REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 50 OF 2013

INTER PUBLIC UNIVERSITIES COUNCILS

CONSULTATIVE FORUM (IPUCCF)……..…….CLAIMANT

Vs

UNIVERSITY ACADEMIC STAFF UNION (UASU)..……..……..1ST RESPONDENT

UNIVERSITIES NON-TEACHING STAFF UNION

(UNTESU)….……...……2ND RESPONDENT

MASINDE MULIRO UNIVERSITY

ACADEMIC STAFF UNION (MMUST) CHAPTER.....…….…3RD RESPONDENT

RULING

1. The Applicant herein is the Inter-Public University Councils Consultative Forum (IPUCCF) which is comprised of 25 public universities. Mr. Okeche for the Applicant urged the Court to correct a common mistake which occurred in the agreement between it and the Respondents namely the University Academic Staff Union (UASU), Universities Non-Teaching Staff Union, (UNTESU) and the Masinde Muliro University Chapter. The mistake which needed correction was one which was mutual. He submitted that the mistake which needed correction can only be canvassed by the parties. He submitted that they have to show where there is an error, where there is a mistake. Mr. Okeche submitted the mistake was done jointly and cannot be corrected by affidavit. He was of the view that he would have to present a witness to prove that fact. He submitted that there was an agreement reached in 2012 for payment of 7.9 billion. He stated that one half of that sum had been paid. He submitted that the other part is to be paid in the coming year. He submitted that it would be a miscarriage if the issue of the error is not corrected. Mr. Okeche submitted that the interlocutory applications dealt with the issue of the strike. The issue of the corrections necessary was one which Mr. Okeche felt required *viva voce* evidence. He submitted the facts can be adduced by the persons who were involved. He was of the view it would be unfair to determine the case without hearing them.

2. The Respondents were opposed to the calling of oral evidence and held the position the issues at hand could be determined by the assessment of the evidence already adduced by was of affidavits. Mr. Raiji for the 1st Respondent submitted that out of the six prayers in the Claim, only one prayer – prayer No. 4 was not dealt with by the Rulings this Court has delivered. That was the prayer that the corrections carried out on the CBA are proper and within the law. He submitted

that the Claimant's witness Prof. Makhanu dealt with the 2 versions of the CBA in his lengthy affidavit. He submitted that on the precedent of the Supreme Court election petition, hearings need not be *viva voce*. He was of the view that if a Court is seized of sufficient evidence the Court is perfectly entitled to receive submissions and proceed to determine the issue. Mr. Raiji submitted that the CBA was coming to an end on 30th June and there was need to have closure before then. He submitted there was enough evidence and material before Court to determine whether payment should be as per the CBA or the "corrected" CBA.

3. Mr. Onyony for the 2nd Respondent submitted that there was no challenge to the authenticity of the documents filed. They were genuine and relate to the Claim. The parties proceeded to file submissions on the remaining issue as determined in my *ex tempore* ruling after hearing the above submissions.

4. The Claimant submits that the CBA had an inherent error and it required amendment which the Claimant made in order to ensure the CBA was correct. The version after correction is before this Court and shows that the cumulative figure is 7.8billion in place of the 14.883 billion in the current agreement which the Claimant impugns. The affidavits of Prof. Sibilike Makhanu sworn 3rd January 2013, Prof. J. K. Tuitoek sworn 16th January 2013, Ms. Jacqueline Wanjala sworn 31st January 2013 and Prof. Sibilike Makhanu's further affidavit sworn on 28th January 2013 all point to the Claimant's issues.

5. The Respondents have indicated almost in unison the version of the Schedules to the CBA are correct. The 1st Respondent filed various affidavits including the one by Muga K'Olale sworn on 18th March 2013. In their submissions, the 1st Respondent recaps the background to the dispute. The Claimant had refused to negotiate a collective bargaining agreement for the period 2010-2012 and only did so after industrial action by the 1st Respondent's members. After negotiations brokered by the Minister for Labour John Munyes, the parties signed a return to work formula and formed a Joint Negotiating Committee which embarked on the negotiations that culminated in the signing of the Collective Bargaining Agreement on 20th September 2012 which will expire at the end of June 2013. The Government released some 3.9 billion in the first tranche as part of the settlement of the dues which were to be implemented. The 1st Respondent submitted that some of the members of the Claimant failed to settle the full salaries and arrears due hence the threatened industrial action culminating on proceedings before me. The 1st Respondent took issue with the meeting at Naivasha which preceeded the announcement of the error in calculation. The current CBA, it was submitted, expires on 30th June 2013 and there is need for closure before that date.

6. The 2nd Respondent on its part filed various documents in support and

filed a number of affidavits. These were the one by Dr. Charles G. Mukhwaya, sworn on 13th March 2013, another headed Supporting Affidavit sworn on 8th Februrary 2013 and a Replying Affidavit sworn on 8th Februrary 2013 and finally his Further replying affidavit sworn on 19th March 2013. The 2nd Respondent submitted that the Claimant has flagrantly breached the CBA dated 30th September 2012. The 2nd Respondent submits that the failure to meet the obligations in the Collective Bargaining Agreement is premeditated and intentional. The 2nd Respondent thus sought dismissal of the Claimant's Notice of Motion and Statement of Claim dated 16th January 2013.

7. The 3rd Respondent relied on the affidavits and documents filed. The affidavits were the one by Prof. Sammy S. Kubasu, sworn on 10th January 2013 and his Further Affidavit sworn on 12th February 2013. They are equally opposed to the Claimant's claim. This was the party that had called for industrial action by way of a strike notice which culminated in the Claimant's certificate of Urgency on 16th January 2013.

8. I have on my part read *in extenso* the parties voluminous affidavits, the respective rival

submissions and the annexures thereto. The decision I have come to is one which has been carefully considered given the only issue in contention. In my Ruling delivered on 24th April 2013, I stated that the alterations which the Claimant had made could only be made after negotiations and not in the manner they were altered. In addition, I as an arbiter in the dipute can interpret the documents filed and determine the disagreement. It is not disputed that the press releases on 18th January 2013 were to the effect that 3.9 billion had been released to pay staff in the universities represented by the Respondents herein.

9. The amount of 3.9 billion was part of the 7.8 billion which was set aside to pay the demands of the Respondents. In a letter Reference RES/43/12/01(20) of September 19, 2002, the Minister for Finance Hon. Robinson Njeru Githae wrote to his counterpart Hon. Prof. Margaret Kamar Minister for Higher Education Science & Technology on the dialogue between public universities and three unions (the Respondents) and the CBA's covering the financial years 2010/11-2012/13. The letter stated that (and I quote)

"*.....it is difficult to accommodate the* ***Kshs. 7.8billion*** *recommended for Collective Bargaining Agreement for the period 2010/11-2012/13 in the current financial year. However, in order to break the stalemate it is recommended that the amount be paid in 2 phases as follows:-*

i. ***That Kshs. 3.9billion (i.e. one half of the requirement)*** *be paid in the current financial year with effect from 1st July, 2012; and*
ii. *That the remaining balance of* ***Kshs. 3.9billion (i.e. second half of the requirement)*** *in the context of the 2013/14 MTEF Budget.*

You may therefore communicate this decision to the three Universities Unions and urge them to ask their members to resume duty with immediate effect."

10. The above letter was the one that clinched the deal and the Universities staff who are members of the Respondents and employees of the Claimant's constituent universities resumed work and awaited payment of 7.8billion.

11. The preamble of the CBA captures the essence of the CBA as follows:

WHEREAS the Recognition and Negotiation Procedure provides for a Two (2) year Negotiation cycle and WHEREAS the Government of Kenya has provided Kshs. 7.8 billion to be shared by the Staff of Public Universities and Constituent Colleges for the Collective Bargaining Agreements for the periods 2010/2011, 2011/2012 and 2012/2013.

WHEREAS the Government has recommended that the said CBA's be paid in two (2) phases, the Forum and the Union, hereby agree in light of the above to negotiate a corresponding three (3) year Collective Bargaining Agreement.

The agreement has the signatures of the concerned parties.

12. The sums in the schedules do not accord with this figure of 7.8billion. In my mind, it was never the intention of the Government to pay any cent above the 7.8billion set aside for the CBA's negotiated in the heat of the countrywide universities staff strikes. Any figure that would not accord with this settlement reached is in effect null and void and of absolutely no effect. I hold that in view of the serious computational errors demonstrated by the Claimant the schedules were in error. It matters not that they were signed by all parties. The mistake was one which would neither benefit the Unions to cling to or encourage the Claimant's members to misuse or misapply the funds set aside for the salary increases. I would therefore not permit the incorrect shedules to remain as part of the CBA signed on September 20, 2012.

13. The issue in dispute is decided in favour of the Claimant as the schedules lead to an absurdity and mathematical inaccuracy which was not the intention of the parties. The Claimant will have costs

of the Application.

It is so ordered.

Dated and delivered at Nairobi this **21st** day of **June** 2013.

Hon. Mr. Justice Nzioki wa Makau

JUDGE