



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**PETITION NO.10 OF 2016**

*(Before D. K. N. Marete)*

**HOSEAH SITINEI.....CLAIMANT**

**VERSUS**

**UNIVERSITY OF ELDORET.....1ST RESPONDENT**

**VICE CHANCELLOR OF UNIVERSITY OF ELDORET.....2ND RESPONDENT**

**ATTORNEY-GENERAL.....3RD RESPONDENT**

**JUDGMENT**

This matter is originated by way of a Petition dated 6th May, 2016.

The 1st and 2nd respondents vide an answer to the petition dated 3rd June, 2016 posit that the petition lacks merit, is frivolous and an abuse of the process of court and should be dismissed with costs.

The petitioner's case is that he is currently the Finance Officer of the 1st respondent. It is his further case that on 17th July, 2016 the 1st respondent issued him with a letter of suspension. He and eight (8) others challenged this in Nakuru E&LRC Cause No.8 of 2015. This matter is still pending in court.

The petitioner's further case is that on 6th November, 2015, the court delivered a ruling to the effect that the parties be notified of the outcome of the investigations of their conduct that drew their suspension and disciplinary action, if this was necessary. This was not done.

On 21st December, 2015, the Chairman of the Council of the 1st respondent wrote to the petitioner requiring him to appear before a disciplinary committee of which he answered that he would only attend as a matter of courtesy as the matter was still pending in court. Again, these disciplinary proceedings, he noted, were unprocedural and violated the Employment Act, 2007.

The petitioner's other case is that despite his plea, the respondents conducted the said disciplinary proceedings in blatant disregard of the petitioner's constitutional rights, fair administrative action and right to fair labour relations. This was thereon followed by the petitioner's petition to this court to arrest the illegal disciplinary proceedings in Petition No.2 of 2016 but this was lost in a judgement delivered on 3rd May, 2016.

The petitioner's employment was subsequently terminated and he now challenges the constitution of the

1st respondent's Council in terms of S.36 (1) of the Universities Act, 2012. This resulted in rendering any decisions made by the improperly constituted council *ultra vires*, illegal, unlawful and of no effect - he submits.

He prays as follows;

- a) A declaration that the termination of the petitioner's employment by the respondents vide letter dated 18<sup>th</sup> January, 2016 violates Articles 41, 47 and 50 of the Constitution of Kenya hence null and void.
- b) A declaration that the termination of the petitioner's employment by the respondents is contrary to section 41, 43, 45 and 47 of the Employment Act, 2007 hence illegal.
- c) A declaration that the respondents are escapists and have abdicated their duties to respect and uphold the constitution of Kenya in their administration actions.
- d) An order that the petitioner be allowed to resume his duties as the Finance Officer.
- e) Or in the alternative, the respondents be compelled to pay the petitioner 6 months' salary in lieu of notice, 12 months' salary for unfair termination, annual leave days not taken out, retirement benefits and other benefits due to the petitioner and such compensation as the court deems fit for violation of this rights above.
- f) The respondents bear the costs of this petition.

The 1st and 2nd respondents oppose the petition in that it does not clearly set at the specific breaches of the constitution and therefore lacks the constitutional threshold for a petition and therefore should be dismissed. Again, the petition offends the cardinal rule on *res judicata*. This is as follows;

4. The Petition offends the cardinal rule on *Res Judicata* as the issues raised therein were raised and determined by the Honourable Justice S. Radido sitting at Nakuru in Nakuru E&LRC Petition No.8 of 2015 and Nakuru E&LRC Petition No.2 of 2016 and for this reason and to avert an abuse of the court process the current petition should be dismissed.
5. The petition is a blatant abuse of the court process as it seeks to have this Honourable Court to sit on Appeal on matters determined by a court of equal jurisdiction oblivious of this court's lack of jurisdiction to hear such an appeal.
6. The propriety or otherwise of appointment of a council of a public university does not fall under the disputes envisages in Article 162(2) (a) of the Constitution of Kenya and section 12 of the Employment and Labour Relations Court Act, Chapter 234B of the laws of Kenya hence this Honourable Court lacks the jurisdiction to hear and determine the current petition and more so that the Honourable Justice S. Radido already rendered himself on the issue as can be gleaned from paragraph 13 to 20 of his judgment in Nakuru E&LRC Petition No.2 of 2016.
7. Whereas the Petition is disguised as a Constitutional Petition, the issues raised are simply a smoke screen adopted by the Petitioner to elevate a personal cause of action in the hope that the Honourable Court will not read into the simplistic scheme. That the causes of action are incoherent that they cannot be determined in the same Petition and in any case the argument on the constitution of the Council for University of Eldoret cannot be used to buttress and individual's claim which attempt remains ill-advised for its intents and purposes.

Further,

13. The burden of proof lies with the Petitioner to demonstrate that indeed the Council was not constituted in accordance with the law, a burden the petitioner has failed to discharge hence

*undeserving of the reliefs being sought in the petition.*

*16. The Petition is based or founded on a misapprehension of the law hence creating an impression that all the members of the Council are appointed through a similar or uniform process.*

*17. The petition has been filed in bad faith with the sole intention of derailing the appointment and recruitment of a new Finance Officer for University of Eldoret hence exposing university to fiscal risks for selfish personal reasons which is evident from the fact that this is not the first petition filed by the petitioner challenging the same disciplinary process hence this honourable court should not entertain it as it will amount to abetting an abuse of the court process and waste of precious judicial time.*

*18. It is evident from the multiplicity of proceedings taken out by the petitioner that the petition is a classic example of abuse of court process and an attempt at forum shopping which would amount to improper usage of the otherwise precious judicial time since all the issues raised in the current petition were raised and determined in NAKURU E&LR PETITION NO.8 OF 2015 and NAKURU E&LRC PETITION NO.2 OF 2016. It then follows that this petition is an attempt by the petitioner to get a different decision from this honourable court from that given by the Honourable Justice S. Radido in the two previous petitions in the hope that this honourable court will not be able to read into the mischief.*

This is a contest against the termination of the employment of petitioner from the office of Finance Officer by the 1st and 2nd respondents. In this protracted litigation, it would appear that the petitioner, together with others filed suits in this court for a determination on their suspension but these were determined with a rider that the respondents be allowed to pursue the disciplinary process and inform the parties. The court anticipated that the petitioner or other parties would be able to pursue their rights depending on the outcome of the disciplinary process. This is the instant case.

The evidence of the petitioner demonstrates a case where he was invited and re-invited to attend disciplinary proceedings in his case. The 1st respondent conducted disciplinary proceedings against the petitioner and notified him of this termination vide a letter dated 18th January, 2016.

The claimant in the entirety of this petition does not demonstrate a case of *malafides* on the part of the respondents. He does not either demonstrate a denial of substantive and procedural fairness as envisaged in Section 41, 42 and 43 on the Employment Act, 2007. This also applies to the violation of Articles 41, 47 and 50 of the Constitution of Kenya, 2010. It is evident that the petitioner was awarded open space to defend his case but all this time took it for granted.

This petition also comes out as a mixed grill of itself and issues raised in ELRC Nakuru Petition No.8 of 2015 and Petition No.2 of 2016. In these separate causes several issues brought out in this petition were forwarded, litigated and determined by court with the following directions and observations;

#### ELRC Nakuru Petition No. 8 of 2015

*34. It is now a couple of months since the suspensions and assuming that the respondent has now concluded the investigations, it should in all fairness comply with the contractual provision on notifying the petitioners under suspension of the outcome and if there is need for disciplinary action.*

*35. The Court therefore directs the respondent to notify the petitioners of the outcome of the investigations and what further action it intends to take.*

#### ELRC Nakuru Petition No. 2 of 2016

*16. 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.*

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

*32. The respondents contended that the court did not have jurisdiction to determine the petition because it was questioning the constitution of the 1<sup>st</sup> respondent's council.*

*35. In so far as the petitioner outlined the legal basis of this 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.*

I would therefore agree with the respondents that this petition flouts the principle of *res judicata* and is therefore inopportune. It should not stand the test of time and space.

I am therefore inclined to dismiss this petition with orders that each party bears their own costs of the petition

Delivered, dated and signed this 14th day of November 2016.

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. Mr. Kipkoech instructed by Gordon Ogola, Kipkoech & Company Advocates for the Petitioner.
2. Mr. Kenei instructed by Gumbo & Associates for the 1st and 2nd Respondents.
3. No appearance for the 3rd Respondent.