**REPUBLIC OF KENYA**

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

**CAUSE NO. 1587 OF 2013.**

**JOSEPH MUTUURA MBERIA ……..……. 1ST CLAIMANT**

**NAFTALY RUGARA MUIGA ……..……. 2ND CLAIMANT**

**VERSUS**

**THE COUNCIL JOMO KENYATTA UNIVERSITY OF**

**AGRICULTURE AND TECHNOLOGY (JKUAT) ……... RESPONDENT**

(Before M. Mbaru, J. - 22nd November 2013)

**RULING**

**Riunga Raiji together with Muigai – appearing for the claimant**

**Mr. Kariuki together with Oluoch-Olunya – appearing for the respondent**

1.On 2nd October 2013, the claimants, Joseph Mutuura Mberia and Naftaly Rugara Muiga filed a Notice of Motion under Article 41 of the Constitution, section 46(d) of the employment Act, section 3, 12(1) and (2) of the Industrial Court Act, order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law seeking an interim injunction to restrain the respondent JKUAT, from suspending them from employment, terminating their employment or taking any other disciplinary action against them pending the hearing of this application and the main suit herein. The claimants have supported their application with their affidavits. The claimant also filed a Further Affidavit on 25th October 2013. On 24th October 2013, the respondents filed the Replying Affidavit sworn by Mabel Imbuga opposed to the application and the interim orders sought by the claimants.

2. The application is based on the grounds that the claimants are the employees of the respondent and are officials of the university Academic Staff union (UASU), JKUAT Chapter and in this capacity have filed 3 court cases challenging the running of affairs of the respondent but on 27th September 2013, they were issued with suspension letters which were dated 6th September 2013. That the claimants are being victimised for being unionised and for the court cases they have filed against the respondent, the suspension is tainted with procedural impropriety and in breach of the rules of natural justice and an attempt to muzzle the claimants and UASU which they represent. Further grounds are that the claimants have a constitutional right to join Union and to question the running of affairs of the respondent as well as seek protection from disciplinary action for participating in proceedings against the employer under the Employment Act. That the suspension of the claimants is meant to disrupt and undermine the operations of UASU as well as ensure that the claimants do not have access to information to discharge their duties as union officials by being kept out of respondent premises and hence away from the workers they

represent. That unless the application herein is granted, the claimants will be exposed to illegal procedures by the respondent and the cases filed in court involving the claimants and the respondents are likely to be unduly interfered with causing them loss and harm and to UASU, the Union they represent.

3. Mr. Raiji assisted by Mr. Muigai for the claimants submitted that on 27th September 2013, the claimants were issued with suspension letters that were backdated to 6th September 2013; the 1st claimant was in the lecture room while the 2nd claimant was in a field activity. That this letter of suspension does not disclose any specific misconduct committed by the claimants the only cited reason was that there was 'inimical conduct' that was alleged to be gross. That there were no stated facts that could be defined as 'inimical conduct' that noted the claimant had failed to perform duties or failed to fulfil duties according to their letters of appointment. Their performance was not faulted and thus the suspension letters to the claimant do not give any reasons. Being unionised, the claimants have a Collective Bargaining Agreement (CBA) with the respondent which define the incidences that can trigger disciplinary process and none of those processes were applied in their case.

4. Counsels for the claimant cited several authorities in support of the application and noted in *Republic versus Matheka Kithome and Others [2012] eKLR* in an application to quash a suspension on the basis that there were no sufficient grounds before the order of suspension was made, the court relied on Article 47 on the basis that this was not a fair administrative action and thus in this case, the reference to 'inimical conduct' does not give any grounds for the suspension of the claimants. In *Jorum gakumo versus Thika Coffee Mills limited [2012] EKLR, the* court held that the burden of justifying misconduct is on the employer and the claimants have no basis to justify the decision taken.

5. That the claimants as union officials were prevented from undertaking their duties contrary to the provisions of Article 41 of the Constitution. They have a prima facie case with strong chances of success and should thus be granted interim orders sought restraining the respondents from suspending them as they are now on half pay, they have financial and family obligations they are unable to meet and will continue to suffer pecuniary embarrassment and hence in the balance of convenience, the orders sought should be granted.

6. In reply, the respondents opposed the application with the Replying Affidavit sworn by Mabel Imbuga the Vice Chancellor of the respondent noting that the claimants were suspended after a full council meeting of the respondent upon what was established to be their conduct that was contrary to the terms of service for academic that was contrary to their employment as noted in their suspension letters. That this conduct requires the respondent to undertake investigations culminating in to them appearing before the staff disciplinary committee and that b filing the application and claim herein, the claimants are keen to stop this process. That the suspension has already taken effect and if the claimants are aggrieved they should let the disciplinary cause proceed and then challenge it.

7. The application is on the basis that there is no prima facie case established by the claimants and that they do not show they will suffer irreparable damage if the orders sought are not granted and the balance of convenience does not favour the claimants. The claimants are already under suspension and to seek to injunct the suspension is a question that is time barred in that if the claimants had wanted to reverse the suspension, this should have gone to the Judicial Review division of the High Court and not before the Industrial Court.

8. Mr. Kariuki assisted by Mr. Oluoch Olunya for the respondents, submitted that on 6th September 2013 the claimants received a letter of suspension that clearly indicated that they had conducted themselves in a manner that affected the smooth running of the respondent against the terms of service as part of the letter of appointment and thus the suspension was in accordance with the CBA clause 6.2, that allows the respondent to commence investigations while the claims are on suspension. That the application by the claimants is premature as after investigations, they may be called for disciplinary hearing.

9. The respondent advocates confirmed that the claimants as full lecturers and union officials should be fully aware of the disciplinary procedures outlined in the CBA and that the current suit is malicious in seeking to reverse a suspension that has already taken place. That the employer has the right to discipline

an employee as held in the case of ***Miguna Miguna – versus- Permanent Secretary, Office of the Prime Minister and the Attorney General (2011) eKLR*** and the court held that the employer was right to commence the disciplinary action and the employee had a duty to justify why could should be retained. That in this case, the claimants are seeking to bar a termination while the case against them is still at the stage of investigations and for the court to grant the orders sought will be interfering with the employer's right to discipline its employees.

10.That no evidence has been produced to support the claims that the claimants have been victimised for being union officials and contrary to the Constitution and that they will only know the charges against them at the hearing if the investigations are concluded and found that they have case to answer.

11. Mr. Kariuki further submitted that there is no prima facie case by the claimant and the Court of Appeal has outlined the sequence to follow in seeking an interlocutory application and where there is no case, the other elements need not be gone into. That the claimant will not suffer irreparable loss that cannot be compensated in damages noting the claimants have their letters of appointment and a salary and in the event the court awards damages, the same can be quantified. Under the CBA it does allow a suspension with half pay and the allegation that the claimants have suffered embarrassment, there is not evidence to this effect to warrant irreparable loss. That it is the respondent who will suffer damaged as the orders sought will be a blanket to prevent investigations and thus on a balance of convenience, the orders sought should not be granted as there are not exceptional circumstances.

12. Oluoch-Olunya in further support to the submission of Mr. Kariuki for the respondent stated that the application before court is defective as there is no prima facie case. That the basis of proceedings is a claim and the prayers therein and that the claim filed by the claimants on 2nd October 2013 does not have a prayer seeking to prohibit their suspension. That suspension has taken effect and cannot be reversed. That the prayers in the application are not grounded on the claim and thus the court has no jurisdiction to grant these orders as this is not a mere lapse but a fundamental omission to the whole suit. That Article 41 of the Constitution and section 46(h) of the Employment noting that constitutional rights have been infringed with the claimant's victimisation is a wrong presumption as the same infers the claimants as they are cannot be subjected to disciplinary action.

**The following issues stand out for determination in this application:**

1. **Whether the respondent as an employer could make an administrative disciplinary decision to suspend an employee**
2. **Whether the court has jurisdiction to intervene in a disciplinary procedure instituted but pending conclusion by the employer, and if yes, what would be the principles governing such intervention?**
3. **Whether the court should issue an interim order stopping disciplinary process by the respondent against the claimants pending the hearing and determination of this cause.**

13. On the challenge to the jurisdiction of this court to handle the application and claim herein and whether this matter should have been taken before the Judicial Review division of the High Court, jurisdiction means the power or competence of a court to hear and determine an issue between parties. In the case of the Industrial Court, this competence and power is found in Section 12 of the Industrial Court Act pursuant to the provisions of Article 162 and 165 of the Constitution. This Court has jurisdiction to interdict any unfair conduct including disciplinary action. However such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Court to exercise such powers having regard to the facts of each case and based on the powers granted tot his Court by the Constitution and by the statute establishing this Court. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. This Court can entertain an urgent application specifically relating to the lifting of a suspension, but it should only be entertained in extraordinary or compellingly urgent circumstances. The point therefore is that the Court does have jurisdiction as a matter of principle to entertain these kinds of applications as brought by the claimants, but must only exercise such jurisdiction in compelling circumstances based on the facts of every case. The respondent's jurisdictional

objection must thus be dismissed.

14. Further to the above, it is important to reiterate here that Article 165 (5) of the Constitution provides for the establishment of this court to hear and determine employment and labour relations disputes. Questions relating to legality and other disputes of administrative disciplinary proceedings or actions pending before employers properly fall within the boundaries of this court as established in accordance with the provisions of the Constitution. The disputes relating to pending administrative disciplinary actions by employers fall within the jurisdiction of the court as provided for under section 12 of the Industrial Court Act. The Act under subsection 12(3) (I) empower the court to make interim preservation orders including injunctions in cases of urgency. The possible interim orders would include the preservation of a *status quo* or rights and obligations in the employment relationship as may emerge in an administrative disciplinary procedure. Where the court decides to make preservative orders, the court does not thereby usurp or participate in the right of the employer to discipline the concerned employee nor does the court thereby become part of the administrative disciplinary process. The court in such an instance would be exercising its constitutional and statutory judicial powers and it is not thereby incompetent to entertain the matter in view of the interim orders if a party dissatisfied at the end of the administrative disciplinary process decided to move the court in that regard. As correctly highlighted by the respondent in the case of ***miguna*** above, an employer is at liberty to commence disciplinary proceedings against the employee and it is the duty of the employee to justify in the administrative disciplinary process the continuation of his employment. However where the Court establishes that such administrative disciplinary proceedings are commenced with ulterior motive or as a process shrouded with illegalities, then the court must intervene and stop such an illegality. In a similar case as this one the Labour Appeals Court of South Africa in ***Member of the Executive Council for Education, North West Provincial Government v Gradwell*** **(2012) 33 ILJ 2033 (LAC)** the Court confirmed the jurisdiction of the Court can entertain an urgent application specifically relating to the uplifting of a suspension in cases that are exceptional.

15. On the question of the suspension of the claimants, I note that the claimants being employees of the respondent are also UASU officials recognised by the respondent. The union and the respondent have a CBA that regulate their relations and part of these regulations is the aspect of how a suspension should be dealt with. Without the court descending into the day to day running of the affairs as between the claimants, the union and the respondent, it is important to note that all employees are bound by the terms and conditions of their employment and at all material time subject to any disciplinary action by the employer in a case of misconduct, gross misconduct or for any justifiable reason necessary for the smooth running of affairs for the employer. This right as due to an employer must however be exercised in a reasonable, fair and just manner so as not to be found unfair and to ensure employees are not victimised. Therefore, whether an employee is unionised or not, all employees remain subject to the disciplinary measures established by the employer for good reason. The fact of being a union official in itself does not remove such an employee from sanctions by an employer where there is a justifiable cause.

16. In this case The respondent as the employer is therefore entitled within the provisions of the recognition agreement to issue policy and terms and conditions of service binding upon its staff provided that the content is not inconsistent with the prevailing CBA between the Union covering the claimants or if such content is not in breach of an express provision of any relevant statute or the Constitution. The claimant has not shown or established such inconsistency in the instant case and the administrative disciplinary procedures made by the respondent would properly be invoked provided they uphold due process of justice and therefore fair labour practices as contemplated under section 41 of the Employment Act, 2007 and Article 41 of the Constitution. The court finds that the respondent was entitled to issue the disciplinary handling procedures applicable to its unionisable staff. In making this finding the court has carefully considered the provisions of the CBA that provides that the grievances will be handled in accordance with the provisions of the recognition agreement with an elaborate procedure for handling both the individual and collective grievances.

16. Essentially the grievances are not disciplinary. This is to be understood as a process to address dissatisfaction in the employment relationship falling short of misconduct whose resolution or settlement is necessary to achieve good work relationships. It would be envisaged that a grievance handling

procedure looks at concluding in harmonious employment relationship. On the other hand, disciplinary procedure is a due process commenced in the event of an alleged misconduct concluding in the imposition of a lawful punishment against the employee if the allegation is proved and the employee fails to exonerate himself. The collective agreement provides for disciplinary measures, suspension as an interlocutory step pending investigations into serious misconducts and, the power of the respondent to make relevant staff rules, notices and standing instructions with involvement of the claimant. The recognition and collective agreements do not provide for disciplinary procedure and the institutional framework. These have been made by the respondent as the employer, by way of the disciplinary handling procedures and which this court finds to be consistent with the CBA. They are binding upon the parties and the claimants as employees of the respondent.

17. The issue for determination is whether in the present case the claimants as the applicants have met the threshold set out above to justify the court's intervention through issuance of an interim order stopping the suspension process by the respondent against the claimants pending the hearing and determination of this cause. The claimant's case is that the procedure invoked by the respondent is unfair because it involves a disciplinary process without the reasons for the same being given whereas that should not be the case in an allegation of any alleged misconduct or on the basis that they had ‘inimical conduct’ that conduct not having been explained. The respondent's case is that the suspension is necessary to facilitate investigations and if there is a case to answer the claimants will be given a chance to have a hearing and defend themselves and their rights as under the CBA will be respected in this regard. The suspension letter dated 6th September 2013 issued to the claimants stated that the claimant had ‘inimical conduct’ but does not set out the particulars of these ‘inimical conduct’. The court finds that the submission of the applicant that the suspension process should be stopped in the interim on account of disputed nature of the suspension not being outlined is a ground that does not meet the threshold set out earlier in this ruling. The suspension has already taken force, under the CBA it has a time limitation and if this is not respected by the respondent, the very essence of the court reliance on the CBA will have been watered down and thus an illegality. The other ground advanced by the claimants for intervention by the court is that the process has been commenced such that it is unfair as the same violates their union functions and a victimization to render them ineffective. The court finds that the interim orders made herein to enable the claimant access the respondent premises will suffice to enable them attend to their union duties as the matter of their suspension should not affect their unionisation and any other union activities. In any event the suspension is not at a disciplinary hearing stage and the claimants are still employees of the respondent until a process is undertaken that address any issues with regard to the ongoing investigations that warrant any further action being taken against them. This will be handled at such time if at all this will be found necessary.

18. The applicant has therefore failed to establish the necessary threshold for the court to order the temporary orders as prayed for.

19. On the other issues raised in this matter, the claimants as the applicants herein have the onus to show that they have a clear right to the relief sought. The contentions are that that suspension was either unlawful, or invalid or unfair. On the question of invalidity, no such case is made out in the founding affidavit. There is no allegation or contention or evidence that the decision to suspend the claimants was not authorized by the respondent or that the respondent acted outside the scope of its powers in suspending the applicants or that there were some or other provision in a code or regulation that prohibits there suspension. In the current matter, there is no such case, and accordingly, no basis for any conclusion that the applicants’ suspension was invalid. The applicant therefore has not demonstrated or proven the existence of any clear right in this respect. There is already a CBA that govern relations as between the respondents and the union of which the claimants as members and officials. On the contention that the suspension was unfair, it is important to state here that there is no implied right to fairness incorporated into the employment contract which can form the basis for a right to a fair suspension. What is incorporated in majority of contracts is simply a general right not to be subjected to unfair labour practices. That an employee should not be unfairly dismissed or subjected to unfair labour practices. These are statutory rights for which statutory remedies have been provided together with statutory mechanisms for resolving disputes in regard to these rights. However a party that act to circumvent these right and to obtain reference to, and reliance upon provisions such a suspension and the advantages that it

does confer or not confer, acts in vain as the very essence of these rights, procedures and process are meant to encourage harmonious settlement of labour disputes. Therefore, an employer who initiates a suspension process with the aim of frustrating an employee, this will soon emerge as such procedures have a time limit and cannot be prolonged forever and the purpose or motive of such a process will just come out clear. Therefore the claimant's right not to be unfairly suspended is fully and only determined by the provisions of the Employment Act with regard to the application of fair hearing and cannot be implied into the contract of employment. The claimants contract of employment thus cannot give raise to a general right that their suspension must be fair. The claimants also cannot base their right not to be unfairly suspended on the general right to a fair labour practice as found in Article 41of the Constitution. Direct reliance on the fundamental rights as contained in the Constitution is impermissible when the right in issue is regulated by legislation, as is actually the case with the Employment Act, which directly regulates the right to fair labour practices, which includes suspension, termination and dismissal. Where legislation is enacted to give effect to a constitutional right, a litigant cannot bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard. The applicant is prohibited in law from doing so, and thus cannot directly rely on the fundamental right to a fair labour practice in the Constitution to establish his right not to be suspended as an employee or as a union official.

20. in this regard then has the Employment Act or any other law adequately addressed what a suspension is? This is not specifically outlined but remains part of administrative measures that an employer can take against employees as part of any disciplinary action short of dismissal in respect of an employee. The Employment Act further prescribes the manner in which such disputes must be resolved, being firstly by way of a referral to a Labour Officer under the Minister for conciliation, and if the dispute remains unresolved, the matter is then referred to the Court for arbitration. What is clear is that the Court is not tasked with the determination as to whether or not a suspension of an employee is fair or unfair, and this task is specifically and only designated for the Labour Officer where the Court is the last resort in matters established to be of an urgent nature or extraordinary or compellingly urgent circumstances. I take it then, when the claimants were served with their letters of suspension on 27th September 2013, which letters were dated 6th September 2013, they panicked and decided to take an immediately action to prevent further encroachment on their rights by the respondent as the time taken to serve them with these notices was inordinately long. A period from 6th to 27th September 2013 is 21 days that the respondent took to author and serves the claimants with this notice. It therefore raises doubts that the respondent will also respect the timelines their suspension is supposed to serve. I agree therefore there was a good cause for the claimants to urgently file this matter on their suspension before this Court and not with the Labour Officer.

21. The issue of the possible embarrassment, prejudice, incontinence together with possible damage and loss caused by the suspension of the claimants, I must immediately point out that this is the case with each and every suspended employee. This would always be the possible result of any suspension. If this would be a basis for the Court to intervene in suspension proceedings, then virtually all suspension cases would be urgent and directly end up in the Court. This would fly in the face of the clear intentions of the legislature found in specific provisions in the Employment Act dispute resolution process, and undermine the effective and orderly resolution of employment disputes in the manner prescribed by law and the very essence of having Labour Officers, CBA and recognition agreements with Trade Unions. All employees who get dismissed or suspended and believe that they are innocent, have their reputations tarnished by their dismissals or suspensions. They will eventually get an opportunity to be heard where the employer should justify the charges against them. Should they fail to do so; such employees will be reinstated with no loss of benefits. Without going into the merits and demerits of the main cause, I accept that some damage to the claimant's reputations would have been done. This court however is not in the business of ensuring that an employee's reputation should not be tarnished. If so, it will open the flood gates and this court will be inundated with many such applications.

22. While making this finding, the court notes that throughout the pendency of the application for interim orders before the court and administrative suspension by the respondent, the claimants have remained in the employment of the respondent. The court draws the respondent's attention to the provisions of section 46(h) of the Employment Act, 2007 that an employee's initiation or proposed initiation of a responsible

and founded complaint or other legal proceedings against his employer shall not constitute a fair reason for dismissal or for imposition of a penalty or adverse decision. The court finds that in view of the complex legal issues raised in this cause, the complaint leading to this cause was responsible and with good foundation. Accordingly, the court makes the following orders:

a. **Both parties agree the claimants are UASU officials and pending their suspension and the suit herein the claimant will continue to have access to the respondent premises without undue restrictions that would negate their union duties unless there is a separate justifiable cause to have them denied such access.**
b. **The application dated 2nd October is dismissed; and**
c. **Costs will be in the cause**

Dated at Nairobi this 22nd day of November 2013

**M. Mbaru**

**Judge**

In the presence of

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