



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
CAUSE NO. 1539 OF 2013

PROF. FRANCIS M. NJERUCLAIMANT

Versus

**JOMO KENYATTA UNIVERSITY OF AGRICULTURE AND
TECHNOLOGY.....RESPONDENT**

Dr. Kamau Kuria, Senior Counsel for the Applicant / Claimant

Mr. Lutta, Counsel for the Respondent

RULING

1. The Application serving before Court is a notice of motion dated 14th January 2014 and filed on the same day seeking the following orders inter-alia;

3. **That the Respondent be restrained by itself, its servants and or agents from recruiting a person to fill the Claimant /Applicant's post of Deputy Vice Chancellor (Administration, Planning and Developments) until the hearing and determination of this application or further orders of this Honourable Court.**

Prayer 4 is couched in same terms as 3 above except that the interim order is sought pending the final hearing and determination of this suit.

2. The matter initially went before **Ndolo J.** on 14/1/2014, where upon she declined to grant interim relief sought exparte and directed the matter comes before me for hearing on 21st /4/2014.

On this date **Dr. Kamau Kuria Snr. Counsel** appeared for the Applicant whereas **Mr. Lutta**, appeared for the Respondent. Brief submissions were entertained from both counsel upon which the Court granted an interim order in terms of prayer 3 of the Notice of motion and granted leave to the Applicant to file supplementary affidavit within 7 days followed by written submissions within 10 days and the Respondent was granted corresponding leave to file written submissions from date of service. The submissions were to be highlighted on 25th February 2014 but parties compromised that right and matter

was reserved for ruling.

3. From the outset, I will reiterate again that this matter has experienced proliferation of interlocutory applications leading to uneconomical utility of the Court's time in handling it.

Be that as it may, the issue at hand is whether or not to confirm the grant of prayer 4 in the notice of motion pending the hearing and the determination of the main suit.

4. The application is founded on the grounds set out in the notice of motion and may be summarised as follows:

On 8th January 2014, the Applicant was subjected to an irregular disciplinary process in contravention of his right to a fair administrative action and a fair hearing guaranteed under *Article 35, 41, 47 and 50* of the Constitution and *Section 63* of the *Universities Act, 2012* and the rules of *natural justice* in that;

- i. he was denied essential information sought on 23rd December 2013, necessary to defend himself;
- ii. he was denied the right to representation by an advocate of his choice at the disciplinary hearing;
- iii. he was denied the right of an adjournment to enable him seek a determination by the Court on the procedure applicable to the disciplinary proceedings inter-alia.

5. The Application is supported by an affidavit of the Applicant sworn on 14th January 2014 in which he reiterates in detail the violations alleged above.

6. The Respondent filed a Replying affidavit sworn by Prof. Rommanns, Odhiambo, the Deputy Vice Chancellor (Academic Affairs) of the Respondent whose evidence may be summarized as follows;

That he was the Acting Vice-Chancellor while the Vice Chancellor Prof. Mabel Imbuga was on leave.

That he attended the University Council Disciplinary Committee meeting of 8th January 2014.

That the Applicant was taken through due process before he was dismissed from service on 9th January 2014.

7. That the Applicant had been supplied with all the documents necessary to ensure that he was able to respond to the charges leveled against him on 13th September, 2013,

That he duly responded to the charges on 16th September, 2013.

That the Applicant was simply bent on frustrating the disciplinary process commenced against him so that the same is time barred.

8. That there were no more documents or statements to be supplied to the Applicant other than those given him on 13th September, 2013 together with the charge sheet.

That the Disciplinary Committee only relied on the same documents and his response thereto in determining his case. No witnesses were called at all.

9. That Applicant was given opportunity to defend himself at the hearing but waived his right to do so and left the meeting with his Advocate Dr. Kamau Kuria.

That the Advocate was permitted to sit through the proceedings and advise the Applicant but not to make submissions on his behalf in conformity with the procedure under *Section 63 of the Universities Act*.

That the Applicant and the Advocate walked out in protest to the refusal by the committee to allow the Advocate to address it.

That the proceedings went on to conclusion in their absentia subsequent to which the Applicant was found guilty and dismissed.

10. **Submissions by the Applicant**

The Applicant submits that the Claimant's rights under the said *Articles 35, 41 and 47 of the constitution* and *Section 63 of the Universities Act*, were violated by the conduct of the Respondent, which conduct is admitted.

11. That the rights of the Applicant included;

- a. to be disciplined by an impartial disciplinary body;
- b. adherence to and observance of *Articles 35, 41 and 47 of the constitution*;
- c. observance of fair labour practices as they pertain to disciplinary hearings;
- d. sufficient details of any alleged dishonesty or fraud or other alleged wrong doing;
- e. to be represented by a representative whether union or counsel of his choice in presentation of his defence;

12. (f) the observance of the rules of natural justice as formulated inter- alia in **Desonza Vs. Tanga Town Council, [1961] EA 377**;

(g) to be supplied with written statements to be used at the hearing;

h. to cross examine the makers of the statement in (g);

i. to be supplied with all the relevant documents needed in his defence;

j. to call witnesses in support of his case; and

k. To make submissions.

13. That all these requirements were not observed by the Respondent and the Court should declare that the purported summary dismissal of the Claimant on 8th January, 2014 is null and void upon hearing the matter on the merits.

That meanwhile, conservatory orders be issued as prayed in prayer 3 and 4 of this Application to ensure that the main suit is not rendered nugatory.

14. The issue for determination at this stage is whether the Applicant has met the requirements of issuance of the conservatory order sought by the Applicant.

Both parties have made submissions in this respect and the Court agrees at this stage that it ought to determine this issue out-rightly in terms of the submissions before Court.

15. In **Giella Vs. Cassman Brown & Co. Ltd. [1973] E.A. 358 at 360, Spry V P** stated:

“The conditions for the grant of an interlocutory injunction are now, I think well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the

applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

16. Prima facie case

In the **Court of Appeal Case of Mrao Ltd. Vs. First American bank of Kenya Ltd. & 2 others [2003] KLR 125**, the learned Judges of Appeal defined *prima facie* case as follows;

“so what is a *prima facie* case? I would say that in Civil cases it is a case in which on the material presented to the 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 or rebuttal from the latter.”

17. On the material before me there exists cogent allegations of constitutional and statutory rights of the Applicant coupled with alleged violation of the rules of natural justice as to call for an explanation or rebuttal from the Respondent during the hearing of this suit on the merits.

18. Irreparable damage / harm

On this second requirement that the applicant must demonstrate that he will suffer irreparable injury which would not be adequately compensated by an award of damages, the Court has perused the memorandum of claim dated 24th September 2013 and filed on 25th September 2013 and noted that the Applicant /Claimant seeks various reliefs set out in prayers (a) to (h) which include issuance of declarations; injunctions, and in (g) in particular, “an order that the Respondent pays the Claimant general and exemplary damages.”

19. It is apparent therefore on the face of the memorandum of claim that the Applicant is entitled to various damages in the event the main suit is successful among other reliefs sought.

20. The Court is therefore of the view that the injury allegedly suffered by the Applicant, if eventually proved on preponderance of evidence, the injury will be remediable by way of general and exemplary damages sought in the memorandum of claim.

21. Balance of convenience

With regard to the third prerequisite for grant of a conservatory order, the Court observes that, the Applicant has rightly or wrongly been dismissed from his employment and a vacuum has been created in the position of the Deputy Vice Chancellor (Finance & Administration).

22. The Respondent is a Public University with a very wide mandate to provide higher learning to thousands of University students in this country and the continued existence of this vacuum, which is likely to be prolonged indefinitely by a conservatory order of this Court, would be inimical to public interest as reflected in the Charter and the statute governing the operations of the Respondent to provide quality education to young adults in this country.

23. In the final analysis, the Court observes the need for this matter to be heard and disposed of expeditiously for justice to be done and be seen to be done to the parties herein.

Costs will be in the cause.

Dated and delivered at Nairobi this 28th day of March, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE