



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

PETITION NO. 8 OF 2015

**IN THE MATTER OF ARTICLES 2, 3, 10, 19,20, 21, 22, 23, 27, 28, 35, 36, 41, 47, 48, 50(1), 73,
159, 165(3)(D), 258 AND 259 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION

**AND IN THE MATTER OF THE RIGHT TO GOOD LABOUR RELATIONS AND FAIR
ADMINISTRATIVE ACTION**

BETWEEN

PROF. EZEKIEL KIPROP	1ST PETITIONER
PROF. JACOB BITOK	2ND PETITIONER
DR. JOSEPH KOECH	3RD PETITIONER
DR. MARY LOPOKOIYIT	4TH PETITIONER
DR. KIPTOO KORIR	5TH PETITIONER
HOSEA SITIENEI	6TH PETITIONER
EDWARD CHEROGONY	7TH PETITIONER
WILSON K. KOROSS	8TH PETITIONER
ELIUD KIPKOECH SEUREI	9TH PETITIONER

V

UNIVERSITY OF ELDORET

RESPONDENT

RULING

1. The Petitioners jointly filed a Petition on 23 July 2015 alleging violation of their constitutional rights. At the same time they filed a motion under certificate of urgency seeking some 7 orders.
2. The motion was placed before Court *ex parte* on the same day and the Court certified it urgent and

- also issued a conservatory order staying the decision of the Respondent to suspend the 1st to 8th Petitioners from employment pending *inter partes* hearing on 31 July 2015.
3. However, before the motion came up for *inter partes* hearing, the Respondent moved the Court on 30 July 2015 through a certificate of urgency seeking that the orders granted on 23 July 2015 be stayed.
 4. The Court directed the new motion to be served for hearing together with the Petitioners motion on 31 July 2015.
 5. On 31 July 2015, the Court was informed that the 4th Petitioner had died and that the 9th Petitioner ought to be withdrawn as a party. The Court allowed the withdrawal (the effect is that there are now 7 Petitioners remaining).
 6. The Respondent's motion was taken as grounds of opposition to the Petitioners motion.
 7. Pending the delivery of this ruling, the Court directed that the Petitioners continue receiving their full salaries and allowances and that the Respondent would not replace or appoint substantive office holders for the offices occupied by the Petitioners.
 8. Prayer 3 of the motion seeks a mandatory injunction. The legal principles for grant of mandatory injunctions at the interlocutory stage are now trite and the Court is of the view that such an order is not merited in this case.
 9. Prayer 4 sought to preserve the Petitioners positions pending *inter partes* hearing of the motion and becomes spent with the delivery of this ruling.
 10. In any case, prayer 5 of the motion would serve as an effective and appropriate remedy at this stage was the Court to be convinced by the Petitioners.
 11. The Petitioners case is that the Respondent suspended them on 17 July 2015 and that the suspensions were in bad faith and contrary to the collective bargaining agreements in place; the Respondent's procedures; the reasons thereof were baseless, malicious, contrived, dubious and questionable because the Petitioners being members of the Respondent's management board ought to have been privy to the relevant information.
 12. The Petitioners also asserted that the suspension letters were vague and inadequate and that only employees from one ethnic group were targeted for suspension.
 13. The Petitioners in the same vein expressed apprehension about any investigations to be carried out by the Respondent and that the suspensions were to divert attention from investigations on alleged mismanagement at the Respondent.
 14. The Petitioners denied involvement in student unrest at the Respondent.
 15. In submissions, Mrs. Kairu for the Petitioners urged that the contracts of employment did not provide for suspension except for those who were members of Kenya Universities Staff Union (KUSU) in which clause 5.2 allowed for suspensions. In this respect, she submitted that for Petitioners who were members of Universities Academic Staff Union (UASU), it is interdiction and not suspension which was provided for.
 16. Mrs. Kairu lamented that the suspension letters did not set out the Petitioners entitlements during suspension and therefore the letters were defective and illegal.
 17. The Respondent opposed the motion. According to the Respondent, the suspensions were to facilitate investigations into allegations that the Petitioners were involved in planning and inciting students to participate in a strike after receipt of credible information.
 18. According to the Respondent, the suspensions were in accordance with the prevailing labour laws and the collective bargaining agreements in place and were but just a process and not a final decision and that the Petitioners would interfere with investigations if they were allowed to remain within the Respondent's facilities.
 19. Allowing the Petitioners to continue reporting to work during the suspensions, in the view of the Respondent would lead to a breach of the peace, and that at the end of the investigations, the Petitioners would get a chance to make representations if necessary.

Evaluation

20. A long chain of authorities from comparative jurisdiction and more so those based on the common law provide that there is need for contractual authority to empower an employer to suspend an employee, and lacking that contractual authority, the suspension may constitute breach of contract or dismissal at law (see *McKenzie v Smith* (1976) IRLR 345, *McClory v Post Office* (1993) IRLR

- 159).
- 21.To the common law position, I would add that where there is statutory underpinning, the framework may provide for suspension (such as under the Anti-Corruption and Economic Crimes Act for those charged with corruption offences).
 - 22.The contract or statute may provide for conditions attendant upon the suspension.
 - 23.Clause 5.2 of the collective bargaining agreement with KUSU expressly provides for suspension on half pay pending investigations for a period not exceeding 21 days and that the letter of suspension shall be copied to the Union's Secretary General/Branch Secretary.
 - 24.None of the suspension letters in the instant case were copied to the Union though it appears such notification is mandatory.
 - 25.Clause 31.2 of the Supplementary collective bargaining agreement with UASU empower the Respondent to *interdict* an employee pending investigations on half salary and inform the employee within 21 days of the position of the interdiction. A disciplinary committee should also be empanelled within 21 days of suspension.
 - 26.The supplementary collective bargaining agreement does not require a notification to the Union of the *interdict* of an employee.
 - 27.The Petitioners advanced an argument that interdiction and suspension are not the same.
 - 28.Technically, the two terms do not mean the same or have the same effect. An example is the use and effect of the two terms within statutory instruments governing the civil service. But I doubt whether UASU and the Respondent used the term *interdict* in its technical meaning
 - 29.In the case at hand, the Respondent had contractual authority/basis to suspend the Petitioners but with attendant conditions. The attendant conditions (entitlements during suspension and period of suspension were not disclosed to them). Further, in the case of KUSU, the Union was not notified.
 - 30.There is a reason why there is a requirement to notify Unions in cases such as this one and generally in disciplinary processes involving employees. The employer in the modern world is always a dominant force and the employee may not have the resources and knowledge of the law and industrial relations to adequately protect his interests/rights.
 - 31.The suspensions were therefore defective.
 - 32.However, the parties did not disclose whether the 1st Petitioner being a Deputy Vice Chancellor is also a member of a Union or the full terms and conditions of his engagement with the Respondent.
 - 33.Because the Court directed that the Petitioners full salaries and allowances be paid pending delivery of this ruling (Court wants to believe there was compliance) and the Respondent was not stopped from continuing with investigations the Petitioners have not been prejudiced.
 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.
 - 36.In case the investigations were not concluded, they should be concluded within 10 days from today and the Petitioners be duly notified of the outcome.
 - 37.The upshot of the foregoing is that the Court finds merit in the Petitioners case but in lieu of issuing the orders sought in the motion, the Respondent is directed to act in accordance with the orders in the previous paragraphs
 - 38.The Petition should be mentioned on 27 November 2015 for the Petitioners to inform the Court of the utility of the Petition remaining in the Court's docket/further directions.
 - 39.Costs do not follow the event in this Court. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 6th day of November 2015.

Radido Stephen

Judge

Appearances

For Petitioners Mrs. Kairu instructed by Sheth & Wathigo Advocates
For Respondent Mr. Kenei instructed by James Gachoka Esq., Advocate
Court Assistant Nixon