



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2047 OF 2011**

**PROFESSOR FRANCIS M. NJERUH ..... CLAIMANT**

**VERSUS**

**UNIVERSITY COUNCIL KENYATTA**

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

**RULING**

This is an application dated 16<sup>th</sup> August 2013 brought by Notice of Motion under section 13 of the Industrial Court Act and Rule 16 of the Industrial Court Procedure Rules and supported by the annexed affidavit of the claimant seeking orders of reinstatement to the position of Deputy Vice Chancellor (Administration & Development) of the respondent with full salary and benefit in terms of the Award of this Court dated 10<sup>th</sup> April 2012. The prayer seeking the respondent be cited for contempt was withdrawn. The respondent filed their preliminary objection and Replying Affidavit of Steven Loyatum dated 23<sup>rd</sup> August 2013.

On the preliminary objections raised, the respondent's advocate Mr. Lutta submitted that the basis of the cause of action which the claimant has brought to court seeking an order for reinstatement is not supported by a previous claim in that the respondent did not officially part Chairperson and not through the legal officers where there were two prayers in the initial claim;

- a. A declaration that the claimant re-appointed on 7<sup>th</sup> November 2011 was done legally under the Jomo Kenyatta University of Agriculture and Technology (JKUAT) Act; and
- b. An order of permanent injunction restraining the respondent in interfering with the claimant's re-appointment for 5 years.

That the current Notice of Motion is seeking reinstatement with full salary and benefits following the letter that suspended the claimant dated 13<sup>th</sup> August 2013 hence the grounds for the Notice of Motion are not the same as in the initial claim. The current issue relate to a suspension.

That these are new grounds and the circumstances of the case different and what is before the Court is Consent with regard to the initial claim and on this basis the matter herein was closed on 10<sup>th</sup> April 2012. The only thing that can arise as after the date of the Consent is for the Court to interpret it or set it aside or where there is an issue of contempt or enforcement, the Court can be invited to address, otherwise, no other cause of action should arise from it.

That when the Court confirmed the Consent and made it the order of the court, the same did not specify that the claimant was not to be subjected to disciplinary proceedings and in the current circumstances,

what the claimant should have done is to file a fresh suit based on the new cause of action for the respondent to be able to defend itself.

Reinstatement was not an issue in the initial claim and what is before court is seeking for mandatory orders and under section 40 of the Industrial Court Act only arise in cases of unfair termination and summary dismissal and not in cases of suspension.

That the suit should be dismissed as the same has been brought under the wrong form. Where the prayer for contempt proceedings have been withdrawn, then nothing remains for court determination.

In response, the claimant advocate Mr. Gathaara submitted that the fact that the respondent was not aware of the Award herein and that the advocate who acted for them then had no instructions to record the consent whereas the affidavit of the Chairman of the respondent dated 15th December 2011, Mr. Riungu state that the matters before court had been extensively discussed with the advocate and even consulted with the Attorney General and thus the claimant was re-appointed. The respondent was thus aware of the proceedings herein and cannot be found not to have been aware of the orders of the court.

That the issue of appointment and re-appointment are matters outlined under the JKUAT Act. That the argument that this is a fresh matter does not arise as the basis of the court order on 10<sup>th</sup> April 2012 is not to interfere with the claimant's employment. If the respondent was aggrieved they had the option to seek a review. The respondent has taken action with regard to an existing order of the court and hence this is not a fresh matter.

On the preliminary objections raised by the respondent herein, I note the Industrial Court Act section 12 grant this Court the jurisdiction to hear disputes relating to all labour relations and in this regard, give orders that are interim or final. In undertaking its mandate, the Industrial Court has the Industrial Court (Procedure) Rules to guide proceeding and to allow parties coming before the Court apply these Rules in order to have a fair chance in presenting their disputes in a procedural and organised manner. In this regard, these Rules are to be used by all parties, where there is a gap, use any other written law or rules of procedure or seek the Court to direct as appropriate.

Matters filed before this court can be concluded with final orders by the Court as outlined under Rule 27 by an Award, Ruling, or Judgement. Where parties have entered consent to conclude a matter, the Court must adopt that consent and make it the final order of the court. Once this final order has been issued, it can only be reopened as under the provisions of Rule 32 or Rule 33 of the Industrial Court Procedure Rules.

The Notice of Motion filed by the claimant dated 16<sup>th</sup> August 2013 is brought under the provisions of section 13 of the Industrial Court Act and Rule 16 of the Industrial Court Procedure Rules. There is no indication or any outline as to any issue herein relating to the provisions of Rule 32 of the Industrial Court Procedure Rules. This Notice of Motion therefore becomes a matter outside the realms of what this Court can entertain herein.

In the event this application is allowed, nothing else remains for determination and the reverse apply where once the application is rejected; the claimant is left at his current position. There is no claim pending for determination to the current application as this is a concluded matter through the consent of the parties that was adopted as the final order of the Court.

Equally, for the respondent to raise the issue of misrepresentation or any other act that infer fraud, mistake or error on the part of an advocate who purported to act for them, the same provisions as under Rule 32 apply. The orders herein dated 10<sup>th</sup> April 2012 have been in existence for the last 20 months. I take it the respondent did comply with these orders as the prayer on contempt has now been withdrawn.

The orders of the court on 10<sup>th</sup> of April 2012 related to a specific complaint and the Court made specific directions. These orders do not prevent the respondent from taking any other disciplinary action against

the claimant. If this were to be interpreted as such, then as an employer, the respondent would be denied a fundamental function within labour relations that of ensuring their employees undertake their duties with due diligence and where there is misconduct apply the provisions of Part VI of the Employment Act.

The orders of 10<sup>th</sup> April 2012 were made before this Court was operationalized as a Superior Court with the powers of interpreting the provisions of the law in a progressive manner and thus the directions herein.

**In this case, noting the issues raised by the claimant and the respondent in objections, I will allow the preliminary objections raised to the extent that this is a new claim that cannot be placed together with the matter already concluded in this cause under the terms of the Court order dated 10<sup>th</sup> April 2012.**

**The application is hereby struck out. Each party to bear their own costs.**

Delivered in open Court this 16<sup>th</sup> day of September 2013.

M. Mbaru

Judge

In the presence of

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