**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. E930 OF 2021**

**IAN CHANGAMU.....CLAIMANT**

***-VERSUS-***

**THE CO-OPERATIVE UNIVERSITY OF KENYA.....RESPONDENT**

**RULING**

**1.** By his Notice of Motion Application dated 10th November 2021, the Claimant/Applicant has sought the following orders: -

a) THAT this Application be certified urgent and heard *exparte* in the first instance.

b) THAT pending the hearing of this suit and or further orders of this Court, the Respondent be and is hereby restrained by itself, servants and or agents from instituting or conducting any disciplinary proceedings against the Claimant.

c) THAT the costs of this suit be provided for.

**2.** The Application is anchored on the grounds obtaining on the face of the Application, and the Affidavit in support of the Application that was sworn by the Claimant/Applicant on the 10th day of November 2021.

**3.** The Application is opposed upon basis of the grounds put forth on the Replying Affidavit sworn by Ms. ANNWE JEMIMMA MMAIA, the Respondent's Principal Human Resources Manager.

**The Claimant's Application**

**4.** The Claimant/Applicant at all material times was and is an employee of the Respondent, Courtesy of an appointment letter dated 16th November 2016, as a teaching Assistant Grade II. Further that he undertook his undergraduate studies and a masters degree in Co-operative Management from the Respondent University.

**5.** That upon his appointment as an assistant lecturer, he has undertaken several tasks assigned to him by the Respondent with utmost integrity. The Respondent owes him a sum of Kshs. 213,108 which it has inexplicably failed to settle.

**6.** The Applicant contends that in the discharge of their duties and where relevant, each member of staff has a password personal to himself or herself. It is by this password that such a member of staff conducts business with the University. Such password is never shared with anyone. He asserted that he has never shared his with any person whatsoever.

**7.** He stated that on the 6th September 2021, he was invited to appear before a committee ostensibly to investigate an alleged alteration of students' CAT and examination marks. He obliged the invitation and attended the committee on the 6th September 2021.

**8.** He alleges that the committee demanded that he admits that he altered the marks using the password of Dr. Joseph Misati Akama on undisclosed times and dates, whereafter they would address no further.

**9.** Thereafter, the Respondent didn't communicate to him the outcome of the investigations. He contends that he was entitled to be appraised of the outcome, any address findings against him and the basis thereof.

**10.** That notwithstanding, by a letter dated 12th October 2021, the Respondent made unfounded accusations against him, general in nature and required him to show cause within 7 [seven] days thereof why disciplinary action would not be taken against him.

**11.** The Claimant/Applicant asserted that owing to the nature of the accusations, and in order for him to be able to do a response, he sought for further and better particulars namely:

a) The identities of the students concerned.

b) Details of the alleged alterations, and in particular the marks involved.

c) The exact times when such alterations were allegedly made.

d) The alleged circumstances in which he was said to have used the password of Dr. Joseph Misati Akama.

**12.** The Claimant/Applicant was categorical that he was not admitting the accusations in any manner whatsoever.

**13.** He stated that in response to his demand, the Respondent through its letter purported to issue the particulars, but the same were woefully inadequate. This constrained him to through his letter dated 4th November 2021 demand for accurate particulars.

**14.** Through a letter dated 9th November 2021, the Respondent purported to give the requested particulars, but the same were grossly inadequate.

**15.** The Claimant/Applicant contends that nothing in the information given implicates him in any wrong doing and that it is not clear where the person whose password was used stands in this bizarre accusation against him. At no time has he ever had access to the accuser's password.

**The Claimant's/Applicant's submissions**

**16.** The Claimant/Applicant has in his submissions largely restated the facts of the matter as they obtain in the Affidavits sworn by him. Those, I won't get into restating.

**17.** It is submitted that on the 12th November 2021, when the matter came up before this Court, the Court certified the Application urgent and fixed the hearing of the Application *inter-partes* for the 30th November 2021. In an effort to defeat the cause of justice, through a document dated 18th November 2021, the Respondent purported to call the Claimant for disciplinary proceedings slated for Friday 26th November 2021. This in violation of the *Lis pendess rule*.

**18.** The Claimant got constrained to file another Application dated 10th November 2021, upon which Justice Stella Ruto gave an interim injunction.

**19.** It was submitted that under Article 41 [1] of the Constitution every person has a right to fair labour practices, and reasonable working conditions. Further that under Article 50, every person has a right to have any dispute resolved by application of the law and a fair public hearing.

**20.** According to the Claimant/Applicant this Court is vested with the jurisdiction to hear and determine an application for injunction by dint of the provisions of section [2] 3 of the Employment and Labour Relations Court Act and Article 23 [8] of the Constitution.

**21.** The Claimant urges this Court to find that he has established the known conditions necessary for grant of an injunction and cited the case of **Giela vs. Cassman Brown 1975 E.A. 358**.

**22.** It is argued that any judicial or *quasi-judicial* process must be lawful, fair, reasonable and procedurally fair. Further that under section 4 of the Fair Administrative Action Act, every person has a right to administrative action that is efficient, lawful, reasonable and procedurally fair and where an administrative action is likely to adversely affect the rights or fundamental freedoms of a person, that person is entitled to *inter alia* information, material and evidence to be relied upon in making a decision or taking of the action.

**23.** In the circumstances of this matter, it is clear that the provisions of the Fair Administrative Actions Act, have not been adhered to. The process by the Respondent is *prima facie* not fair and reasonable. The Claimant/Applicant has proved a *prima facie* case and should entitle him to the orders sought.

**24.** The Claimant contends that the Respondent cannot hide under the fact that what is at hand was an internal disciplinary process as a licence for it to engage in activities that brazenly violate express statutory provisions and the rules of natural justice. There is ample material that the intended disciplinary proceedings are discriminatory, bedevilled with conflicting interest, prone to accusations of persons being judges in their own cause and so on. For instance, how would Mr. Dr. Misati, who at least is supposed to be a witness, be a member of a committee that was established to investigate the matter.

**25.** It was further submitted that the authorities cited by the Respondent are distinguishable from the instant case. The authorities do not in any manner obliviate the Courts power to intervene whenever a disciplinary process is flawed.

**26.** Lastly, it was contended that if the disciplinary proceedings are allowed to proceed to conclusion and at the end of the day the Claimant succeeds in this suit, he will suffer in a manner that cannot be compensated monetary terms. The balance of convenience tilts in his favour. The Claimant will suffer no prejudice in the event the Claimant fails in his suit, they will still proceed with the impugned disciplinary process.

**The Respondent's submissions.**

**27.** Counsel for the Respondent proposes two issues for determination on the instant Application, thus;

(i) Whether the Claimant/Applicant has satisfied the requirements for a grant of an injunction.

(ii) Whether this Honourable Court should interfere with the Respondent's internal disciplinary procedure.

**28.** On the 1st issue counsel submitted that in order for the Claimant/Applicant to be granted the restraining orders, that he has sought, the Application must satisfy the requirements that were set out in the case of **Giela vs. Cassman Brown [1975] E.A. 358**, namely;

(i) The Applicant must establish a *prima facie* case with a probability of success;

(ii) The Applicant must demonstrate that he will suffer irreparable harm which cannot be adequately compensated by an award of damages; and

(iii) If the Court is in doubt, it should decide the Application on the balance of convenience.

**29.** It was submitted that a *prima facie* case was define in the celebrated case of **Mrao vs. First American Limited and 2 others [2009] LLR,** as follows:

*"……a case which on the material presented to Court, a tribunal properly constituted properly directing itself will conclude that*

*there exists a right which has apparently been infringed by the opposite party as to call for explanation or rebuttal from the latter…..…"*

The Claimant/Applicant has not demonstrated that he has a prima facie case with a probability to success. He seeks to stop a disciplinary hearing against him, yes, the Respondent has a right to carry out the disciplinary hearing and, in this matter, one on a serious allegation of academic misconduct.

**30.** It is further contended that the Claimant has not demonstrated that the harm that he is likely to suffer if the injunctive orders he has sought are not granted. He can be compensated by way of an award of damages as envisioned under section 49 [1] of the Employment Act.

**31.** Counsel argued that if the injunctive orders were granted, the Respondent would be deprived of the right to administer the Claimant's contract and the right to manage its business, as such the balance of convenience tilts in favour of the Respondent.

**32.** On the 2nd issue, Counsel argued that it is trite law that an employer has a prerogative to discipline its employees as appropriate. That a Court of law can only interfere with the disciplinary process if only there is evidence that it is flawed and there is apparent lack of fairness and to allow such process to proceed shall lead to gross injustice. The Claimant in his pleadings has not in any way explained why the Respondent's internal process is flawed to an extent that the Court's intervention becomes necessary.

**33.** To buttress the submissions, counsel places reliance on the case of **Rosemary Waitherero Mburu vs. Kenya Airways Limited [2020] eKLR**, where the Court held;

*"47. The only reason for which this Court may interfere with disciplinary process if at all if there is evidence that it is flawed.*

*48. The Applicant has not in any way explained why the process is flawed for this Court to intervene.*

*49. Courts are reluctant to interfere with an employer's internal disciplinary process unless it is evidently flawed and in breach of the law and such interference will only be limited to putting the process to the right course.*

*50. In the case of the Applicant, I find no reason to interfere with the disciplinary process. I therefore find the Application without merit. I dismiss the Application accordingly*.

**34.** Further reliance was placed on the case of **Alfred Nyungu Kimangui vs. Bomas of Kenya limited [2013] eKLR** where Justice Rika expressed himself thus;

*"14. The Industrial Court should be cautious in exercising its jurisdiction, so as not to appear to take over, and exercise managerial prerogatives at workplaces. Grant of interim orders that have the effect of limiting genuine exercise by management of its rights at the workplace, should be avoided. Termination of employment, and initiation of disciplinary processes at the workplace, are presumed to be management prerogatives. The Court should be slow in intervening, particularly at interlocutory stages, otherwise the Court would be deemed to be directing the employers in regulation of their employees."*

**35.** Counsel concluded that the Claimant's Notice of Motion Applications dated 10th and 19th November 2021 are an abuse of the Court process as the Claimant is seeking to stop a process he had voluntarily agreed to participate in by virtue of his response to the Notice to Show Cause letters.

**Determination**

**36.** In this Application two issues present themselves for determination, thus:

a) Whether this Court has jurisdiction issue an injunction restraining initiation or continuance of disciplinary proceedings against an employee.

b) If the answer to [a] above is in the affirmative, whether the Claimant/Applicant has made a case for the grant of a temporary

injunction as sought.

**Of Jurisdiction**

**37.** There is no doubt that this Court has jurisdiction to grant an injunctive relief where the circumstances of a matter warrant such a grant. The authority is expressly bestowed upon the Court by the provisions of section 12 [3] of the Employment and Labour Relations Court act No. 20 of 2011, and Article 23 [3] of the Constitution. However, it is imperative to state that invocation of the authority bestowed by any of the stated provisions is wholly dependent on the nature of the matter before the Court.

**38.** Rendering itself on the jurisdiction to grant injunctive reliefs, in matters disciplinary of employees this Court in **Naomi Aching Oketch & 3 other vs. Seeds of Place Africa International [SOPA] & another [2021] eKLR**, expressed itself thus;

*"12. No doubt this Court has jurisdiction to grant injunctive reliefs and stay for suspension from employment. In **Mesey vs. South West London and St. George's Mental Health WHS Trust [2007] the English Court of Appeal** demonstrated existence of the power in Courts to grant these reliefs.*

*Sedley LJ stated:*

*"There seems to me to be no reason of principle why the Court should be without power, if in all the other circumstances it judges it right to do so, to stay a suspension just as it may stay a dismissal. Each is capable of being a breach of contract, the one no doubt more fundamental than the other, each is capable of not being fully compensable in damages."*

**39.** However, the power should be exercised judiciously not whimsically or capriciously. I agree with Justice Rika's holding in **Alfred Nyungu Kimungui vs. Bomas of Kenya [2013] eKLR**, thus:

*"**14**. The Industrial Court should be cautious in exercising the jurisdiction so as not to appear to take over and exercise managerial prerogative at workplaces. Grant of interim orders that have the effect of limiting genuine exercise by management of its rights at the work place, should be avoided. Termination of employment, and initiation of disciplinary process at the work place are preserved to be management prerogatives. The Court should be slow in intervening, particularly at interlocutory stages, otherwise the Court would be deemed to be directing the employers in regulation of their employees."*

**Whether the Claimant/Applicant has established a case for the grant of the injunctive relief.**

**40.** This Court is in agreement with the view expressed by the Court in **Wycliff Gisebe Nyakina vs. Council of the Institution of Human Resource Management & 3 others [2018] eKLR**, that the Court can only give an injunctive relief against disciplinary processes between an employer and an employee, where it is demonstrated that the process is manifestly flawed. It is through these lens that I shall consider the instant Application.

**41.** The Applicant's Application dated 10th November 2021, is *inter alia* anchored on the grounds put forth on the fact of the Application, thus:

*"**[i]** The Claimant is being accused of using a password that exclusively belongs to another member of staff who is not authorized under any other person.*

***[ii]** The intended proceedings are false, brought in bad faith, illegal and violate the Plaintiff's right to fair administrative action and rules of natural justice.*

***[iii]** If the conservatory orders are not granted, the Claimant who is 26 years old and focused on scaling academic hights will be adversely affected by any inevitable adverse findings which the Respondent has evinced intention to reach. He will not be compensated in monetary damages."*

**42.** Looking at these grounds, they do not speak to a manifestly flawed process.

**43.** I have carefully considered the averments in the Replying Affidavit, they are largely on the demerits of the accusations that are being levelled against the Claimant. It shall not be proper to this Court to venture into the demerits or otherwise of the accusations. That should be left for canvassing at the disciplinary hearing.

**44.** However, I note that the Claimant/Applicant has asserted in paragraph 12, 13 & 14, thus:

***12.*** *"THAT by a letter dated 1st November 2021, the Respondent purported to furnish the particulars requested but the said particulars were wilfully inadequate. A copy of the said letter is annexed hereto and marked "IC5".*

***13.*** *THAT by a letter dated 4th November 2021, I still requested those particulars. A copy of the letter is annexed hereto and marked "IC6".*

***14.*** *THAT by a letter dated 9th November 2021, the Respondent again purported to furnish the Claimant with the requested particulars. Those were grossly inadequate. I annex hereto a copy of the said letter marked "IC7".*

**45.** This Court is cognizant of the right to a fair hearing enveloped under the provisions of Article 50 of the Constitution and the provisions of section 41 of the Employment Act on fair procedure. I have carefully gone through the documents placed before this Court by the parties herein including the letters hereinabove mentioned. I am not persuaded that the process that the Respondent has commenced against the Claimant/Applicant is manifestly flawed.

**46.** The Claimant/Applicant contends that the particulars that the Respondent supplied though its letter dated 9th November 2021, are grossly inadequate, to what extent, he has not demonstrated. In so defaulting, the Claimant/Applicant wants the Court to venture into the realm of speculation. The Court is not ready to.

**47.** The inadequacy of the particulars supplied in an issue that the Claimant can raise, in the disciplinary proceedings, and depending on how it is handled at that point, it can be a subject matter in legal proceedings in a legally recognized forum post the disciplinary process.

**48.** It has not escaped sight of the Court that the Claimant/Applicant has neither in the Application nor the statement of claim sought for any order from this Court, seeking that the Respondent be compelled to furnish him with particular information or at all.

**49.** By reason of the aforegoing premises, this Court is unprepared to interfere with the disciplinary process that the Respondent has commenced against the Claimant/Applicant. However, for clarity of record, there is no implication here that the Claimant/Applicant cannot assail, the substantive and procedural fairness of the disciplinary process and any decision flowing therefrom if the Claimant gets aggrieved by the same. The Application is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT**

**NAIROBI THIS 19TH DAY OF APRIL, 2022.**

**OCHARO KEBIRA**

**JUDGE**

Delivered in presence of:

Mr. Onsome for the Claimant / Applicant.

No appearance for the Respondent

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules,** which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**OCHARO KEBIRA**

**JUDGE**