



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NUMBER 1308 OF 2014

PROFESSOR ISAAC KAARIA INOTI.....CLAIMANT

VERSUS

MERU UNIVERSITY OF SCIENCE AND TECHNOLOGY.....1ST RESPONDENT

PROFESSOR JAPHET KITHNJI MAGAMBO.....2ND RESPONDENT

RULING

1. The applicant who is the claimant in this suit brought an application under certificate of urgency dated 7th August, 2014 seeking a raft of orders the main of which are:-

(a) That the 1st Respondent be restrained by itself, its servants and agents from engaging in acts of constructively dismissing the claimant from the Office of the Deputy Principal Administration, Finance and Planning of the 1st Respondent until further orders of the honourable Court.

(b) The 1st respondent be restrained by itself its servants and or agents from interfering with claimants' discharge of his duties under the contract of employment entered into by him with the respondent's predecessor on 17th November, 2010 pending the hearing and determination of this suit.

2. The application is brought on the grounds that:-

(a) Despite the fact that a 5 year contract from 17th November, 2010 subsists between the Claimant and the 1st Respondent, the latter has since late March, 2014 acted as though that contract has been varied, expired or been determined by the Claimant himself through resignation or termination by the Respondent.

(b) Since late March, 2014, the Respondent has set in motion acts designed to result in a constructive unlawful dismissal or unlawful termination of the Claimant's contract of employment entered into on 17th November 2010; the acts of constructive termination are still continuing.

3. In the supporting affidavit to the application, the applicant depones in the main as follows:

1. That the 1st Respondent is the successor to Meru University College of Science and Technology which was a former constituent college of Jomo Kenyatta University of Agriculture and Technology, a public University.
2. That on 17th November, 2010, he entered into a contract of service with the said Meru University College of Science and Technology upon accepting its offer of employment dated 12th November, 2010 appointing me as Deputy principal, Administration, Finance & Planning.
3. That at the time he entered into that contract, he was still working with Jomo Kenyatta University of Agriculture and Technology which wanted to utilize his services until 30th April, 2011.
4. That with the consent of the 1st Respondent's predecessor, he served his said former employer until 30th April 2011.
5. That according to the variation which the 1st Respondent's predecessor made with him, his 5 year contract was to begin on 1st May, 2011 instead of 17th November, 2010.
6. The 1st Respondent was granted a Charter on 1st February, 2013, and started complying with the Universities Act, 2012 and its Charter.
7. That on 12th March, 2013, he was appointed an Acting Deputy Vice Chancellor, Administration, Finance & Planning.
8. That in part, the said Letter of Appointment dated 12th March, 2014 read as follows:-

This is to inform you that you have been appointed to act as the Deputy Vice Chancellor Administration Finance and planning of Meru University of Science and Technology from March 1, 2013.

You shall report to the Acting Vice Chancellor and will be accountable and responsible on all matters relating to the position of Deputy Vice Chancellor (Administration Finance and Planning)

Other terms and conditions of service remain the same.
9. That as of 12th March, 2013, the other terms and conditions of his service were as set out in his letter of appointment dated 12th November, 2010 which he accepted on 17th November, 2010.
10. That since he was appointed Deputy Principal Administration Finance & Planning in 2010, he did not consent to the variation of that contract except those pertaining to the commencement of his employment on 1st May, 2011 instead of 17th November, 2010 and by the letter appointing him Acting Deputy Vice Chancellor Administration Finance & Planning on 12th March, 2013.
11. That the said letter of appointment dated 12th March, 2013 made it abundantly clear that it was neither a termination of his employment nor a variation of his original letter of appointment.

4. The respondents in their replying affidavit through Professor Japheth Magambo deponed in

the main as follows:-

1. That the claimant herein was at all material times an Associate professor of JKUAT a position he holds to date as evidenced by his Curriculum Vitae annexed to his aforesaid Supporting Affidavit.
2. That it was against this background that on or around November 2010 the claimant was offered an appointment as Deputy Principal of MUCST which for the avoidance of doubt was a Constituent College of JKUAT.
3. That in this regard, the claimant took a leave of absence from his position of Associate professor at JKUAT and to date remains an employee of JKUAT a fact which he believed this Honourable Court could ascertain and which information he informed by the 1st Respondent's Advocates on record they shall seek to have confirmed as appropriate.
4. That upon the accreditation of the 1st Respondent, MUCST ceased to exist and the 1st Respondent was enjoined to comply with the provisions of the Universities Act and its Charter, vide the letter of 12th March, 2013, the claimant was appointed in an acting capacity as Acting Deputy Vice Chancellor (Administration, Finance and Planning) of the 1st Respondent.
5. That for the period that the claimant served in an acting capacity as Deputy Vice Chancellor (Administration, Finance and Planning) it was abundantly clear that his role as Deputy Principal of MUCST was defunct and redundant.
6. That on or around August 2013 the 1st Respondent in compliance with its Charter and the Universities Act advertised the substantive post of Deputy Vice Chancellor (Administration, Finance and Planning) and invited applications from suitably qualified and experienced persons to fill the position.
7. That the claimant applied for the said post and was duly interviewed on 16th January 201 and was not successful in his interview for the position.
8. That the claimant applied for and proceeded on leave between 4th February, 2014 to 4th March, 2014.
9. That thereafter the claimant applied for his Sabbatical Leave in accordance with his "Terms of Service" which provided as follows on the question of Sabbatical leave.

"Sabbatical Leave shall be computed on the basis of one month for each year completed in service to be taken at the end of the tour"
10. That accordingly, effective 19th March, 2014 to 18th June 2014 the claimant proceeded on his Sabbatical Leave as per his "Terms of Service" when appointed as Deputy principal of MUCST.
11. That eventually as was expected of a person who has been in an acting capacity in any office, the claimant handed over from the office of Acting Deputy Vice Chancellor on 1st July, 2014.
12. That on the same date 1st July 2014, the claimant filled out the requisite clearance forms from various departments of the 1st Respondent.

13. That vide letter dated 1st July 2004, which letter was copied to the chairman of the 1st Respondent, the claimant requested his final dues as per his contract.

14. That considering the circumstances of the claimant's matter including *inter alia* the provisions of the Charter, the provisions of the Claimant's Terms of Service and in particular the effect of the Universities Act and Accreditation of the 1st Respondent on the same, it was well considered that the Claimant be accorded a hearing by the Council on the subject of his clearance and final dues, and he was duly invited to a meeting of the Council scheduled for 14th August, 2014 which he declined to attend citing *inter alia* the commencement of the underlying suit.

15. That on the whole the following salient facts are clear:-

(a) The Claimant's Contract of Service as Deputy Principal of MUCST was terminable in Law in Fact and further the same came to an end with the accreditation of the 1st Respondent.

(b) Though the Claimant served the 1st Respondent, he did so in an acting capacity in the office of Deputy Vice Chancellor Administration Finance and Planning.

(c) Having unsuccessfully applied for the substantive post of Deputy Vice Chancellor Administration, Finance and Planning, the Claimant handed over the said office which is presently served by the duly appointed substantive holder thereof.

(d) The role of Deputy Principal of MUCST which was previously filled by the Claimant is defunct and redundant.

(e) The Claimant has cleared from the 1st Respondent and formally sought the payment of his final dues "as per his terms of service" and is therefore not an employee of MUCT or the 1st Respondent.

(f) The Claimant is presently an Associate professor at JKUAT.

5. This is an application for an interlocutory injunction, the Court therefore must guard against delving too deep into the merits and demerits of the issue in controversy as these should be left for the main trial. All the Court needs to be satisfied about at the moment is whether the applicant has made out a prima facie case with probability of success, and if so, would the loss suffered if he is ultimately found successful in the main claim be impossible to adequately recompense by way of damages.

6. The main question in controversy in this claim which I must consider whether or not merits preserving by way of an interlocutory injunction is the status of the applicant's contract of employment dated 12th November, 2010 which according to the claimant commenced from 1st May, 2011, vis-à-vis the transition of the 1st respondent from a constituent college of JKUAT to a fully-fledged University upon conferment of the Charter on 1st March, 2013. Further, the Court at the full trial will seek to interpret the effect of section 76 (1) of the University Act on the claimant's contract with the 1st respondent's predecessor and his subsequent appointment as acting Deputy Vice Chancellor Finance and Administration of the 1st respondent, a post he subsequently unsuccessfully applied for. These are no doubt important questions and by virtue of them alone, the applicant has reasonably demonstrated that he has a prima facie case with some probability of success.

7. Applying **Giella & Cassman Brown** test, the next concern of the Court at this stage is that, if the applicant turns out to be successful, at the main trial would damages be adequate in compensating him for any loss he may have incurred as a result of the respondents actions in terminating his services?

8. The orders sought by the claimant in the main claim are in their nature injunctive. They seek to restrain the respondent from among other things breaching the contract of employment with the claimant dated 17th November, 2010 and also restraining the respondent from interfering with the claimant's discharge of his contractual duties as Deputy Principal Administration, Finance and Planning.

9. The respondent on its part has argued that upon its elevation to a fully-fledged University, the post of Deputy Principal Administration Finance and Planning which was held by the claimant ceased to exist and it is the reason for which he was appointed as acting Deputy Vice Chancellor Finance and Administration of the 1st respondent, a post he unsuccessfully applied for.

10. In the claimant's view, the contract between himself and the 1st respondent entered into on 12th November, 2010 and which according to him commenced on 1st May, 2011 was meant to expire on 1st May, 2016.

11. If therefore the Court were to find that the respondent breached the claimant's contract of employment aforesaid, there are provisions in the Employment Act as well as employment law generally that would assist the Court in assessing the measure of damages payable to the claimant.

12. The contention of the claimant that termination of his services would ruin what he considers his expansive career as a scholar is contestable but that again is a matter to be considered at the full trial and if proved this Court has unlimited jurisdiction to grant any measure of damages that might reasonably assuage the claimant's injured career if at all.

13. Employment contracts are contracts like any other and are terminable either by breach or in accordance with stipulations contained in the contract itself. Further considering the personal aspects of contract of service, it would be uncomfortable to keep two unwilling parties in such a relationship especially where the minimum necessary confidence has ceased to exist. That is not to say interlocutory injunctions cannot issue in employment contracts. They can and this Court in appropriate cases has done so but it is a discretion which must be exercised sparingly and in compelling cases.

14. Taking into account the principles governing the grant of interlocutory injunctions as set out in **Giella v. Cassman Brown** case and elaborated in the **American Cynamid case**, the Court is not persuaded that this is a proper case for the grant of interlocutory injunction and hereby dismisses the application with costs.

15. It is so ordered.

Dated at Nairobi this 6th day of March 2015

Abuodha J. N.

Judge

Delivered this 6th day of March 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge