REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1539 OF 2013

PROF. FRANCIS M. NJERUH ……..CLAIMANT/APPLICANT

-VERSUS-

JOMO KENYATTA UNIVERSITY OF AGRICULTURE & TECHNOLOGY……RESPONDENT

Dr. Kamau Kuria for the Claimant/Applicant.

Mr. Luta for the Respondent.

RULING

1. This application was brought on a Certificate of urgency by a Notice of Motion dated 24th September, 2013 seeking for orders;

"1 *That this Honourable Court be pleased to certify this application urgent.*

2.That the service of the application in the first instance be dispensed with owing to the urgency of the matter.

3. That the Respondent be retrained by itself, its servants and or agents from breaking the contract of employment entered into by it with the claimant on 7th November, 2011 pending the hearing and determination of this application or until further orders of this Honourable Court.

4. That the Respondent be restrained by itself, its servants and or agents from breaking the contract of employment entered into by it with the Claimant on 7th November, 2011 pending the hearing and determination of this cause.

5. That the Respondent be restrained by themselves, their servants and or agents from suspending the Claimant or dismissing him from his employment until trial or furtherorders of this Honourable Court.

6. That the Respondent be restrained by itself, its servants and or agents from effecting in any manner whatsoever an unlawful constructive termination of the Claimant's employment.

7. That the Respondent be restrained by itself, its servants or agents from interfering with the Claimant's discharge of his duties as Deputy Vice Chancellor (Administration, Planning & Development) until further orders of this court.

8. That the Respondent be restrained by itself, its servants and or agents from interfering with the Claimant's discharge of his duties as Deputy Vice Chancellor (Administration, Planning & Development) until trial of the cause.

9.That the Respondent be restrained by itself, its servants and or agents from advertising in the media or in any other manner the Claimant's post of Deputy Vice Chancellor (Administration, Planning & Development) until trial or further orders of this Honourable Court.

10.That the Respondent be restrained by itself, its servants and or agents from intimidating, harassing, frustrating the Claimant until trial or further orders of this Honourable Court.

11.That the costs of this application be provided for."

2. The application is founded on grounds *inter alia* that;

a. *The Claimant fears that the Respondent has embarked on a process of constructively dismissing the Claimant from his post and unless it is restrained, the Respondent will purport to terminate the Claimant as Deputy Vice Chancellor (Administration, Planning & Development) under the contract entered into by him and the Respondent on 7th November, 2011.*

……..

d) The Claimant was re-appointed by the Respondent as Deputy Vice Chancellor (Administration, Planning & Development) for a final term of five years on 7th November, 2011.

e) Through a suspension letter dated 14th August, 2013 the Respondent purported to suspend the Claimant from his post of Deputy Vice Chancellor (Administration, Planning & Development) and refused the Claimant access to his office.

f) The purported suspension of the Claimant's employment is illegal, arbitrary and a contravention of his rights under Article 47 of the constitution to an administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

g) The purported suspension was done in pure disregard to the provisions of Section 63 of the Universities Act as the Claimant was not furnished with any charges, was not given an opportunity to prefer his defence and was not personally given any hearing whatsoever by the Respondent.

h) The effect of the purported termination of the Claimant's appointment is to take from his remuneration of Kshs.368,115/= per month exclusive other benefits and allowances.

i. *The purported suspension of the Claimant in the out rightly illegal and unlawfully manner contravened the Claimant's rights under Article 28 of the Constitutions as it offended the Claimant's dignity and Article 41 as it amounted to an unfair labour practice.*

3. The matter came before me on 25th September, 2013 when I certified the matter urgent and granted interim orders in terms of prayer 3 of the Notice of motion to wit;

"The Respondent be restrained by itself, its servants and or agents from breaking the contract of employment entered into by it with the claimant on 7th November, 2011 pending the hearing and determination of this application or until further orders of this Honourable Court."

4. Meanwhile by a Notice of Motion dated 3rd October, 2013, the Respondent sought the court to stay, set aside, vary or review its orders issued on 25th October, 2013 and that the court do strike out the Plaintiff's claim as being an abuse of the process of the court.

The grounds for the cross-application are stated as follows;

1. *The Claimant has failed to disclose that he is actively engaged in the disciplinary process as an employee of the Respondent.*

2. *The Claimant has failed to make a material disclosure that he filed a Notice of Motion dated 17th August, 2013 seeking similar prayers in Industrial Cause No. 2047 of 2013 which was struck out by Hon. Lady Justice Mbaru.*

3. *Failed to disclose that he is pursuing an appeal against the said order in the Court of Appeal.*

4. *Failed to disclose that he filed Nairobi A.C.J.R. No. 347 of 2013 Prof. Francis M. Njeru vs. The Council, JKUAT, seeking similar orders.*

5. *The ex parte orders made by this court were not limited to 14 days as provided by the law.*

6. *The orders unless, stayed, discharged, set aside, varied or reviewed will stifle the Respondent's disciplinary matters which must be concluded within 6 months.*

7. *The Claimant has attempted to use the order issued to resume duty despite the court not having stayed his suspension or ordered that he resumes duty. The application is further grounded on the supporting affidavit of Dr. Ekuru Aukot.*

5. This application was heard *ex parte* before me and certified urgent upon which the court sought to clarify the *status quo* as per the order issued on 25th September, 2013 as follows;

"2. That order of the court issued on 25th September, 203 and extracted on 26th September, 2013 was not meant to stop any disciplinary process currently taking place against the Respondent.

3. That the issues raised in the Notice of Motion dated 24th September, 2013 must be dispensed with after an inter parties hearing, before the disciplinary process is concluded.

4. That the application dated 4th October, 2013 be consolidated with the application dated 24th September, 2013 and the same be served on the Respondent to respond within 14 days."

The consolidated matter was set for hearing on 7th November, 2013.

6. Meanwhile, the Applicant filed a Notice of motion on Certificate of urgency dated 7th October, 2013 seeking to set aside my orders above dated 4th October, 2013. The matter went before Hon. Justice Mbaru on 7th October, 2013 who certified the matter urgent and granted an interim order restraining the Respondent from continuing with the disciplinary hearing pending the hearing of the application before me on 28th October, 2013. The Respondent filed grounds of opposition to the fresh application on 25th October, 2013 terming it an abuse of the court process.

7. As can be seen from the plethora of applications, the matter is characterised by confusion caused by the parties refusing to respond to the other party's application but instead

choosing to abuse the process of the court by sneaking in a fresh application on a certificate of urgency. This conduct is not in keeping with good practice of advocacy before courts and is discouraged by the court because it complicates and hampers the resolution of real issues before court and escalates the workload of the court and costs.

8. When the parties appeared before me on 28th October, 2013, they agreed to dispose of all the pending issues by way of written submissions and lists of authorities which were duly filed in by the parties and the ruling was reserved on 29th November, 2013.

As was held in High Court of Kenya at Nairobi in the matter of **Assanand v. Pettit (No.2) Civil Case No. 2567 of 1977 [1989] KLR**;

"1. The principles governing the granting of interlocutory injunction are to be found in the judgment of Spry, VP in the case of E.A. Industries Ltd. vs. Trufoods Ltd [1972] EA 420.

2. An applicant has to show a prima facie case with a probability of success and if the court is in doubt it will decide the application on the balance of convenience.

The injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages."

I restated these principles in the matter of **Gladys Shollei vs. the Judicial Service Commission**, **Industrial Court of Kenya, at Nairobi Cause No. 39 of 2013.**

9. The Applicant through senior counsel Dr. Kamau Kuria has strenuously persuaded the court to find that the purported disciplinary proceedings have been instituted in bad faith in that;

a. The Respondent has ignored the advice of the Hon. Attorney General to the effect that;

a. The Vice Chancellor was wrong in applying to the Claimant a circular and concluding that he was allegedly time barred in applying for a renewal of his contract. A copy of the advice is annexed to the supporting affidavit of the Claimant dated 24th September, 2013 yet the Respondent persists in perpetuating the illegality as see in the written submissions page 1 and 2.

The Attorney general had advised;

"*The failure to reapply for re-appointment six months before the expiry of his contract should not be the basis for refusing to appoint him because the circular from the Head of Civil Service does not apply to his position"*.

Counsel for the Claimant submitted that the Respondent appears to have set special rules for the Claimant.

10. Secondly, the Respondent committed a second act of bad faith by trying to dismiss the Claimant after he was appointed on 7th November, 2011. That in a consent entered into in the Industrial Court Case NO. 2047 of 2011 compromising the case in April, 2012, the Respondent admitted its wrong doing.

Thirdly, the Respondent evaluated the performance of the Claimant and rated his performance excellent on 30th May, 2013. Therefore the action by the Respondent is actuated by malice and vendetta by the Vice Chancellor against the Claimant.

11. The Claimant alleges that the Respondent has violated the Claimant's right to a fair administrative action contrary to ***Article 47*** of the Constitution, in that he was not accorded a hearing at all before the suspension. Yet ***Article 47 (1)*** provides;

"*Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair*."

That by so doing, the Respondent violated ***Section 63*** of the Universities Act, 2012 which provides that;

"(1) In the performance of its functions a university council shall uphold the rights of any person who is likely to be affected, and shall –

d. inform the person concerned of the nature of the allegations made against that person;

e. afford that person adequate time to prepare and present a defence; and

f. Afford the person the opportunity of being heard in person."

12. It is submitted that the Claimant was not informed of the nature of the allegations made against him in his letter of suspension. That all he knew was that complaints had been made against him to the Council during the 71st full Council meeting and those complaints had resulted in his suspension, a decision which was reached at the 72nd full Council meeting. The minutes of those meetings despite requesting for them, were not given to him on the basis that, those documents were confidential internal documents.

It is alleged this denial was in violation of ***Article 35*** of the Constitution which provides;

"(1) Every citizen has the right of access to –

Information held by another person and required for the exercise or protection of any right or fundamental freedom."

13. That the Claimant was entitled to the right to equal protection and equal benefit of the law, under ***Article 27 (1)*** of the constitution which right was also violated by the action of the Respondent to deny him information to protect himself against arbitrary suspension and denial of his remuneration as a direct consequence of the suspension.

The Claimant further submits, if the suspension is to be regarded as fair and reasonable, which is denied, he ought to receive his full pay and not 50% as he is getting now.

14. The Claimant relies on the decision in **HOSPERSA and Another vs. MEC for Health Gauteng Provincial Government (J 542/2008) [2008] 2ALC 45**, wherein the learned judge said *inter alia*;

"In terms of the common law, the unilateral suspension of an employee also does not relieve the employer of the duty to pay the employee. It is also accepted in our labour laws an employer may not suspend an employee without pay and may only do so if they have contracted to that effect, either when the contract was first entered into or if a collective agreement provides for such penalty, or when the employee is faced with dismissal and agrees to unpaid suspension as an alternative penalty (see Grega Work Place Law 2007 at p. 103)."

15. The case of **Muller & Others vs. Chairman of the Ministers' Council: House of Representatives & Others (1991) 12 KJ 701 (c) at 766** was relied on to the effect that an employee has a right to a hearing before suspension as follows;

"The question, as we see it, is whether the person involved is entitled to be heard not on the ultimate question of whether the charge is or is not made out but on the question under consideration at that time, namely, whether or not he should be suspended as an interim step ….. Plainly, the decision which adversely affects [his] rights and legitimate expectations. It is likely to have profound emotional, social and financial effects on him. [He] was entitled to be heard on the question whether he should be suspended without salary during the interim period. It may well be that there is little that the appellant could have said or done that was likely to influence the decision on that question. It may well be the decision would have been the same if he had been given the opportunity of being heard. The fact remains, however that he was given no opportunity whatsoever of being heard on the question whether he should be suspended without salary."

16. This case is on the fours with Muller's case on the issue of suspension without pay and counsel has ably submitted that the court should in the interim obviate the suffering imposed on the Claimant by the suspension without pay pending the hearing and determination of the claim.

It is a further submission by the Claimant that if the Respondent is not restrained, it will continue with the flawed disciplinary proceedings and in the end, dismiss the Claimant from employment.This will be in violation of ***Section 80 (4)*** of the **Universities Act, 2012**, which protects all the formerly employees under the repealed Act as is the case with the Claimant.

17. In **Shepherd Homes vs. Sandman [1970] 3 All ER 402**, the court held that a mandatory injunction could be issued in certain instances;

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not be granted on motion. If, however, the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or

if the defendant, after express notice, has committed a clear violation of an express contract, or where the defendant, on receipt of notice that an injunction is about to be applied for, hurries on the work in respect of which complaint is made, so that, when he receives notice of an interim injunction, it is completed, a mandatory injunction will be granted on interlocutory application."

18. Industrial Court's jurisdiction to interfere with disciplinary procedures was canvassed by the South African Labour Appeal Court in **Booysen v.The Minister of Safety and Security [2011] 1 BLL 12 83 (CAC).** The court had this to say;

"545. To answer the question that was before the court aquo, the Labour 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 set out to the discretion of the Labour Court to exercise such power having regard to the facts of each case. 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. The list is not exhaustive."

19. The words of Justice Muga Apondi; Warsame and Dulu, JJ in **Republic v.The Honourable the Chief Justice and Others, High Court of Kenya** at **Nairobi Miscellaneous Civil Application NO. 1298 of 2004** are opportune in this consideration (Ole Keiwua case). The Justices held that rules of natural justice apply even before the disciplinary proceedings are instituted against a person.

The court accepted as correct the following statement of law from **General Medical Council v. Sperckman (1943) 2 All ER 337** as follows;

"If indeed the principles of natural justices are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essentials of justice. The decision must be declared to be no decision."

20. In the **Industrial Court at Nairobi in Cause No. 1012 of 2013**; **Mulwa Msanifu Kombo v. Kenya Airways** Justice Monicah Mbaru held the view that the Industrial Court will descend into the arena if it is shown that an unlawful and unfair disciplinary process is about to take place or is in fact taking place. She stated as follows;

"*Thus, similarly, this court would be reluctant to involve itself in a disciplinary process commenced by the employer unless in appropriate cases it is established that the disciplinary process has been commenced or is continuing unfairly.*

The intervention in disciplinary process by employers will be entertained by the court rarely and in clear cases where the process is likely to result in unfair imposition of a punishment against the employee. The court will intervene in an administrative disciplinary procedure if it is established that the procedure relied on by the employer offends fairness or due process by not upholding the rule of natural justice or, if the procedure is in clear breach of the agreed or legislated or employer's prescribed applicable policy or standards, or if the disciplinary procedure were to continue it would result into manifest injustice in view of the circumstances of the case."

I could not agree more.

21. The Respondent has very ably submitted grounds of opposition to the prayers sought stating that the Claimant seeks to frustrate the Respondent's disciplinary process which is a statutory duty of the Respondent.That the Claimant is attempting to use the court process to evade and delay the disciplinary process which has commenced.That the Claimant should not use court orders to resume duties from which he has been suspended from.

From the attachments to the supporting affidavit of Dr. Ekuru Aukot dated 3rd October, 2013, it is apparent that a notice to show cause dated 6th September, 2013 was served on the Claimant after his suspension by the Council. It is without a doubt that the notice to show cause followed the suspension on 50% salary.

22. It is also obvious from the notice to show cause that the charges preferred against the Claimant came after the suspension.

The charges include:

(a) **Financial mismanagement contrary to Section 44 of the Employment Act, 2007 as read with Rule 5 of the Public Officers Ethics Act, No. 4 of 2003 (University Education Code of Conduct and Ethics) on management of University Education Resources which provides;**

"2. A member shall ensure that university education resources are properly utilized and fully accounted."

The charge has eight (8) counts which include-

1. Spreading rumours which led to derailment of a university project resulting in loss of 1.4m.

2. Constant and deliberate delays in implementing a project leading to a loss of Kshs.575.000/=.

3. Irregular approval of refund medical expenses for a member of staff resulting in loss of Kshs.52,858/30.

4. Irregular approval of substance allowance of two employees in the sum of US£620.

5. Irregular approval of overtime payment for self in the sum of Kshs.239.964/=.

6. Failure to adhere to provisions of the Public procurement & Disposal Act. No specific loss is attached to the charge.

7. Disregard of university police on financial management and staff training by approving certain members of staff to attend some training.

8. Failure to implement nationalization policy of casuals and the wage bill for casuals stands at Kshs.72 million per annum as a result.

23. **Charge 2. Insubordination by questioning the Council's mandate to appoint a substantive finance officer by;**

(ii) Appointing several members of staff of university to the Hospital/Maternity project without approval of V.C. & Management Board.

(iii) Varying terms of construction and award of contracts.

(iv) Stopping payment of 10% deposit towards purchase of a land in Mombasa and so on.

From the look of the particulars to this charge, they all relate to internal mandate wars.

24 (c) **Charge 3. Failure to act in the interest of the university**.

The particulars relate to wars and decisions made by the Claimant in his official capacity.

(d) **Charge 4. Intimidation and harassment of staff by harassing and intimidating the finance officer and two other members of staff by alleging that they were collecting signatures from staff to get a vote of no confidence against the Claimant.**

(e) **Charge 5. Lack of integrity, conflict of interest and lack of professionalism by failing to handle several disciplinary cases appropriately due to interests thereby exposing the university to litigation.**

25. Without commenting on the merits of these charges, they appear to conform to a certain pattern of general allegations emanating from actions and or omissions of the

Claimant in the course of his duty. What is evident also from them is the tuft wars between the Claimant and the Vice Chancellor, who is also the author of the charges against the Claimant.

The notice specifically requires the Claimant to show cause why he should not be removed from the office of the Deputy Vice Chancellor (APD) JKUAT subsequent to a suspension based on conduct considered by the Council to be inimical to the good running of the university.

26. The Claimant has responded to the charges made against him in a lengthy response on pages 181 to 184 attached to the affidavit of the Respondent and has addressed all the charges and the particulars thereof. What is still pending is the disciplinary hearing which the Claimant says is a foregone conclusion.

The court will at this stage not comment on the substance of the response safe to say that the exercise commenced by the Respondent appears to be an evaluation/appraisal of the performance of the Claimant rather than a disciplinary process against the Claimant.

27. It being common cause that the suspension of the Claimant without pay was not preceded by even the most basic inquiry requiring the Claimant to explain himself on the raft of allegations made against him, the court is satisfied on the authorities referred to in this ruling that a *prima facie* case of violation of constitutional rights and freedoms of the Claimant by the Respondent has been made out by the Claimant.

That the suspension has resulted in profound embarrassment and financial loss to the Claimant on a daily and monthly basis is apparent. The court is thus satisfied that any continued non-payment of his full salary would perpetuate *prima facie* illegality and violation of the Claimant's rights.

As was stated in the **Industrial Court Case No. 1200 of 2012 Prof. Gitile Naituli v. Multimedia University and Another**, the claimant herein will suffer irreparable harm if his constitutional rights continues to be violated on a daily and monthly basis. The court will act now rather than later to stop that tide of irregularity pending the hearing and determination of the main suit.

28. The overall result of the Respondent's conduct, *prima facie* violates the cardinal rule of natural justice prior to depriving the Claimant of his salary and benefits to his continuous loss and detriment.

The court will accordingly allow the application by the Claimant only to the extend that his suspension be with full pay and benefits until the disciplinary process is finalized or this case is heard and determined whichever comes first.

All the arrear salary and remuneration be paid accordingly.

Costs will be in the cause.

Dated and delivered at Nairobi this 6th day of November, 2013.

MATHEWS N. NDUMA

PRINICPAL JUDGE