



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO.11 OF 2016

(Before D. K. N. Marete)

PROFESSOR EZEKIEL KIPROP.....PETITIONER

VERSUS

UNIVERSITY OF ELDORET.....1ST RESPONDENT

THE VICE-CHANCELLOR, UNIVERSITY OF ELDORET.....2ND RESPONDENT

THE CABINET SECRETARY FOR EDUCATION,

SCIENCE AND TECHNOLOGY.....3RD RESPONDENT

JUDGMENT

This is a petition dated 6th May, 2016 which seeks the following orders of court;

1. *A declaration that the decision of the council vides its letter of 18th January 2016 violated Article 41, 47 and 50 of the Constitution of Kenya hence null and void.*
2. *A declaration that the termination of the petitioner is in gross violation of Sections 41,43,45 and 47 of the Employment Act hence illegal.*
3. *An order that the petitioner be reinstated and/or allowed to resume his duties as the Deputy Vice Chancellor (Administration & Finance) of the 1st respondent.*
4. *That the petitioner be compensated by way of damages being not less than 12 months' salary for violation of his rights above.*
5. *Alternatively the petitioner be paid his remuneration/salary for the remainder of his contract as the deputy vice chancellor, 12 months salary and 6 months notice.*
6. *A declaration that within the intent of Article 10, 41, 47 and 73 of the Constitution of Kenya, the respondents are escapists.*
7. *An order for payment of costs of this petition by the respondents,*

This is premised on the Supporting Affidavit of the petitioner sworn on even date.

The 1st and 2nd respondents in a 1st and 2nd Respondents Answer to Petition dated 3rd June, 2016 deny the petition and pray that the same be dismissed.

The petitioner's case is that on 17th July, 2015, the 1st respondent issued the petitioner, with a suspension letter. He, together with eight (8) other personnel of the 1st respondent challenged this suspension vide Nakuru ELRC Cause No. 8 of 2015. This is still pending in court.

The petitioner's further case is that on 6th November, 2015 the court made a ruling in the Nakuru petition to the extent that the petitioner be notified of the outcome of the investigations to the conduct of the petitioner and others to warrant their suspension and disciplinary action, if at all. The petitioners have failed, refused and or neglected to make this communication so far.

The petitioner further states that, on the 21st December, 2015, the 1st respondent's council chair wrote to the petitioner requiring that he appears before a disciplinary committee to which the petitioner belatedly agreed. He also informed the chair that these disciplinary proceedings were unprocedural and unlawful.

The petitioner's further case is that on 7th December, 2015, he resumed duty as the Deputy Vice Chancellor – Administration and Finance, prompting the respondents and particularly the 2nd respondent, to make drastic overtures affecting the petitioner's order of office and duty. This was by ordering the petitioner's personal assistant to take a compulsory 50 days leave, transferring the petitioner's secretary to another department and giving the petitioner's driver a warning for performing his duties as the driver of the petitioner. He also issued a show cause letter to the 1st respondent's Transport Officer.

This was not only malicious but also an indicator that the respondents, particularly the 2nd respondent is using her office to settle personal scores with the petitioner at the expense of the university's interest and that of the students and public.

On 13th January, 2016, the respondent purported to conduct disciplinary proceeding against the petitioner and issued him with a letter of termination of employment as Deputy Vice-Chancellor - Administration & Finance dated 20th May, 2016. This termination is based on defective suspension letters and choreographed illegal disciplinary proceedings.

The petitioner's other case is that the 3rd respondent was not involved in the termination and yet he is the appointing authority and that these disciplinary proceedings were in disregard of the petitioner's constitutional rights to fair hearing, fair administrative action and fair labour practices. He therefore rushed to the Nakuru ELRC in Petition No.1 of 2016 where the court allowed the disciplinary proceedings to run its full course as the court was not without a remedy if the law was violated.

The petitioner further faults the constitutionality of the constitution of the 1st respondent's council and opines that it cannot undertake its mandate as a consequence of this distraught constitution.

The petitioner summarizes the particulars of violations by the respondent as hereunder;

- i. Denying the petitioner his right of to be heard before the disciplinary panel contrary to Article 50 of the constitution of Kenya, 2010.*
- ii. Depriving the petitioner of his right to administrative action that is expeditious, efficient, lawful, transparent, open, reasonable and procedurally fair.*
- iii. Disobeying orders issued by the court on the 6th November, 2015 directing the respondents to communicate to the petitioner the outcome of the investigations into the conduct of the petitioner contrary to Article 159 and 160 of the constitution and the letter and spirit of the constitution.*
- iv. Failing to avail the respondent documentary evidence that were to be relied upon during the*

disciplinary proceedings against the petitioner contrary to Article 50.

Tv. erminating the petitioner based on defective and illegal suspension letters.

vi. Sacrificing the petitioner at the altar of profiteering and kleptocracy by 1st and 2nd respondents.

Tvii. erminating the petitioner based on no reason or fluid reasons.

viii. Conflict of interest as the 2nd respondent as is the main complainant.

ix. Earmarking the petitioner who stood for transparency, accountability and openness.

x. Taking the petitioner through a choreographed process.

xi. Subjecting the petitioner to a nonexistent process.

The 1st and 2nd respondent's case is that the petition is unmerited, bad in law, frivolous and an abuse of the process of court and material for dismissal with costs.

It is their further case that the petition does not clearly set out the specific acts of breach of the constitution and therefore does not meet the necessary threshold of constitutional petitions as established.

The respondent's further case is that the petition offends the cardinal rule of *res judicata* in that the issues raised herein were tabled and determined by Radido, J in Nakuru ELRC Petition No. 8 of 2015 and Nakuru ELRC Petition No.1 of 2016 and this petition should be shown the door. This is because this petition sets to have this court sit in appeal on matters dealt with by a court of equal jurisdiction whereby this court has no jurisdiction to do so.

23. Whereas the petition is couched in form of a Constitutional Petition, a cursory reading of the petition immediately reveals the true form, intent and

nature of the proceedings as being purely personal labour cause aimed at challenging the disciplinary proceedings against the petitioner and which has nothing to do with interpretation of the Constitution of Kenya and in any case it reveals a poor attempt at correlating rights in rem to advancement of causes in personam which is contrary to the rules of constructions of Constitutional provisions.

26. The Petition will entrench a culture of inequality within the University contrary to Article 27 of the Constitution of Kenya by creating a differential and preferential treatment of the petitioner in total disregard of the fact that other employees suspended together with the petitioner have gone through the disciplinary process and final decision relayed to them. These employees have since complied with the decision of the Council.

It is the respondent's final case that the reliefs sought would impede proper hearing of the 1st respondent and imbue chaos and a state of anarchy which is not the intent of the law or employment and labour relations processes. Further, the petitioner only loses the Vice Chancellor tag but remains a professor of plant pathology and is therefore not prejudiced as opposed to the 1st respondent who would suffer immensely if the petitioner was retained in this position.

This is a contest against the termination of the petitioner from the office of Deputy-Vice Chancellor – Administration & Finance 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 severally invited and re-invited to attend disciplinary proceedings in his case. It is his evidence that at 13th February, 2016 the 1st respondent conducted disciplinary proceedings against the petitioner and notified him of this termination vide a letter dated 18th January, 2016 and handed over to him on 5th May, 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.1 of 2016. In these separate causes several issues brought out in this petition were forwarded, litigated and determined by court as follows;

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. 1 of 2015

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.

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.

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.

33. 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.