REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 81 OF 1997

NATHAN ISAAC AYAKO ……..APPELLANT

VERSUS

K.E.T.R.I. BOARD OF MANAGEMENT ……..RESPONDENT

JUDGMENT

The appellant worked for the respondent as its administrative officer.

During April 1996, accusation were labeled against the appellant by the respondent involving fraud and recruitment of employees without authority.

As a result of these accusations, the appellant was interdicted from his employment; and summoned to appear before a disciplinary committee on 9/5/1996, to show cause why disciplinary action should not be taken against him.

He thought this action was not fair and filed a suit in the court of the Resident Magistrate at Kiambu on 13th May 1996 to pray for an injunction to restrain the defendant, its servants and/or agents or in any other way whatsoever, from convening a disciplinary committee on 9th May 1995 or there after to try the plaintiff until the suit was heard and determined.

He alleged in the plaint that the intended disciplinary committee meeting was unprocedural, irregular, illegal, biased and ran against rules of natural justice and laws governing employment in Kenya. Particulars of the irregularity - - - - were set out in paragraph 7(a),(b),(c),(d) and (e) of the plaint.

On the same day the suit was filed the plaintiff also filed an application under certificate of urgency to pray that the respondent be restrained from convening any disciplinary committee meeting which had then been pushed to 15th May 1996 to try the appellant in absence of legal representation pending the hearing of the suit.

The matter was placed before the Resident Magistrate, (Njeru Ithiga) on 13th May 1996 and an exparte order was made in that regard and the same fixed for inter parties hearing on 27th May 1996.

On that day, counsel for the appellant appeared in court but not that of the respondent and the interim injunction granted on 13th May 1996 was confirmed.

Then on 11th February 1997 the respondent came to court under Chamber Summons dated and filed in court on 11th February 1997.

That application sought an order of court to vacate the court order of 27th May 1996. It was supported by

an affidavit of one Joseph Mathu Ndungu, Director of the respondent.

The application was placed before another magistrate (R.K. Mwangi, SRM) for hearing on 12th February 1997 and 24th February 1997 and a ruling made thereon on 12th March 1997. This ruling allowed the application and vacated the order of 27th May 1996 on grounds that the principles set out in the case of Giella v Cassman Brown & Co. Advocates had not been satisfied.

This appeal is against that order; the memorandum whereof lists 6 grounds of appeal.

The first and second grounds questioned the magistrates jurisdiction to hear the application or else he was sitting as an appellate court over his colleagues order; while grounds 3 and 5 took issue with the magistrate for misconstruing the application by the respondent or constitutional and administrative laws governing a right to a fair hearing and/or a right to legal representation.

While ground 4 questioned why the respondent was heard when it was already in contempt of the court's order. The sixth ground was of a general nature.

Counsel for the parties appeared before this court on 5th June 2002 and submitted either in support or in opposition to the application.

As regards the 1st and 2nd grounds of appeal, even though the order of temporary injunction had been confirmed on 27th May 1996 due to non attendance by the respondent, Order XXXIX Rule 4 Civil Procedure Rules gives the court a discretion to discharge vary or set aside an injunction on application made to it by a dissatisfied party to such an order.

It does not matter that the application for setting aside here was made to a different magistrate than the one who granted the temporary injunction so long as this other magistrate had the requisite jurisdiction to hear and determine the matter which I am satisfied he had.

Though the duty of the magistrate then was to set aside the injunction order, he realized the confirmed order was exparte and he had to expound on the law to show the principles necessary for such an order to be made.

As regards grounds 3 & 5, the magistrate did not misconstrue the application. The application by the respondent before him was to set aside the injunction and this is what he did.

The rest were explanation he gave for his action adding that the order was a direct interference of the internal management of the respondent. I dare add this was true in so far as the Act setting up the respondent has specific provisions for its management and the discipline of staff and that the court should only come in when those provisions are misapplied.

In the application for injunction the appellant had not satisfied the principles laid down for the order to be made.

The Magistrate explained that the question of contempt did not arise as there were no material before her to suggest so. In any case an institution cannot be in contempt, and that the person named to have committed the contempt was not joined to the application.

The learned magistrate was right in pointing out all this and I do not see any basis for faulting her decision.

Courts are loth to being dragged into matters relating to internal management of institutions or individuals and that unless appropriate applications are made to show how the court's jurisdiction fits in, insisting that one should be represented by counsel at an institution's disciplinary meeting or if not an injunction do issue to prevent such meeting is an abuse of the court process.

This appeal has no merit and I dismiss it with costs.

Delivered this 13th day of June, 2002.

D.K.S. AGANYANYA

JUDGE