REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 11 of 2013

UNIVERSITIES ACADEMIC STAFF ..... CLAIMANT

=VERSUS=

MASENO UNIVERSITY …..... RESPONDENTS

RULING

This ruling is in relation to one claimant herein Dr. Mary Goreti Kariaga (2nd claimant) whom the respondent content should not be allowed to testify in this case as the matter relating to her interests in this case have already been canvassed in Misc. Appl. 963 of 2007 and judgment was delivered in her favour by J Wendoh on 5.8.2009. That that being the case, the respondents content that if this court proceeds to hear the said claimant, this court will be ruling on appeal in the judgment of J. Wendoh.

The brief facts of the case are that; the 2nd claimant herein Mary Goreti sued Maseno University Staff Disciplinary Committee and The Maseno University Council in Misc. Appl. No. 963 of 2007. By her notice of motion dated 28/8/2007, she challenged the decision of the Maseno University Staff Disciplinary Committee made on 1/2/2004 terminating her service with Maseno University. She also sought to have the decision of the Maseno University Council made on 8/3/2007 dismissing her appeal quashed by an order of certiorari. Upon hearing this application J. Wendoh made a finding that the decision by both the Staff Disciplinary Committee and the Council dated 1/2/2007 and 8/2/2007 respectively were made in excess of the respondents jurisdiction in breach of natural justice and must be quashed by an order of certiorari. She also stated that:-

"In Judicial Review, the court cannot grant any other orders than those specified, in the statement and notice of motion and the court will only grant prayers 1 and 2 as prayed ---"

The question before this court according to the claimants statement of claim in relation to the 2nd claimant is the unlawful termination of 2nd claimant by her employer despite these orders of the court. Her prayer sought in the current case are;

(1) An order for immediate and unconditional re-instatement to employment without loss of benefits and seniority.

(2) An order for the immediate payment of all dues held since October, 2006 including salary, allowances, bonuses, salary in lieu of leave and arrears totaling Ksh 2,696,317 as per computations attached thereto and marked B9.

(3) An order for the payment of 12 months' basic salary as compensation for unfair dismissal.

According to the respondent's counsel, by coming to the Industrial Court over this case, she has come to reinforce orders of J. Wendoh.

The issue I have to determine is whether the 2nd claimant's case has already been canvassed in Misc. Appl. No. 963 of 2007 and whether this court has jurisdiction to entertain the same.

As already explained above, the issue before J. Wendoh was a Judicial Review application which was heard and orders given accordingly quashing the decision of the respondents dismissing the 2nd claimant. Issues of reinstatement, payment of all dues and compensation were never canvassed in that case. J. Wendoh indicated in her judgment that she could only grant orders for prayers sought and nothing more.

I believe the two suits are distant from each other. In Civil Appl. No. 182 of 2004 Staff Disciplinary Committee of Maseno University and 2 others V Prof. Ochong' Okello (2012) KLR JJA Visram and Nambuye had this to say:-

" 16 A parallel may be drawn from Civil Appeal No. 20 of 1994 Erick D. J. Makokha & Others Versus Lawrence Sagini & Others in which a question were as to whether the breach of contract of personal services of Lecturer of a Public University could be remedied by equitable remedies of injunctions and specific performance. In a unanimous judgment, a five judge bench of this court had this to say:-

In our opinion, the well settled rule that a breach of contract of personal service cannot be redressed by the equitable remedies of injunctions and specific performance remains good Law. The comparatively few cases in which declarations were made and injunctions were granted to restrain a breach of contract of personal services are exception to the general rule of the common Law.

It was not therefore an appropriate action justifying the granting of judicial review. The respondents may well have had a genuine grievance. His remedy however lies under private law which covers disputes relating to contractual relationships. Therefore, the High Court erred in granting the orders of Judicial Review as Prof. Ochong' did not have Public Law right capable of protection under the supervisory jurisdiction of the Court."

The Hon. Judges were here expressing the fact that the High Court cannot grant orders of judicial review in matters falling under private law for which an employment contract fall under.

As it were in this case matters of the employment contract were never canvassed in the Misc. Application 963/2007. Indeed the learned Judge pointed out that she could not grant orders for prayers not sought.

The respondents here are trying to submit that the 2nd claimant's case here is *res judicata*. I do not find this to be the case because issues currently under consideration were never considered. It must be established by the respondents that the matter in the 1st suit was substantially similar, over the same subject matter in a court of competent jurisdiction. In this case, the respondents have not established this nexus and their contention that the 2nd claimant's case has already been decided must fail.

I will therefore allow the 2nd claimant herein to proceed with her claim in which case the respondents have a right to respond accordingly.

HELLEN WASILWA

JUDGE
17/5/2013

Appearances:-

Mr. Okeche for Respondent

Mr. Enondo for Claimants

CC. Doreen Ndemo