory orders the applicant must establish a prima facie case and further prove that he is likely to suffer irreparable harm should the orders sought not be granted. If the court is in doubt, then the court must consider the balance of convenience (**Giella v Cassman Brown**).

In the case of **Mary Aliviza & Another v Attorney General** (cited with approval in **Petition No.39 of 2013 Gladys Boss Shollei v Judicial Service Commission**) the court observed as follows;

*"The Judges relying on the authority in **Sergeant V. Paul (1949) 16 E.A.C.A. 63** stated;*

"One, the grant or refusal of a temporary injunction which is an interlocutory order, is an exercise of Judicial discretion which must be exercised judiciously.

*Two, the purpose of a temporary injunction is to preserve the status quo (see: **Noor Mohamed, Hanmohamed V. Kassamali Virji Madhani (1953) 20 E.A.C.A. 8** and **Garden Cottage Food Limited V. Milk Marketing Board (1984) A.C. 130**).*

Three, the conditions for the grant of an Interlocutory Injunction are now well settled in East Africa;

a. an applicant must show a prima facie case with a probability of success;

b. an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and

c. if the Court is in doubt, it will decide an application on the balance of convenience."

On the issue of *prima facie* case, the Court of Appeal in **Mrao v First American Limited & 2 others (2003) KLR** observed that it is -

"a case which on the material present to court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation from the latter."

In **Mary Aliviza** case the court further stated that;

"At this stage we must of course refrain from making any determination on the merits of the application or any defence on it. A decision on the merits or demerits of the case must await the substantive consideration of the facts and applicable law after full hearing of the reference."

In the present case the applicant was suspended from duty for a period of 30 days to enable the 1st Respondent who is its employer to investigate the anonymous letter alleging that the Applicant's PhD Certificate, on the strength of which he was appointed to work for the 1st Respondent, was not authentic. As stated in the Replying Affidavit of the 2nd Respondent, the 1st Respondent is an education provider whose services are regulated by the Commission of University Education. It is obliged to ensure that quality education is offered at its institutions. It would be irresponsible therefore for such an institution to take lightly allegations that any of its lecturers upon whom it relied to provide quality education has questionable certificates. It is my view that any employer would be negligent to fail to investigate such allegations.

In his application the applicant alleges that the decision to suspend him was unilateral and that the method adopted to verify his certificates was not the conventional mode. It is alleged that the Respondents violated the Applicants constitutional rights under Article 41, 47 and 50 of the Constitution.

The court does not share that view. The Respondent convened its committee responsible for recruitment, the Council Committee on Human Resource and Appointments, to decide on how to handle complaint relating to the Applicant. The Committee resolved to carry out investigations to be completed in one month following which it would determine how to proceed with the applicant's case, and that during the period of investigations, the applicant be suspended from duty.

The Court is not expected to enter into the boardrooms of the employers to micro manage its affairs. The court would only interfere if there is proof of violation of the law or the process of the Respondent. **Ndolo J** in the case of **Rebecca Ann Maina v Jomo Kenyatta University of Agriculture and**

Technology [2014] eKLR stated as follows-

As held in the case of Alfred Nyungu Kimungui Vs Bomas of Kenya (Industrial Court Cause No 620 of 2013) the Industrial Court should not take over and exercise managerial prerogatives at the work place.

36. *However, in cases where an employee facing disciplinary action legitimately feels that the process is marred with irregularities or is stage managed towards their dismissal, the Court will intervene not to stop the process altogether but to put things right. When the Claimants came before me, their boss Prof. Francis M. Njeruh had just been dismissed. Further, the Court took notice that since 15th August 2013, the Claimants had been transferred at a frequency that seemed somewhat abnormal.*

In this case the Claimant has come to court at the very commencement of the process when no determination has been made on the truth of the letter that alleged his Certificates are not authentic. Suspension for one month is not an unduly long period. In fact had the Applicant not come to court when he did, the investigations would have been concluded and the suspension lifted if it was established that his PhD certificate is authentic, or disciplinary action taken, if it was established that the certificates were not authentic.

Even taking into account what has been unearthed by the investigations, the court cannot tell at this stage who between the applicant and the Respondent is right. This can only be established after a full hearing. In the interim there is a letter from the Commission of Higher Education, the body mandated by law in Kenya to authenticate such academic certificates, to the effect that the University the applicant alleges to have gone to is not recognised. There is further a letter from the said University denying issuing the certificate. On the other hand the applicant states that the Commission and the Respondents were looking for the wrong university. However, all he has produced to counter the findings of both the Respondent and the Commission is an email communication from a person alleged to be the College Secretary of North London College and a photograph of the applicant with 2 other people wearing academic gowns. The applicant's evidence cannot override that which has been presented by the Respondents.

The Human Resource Manual for the Respondent provides for suspension without pay. An employee under suspension is however entitled to all allowances. The circumstances under which an employee may be suspended are among others, as a result of proceedings for dismissal taken against him if the university considers that the employee ought to be dismissed.

The manual also provides for interdiction on full allowances and not less than half salary, where investigations and or proceedings into the employee's misconduct which may lead to his dismissal are being taken or are about to be taken.

In the present case it is not clear whether the investigations that are being carried out can be considered to be those contemplated for interdiction or suspension as both refer to proceedings.

From the foregoing I find that it was proper for the Respondent to carry out investigations to establish the authenticity of Applicant's Certificates following the aspersions raised in the anonymous letter and that the Respondents are authorised to do so by the manual. I however find that the manual is ambiguous as to whether the applicant should have been interdicted or suspended.

I further find that the applicant has not been able to establish a prima facie case as he has failed to prove on the basis of what is so far on record, that his PhD certificate is authentic.

On a balance of convenience, I find that based on the findings by the Commission of University Education that Clayton University is not listed in the directories of higher education institutions available at the Commission and that the Commission cannot authenticate the Applicant's Certificates, the balance of convenience is in favour of the Respondents.

I therefore decline to grant the prayers sought by the applicant with the consequence that I dismiss the same. Costs shall be in the cause.

Dated and signed and delivered this 15th day of September, 2016

MAUREEN ONYANGO

JUDGE