



**Banking Insurance and Finance Union v County Sacco Society Limited
(Cause 136 of 2022) [2024] KEELRC 1578 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1578 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 136 OF 2022
MA ONYANGO, J
JUNE 13, 2024**

**BETWEEN
BANKING INSURANCE AND FINANCE UNION CLAIMANT
AND
COUNTY SACCO SOCIETY LIMITED RESPONDENT**

JUDGMENT

1. The Claimant is a trade union registered in Kenya under the [Labour Relations Act](#) to represent employees in the banking, insurance and finance sectors as more particularly set out in the membership clause of its constitution.
2. The Respondent is a savings and credit society registered under the [Societies Act](#) and regulated by SASRA to carry out business within the Republic of Kenya.
3. The Claimant and Respondent have a recognition agreement and have negotiated several collective bargaining agreements (CBA)s for the benefit of the members of the Claimant. The last CBA at the time material to this suit was signed 10th January 2020.
4. It is the Claimant's case that after signing the CBA on 10th January 2020 the Respondent in violation of the CBA started victimizing and harassing its members.
5. It is the Claimant's averment that on 29th May, 2020 Robert Nyaga (herein after referred to as the Grievant), an Accountant of the Respondent in Job Group G, having risen through the ranks from the position of General Clerk in Job Group F, received a letter from the Respondent deploying him to the Respondent's Karurumo Branch as a Branch Manager in Job Group F. The Claimant avers that this was a demotion without valid reason. The Claimant further avers that the Grievant was not paid disturbance allowance upon the transfer and his responsibility allowance was withdrawn contrary to Clause 21 and 22 of the parties CBA.



6. It is the Claimant's averment that upon querying the same, the Grievant was issued with a show cause letter for an error he allegedly committed on 20th August 2019. That on 19th November, 2020 the Grievant who was the Claimant's shop steward was summoned to appear before the Executive Board on 1st November, 2020 at 10.00 am for disciplinary hearing to answer to charges allegedly committed in 2011.
7. The Claimant avers that on 28th October, 2020 it filed an application in ELRC Cause E693 of 2020 seeking among other remedies, orders restraining the Respondent from harassing, victimizing, discriminating or terminating its members employment for exercising their constitutional rights by joining membership of trade unions of their choice. That the Respondent opted for an out of court settlement by agreement dated 18th March, 2021 which was adopted as an order of the court on 12th August, 2021.
8. It was the averment of the Claimant that three months after signing the consent the Respondent again resorted to victimizing its members and on 16th June 2021 the Respondent again summoned the Grievant to appear before its Executive Board for disciplinary hearing on 5th July, 2021 on the same allegations as those in the letter dated 19th November, 2020 but with different dates being that the Grievant committed the offences in 2014.
9. It is the averment of the Claimant that the Grievant requested for documents to assist him in responding to the disciplinary case but was denied the same by the Respondent on grounds that they were confidential documents that can only be released through a court order. That the Grievant was by email sent on 5th July 2021, informed that he was free to peruse the documents at the Respondent's Head Office and to appear for the disciplinary hearing on 21st July 2021.
10. The Claimant avers that by letter dated 19th July 2021 the Respondent preferred additional charges against the Grievant and directed him to respond to the new charges within 24 hours.
11. The Claimant avers that following the harassment of the Grievant the Claimant filed contempt proceedings on 16th August 2021 after the Grievant was invited for a disciplinary hearing on 12th August 2021. That on 23rd July 2021 the Respondent suspended the Grievant.
12. That the contempt application was however dismissed on a technicality on 10th February 2022. The Claimant avers that after the dismissal of the contempt application the Respondent stepped up the victimization of the Claimant's members. That on 28th February 2022 the Respondent's Chairman summoned the Vice Shop Steward Mr. Robert to a disciplinary hearing for offences allegedly committed in 2011. That it further suspended the Chief Shop steward Jane Njoki indefinitely on fictitious accusation.
13. The Claimant prayed for orders that:
 - 3.1 THAT the court to declare the suspension of Robert Nyaga is unlawful as he has been on suspension for seven (7) months and the CIBA provides for one (1) month { suspension period during which investigations are done by employer and in any case there was nothing to investigate.
 2. That the disciplinary hearing scheduled for 7th March 2022 be declared unlawful since the acts were allegedly committed in 2011 that is eleven (11) years ago and which act is an act of witch-hunt and malice
 3. That the Respondent should be compelled to lift the suspension of Robert forthwith unconditionally and allow him to resume normal duties without any loss and to pay him the half salary of Kshs.



- 162,462/= withheld during the suspension as there are no investigations that were being carried out or are being carried out.
4. That the disciplinary hearing scheduled for 7th March 2022 is already overtaken by events as the same allegations they are raising were settled in Cause E693 of 2020 and a consent registered in court and Robert cannot be punished now for mistakes that occurred eleven (11) years ago.
 5. That all disciplinary letters to our shopstewards including that of Robert based on allegations of witch-hunt due to their stand on union activities be withdrawn.
 6. That the Respondent to stop the anti-union activities and comply with the strict provisions of the CBA and the law.
 14. In its Response to the Memorandum of Claim dated 18th May 2022 the Respondent states that the complaints in the instant claim are a duplication of those raised by the Claimant in Cause No. E693 of 2020 which was resolved by consent of parties as well as the contempt application dated 16th August, 2021 in the same suit which was dismissed.
 15. The Respondent denies that the suspension of the Grievant was indefinite. It states that the Grievant was required to respond to the charges levelled against him of storming out of a Staff Advisory Committee meeting and detailed defense in respect of the disciplinary case in 7 days.
 16. The Respondent denied that the charges against the Grievant was witch-hunting. It explained that in the year 2020 the Respondent hired the firm of Hudson and Associates to carry out a system audit in respect of its accounts which revealed that a sum of Kshs. 83,773,732.37 for the period between 2011 and 2016 could not be accounted for. That the Grievant was the Accountant of the Respondent and was at that time in charge of Finance Department having been promoted to the position in January 2011 which he held until 2019.
 17. The Grievant was further accused of receiving Kshs. 20,000 from a customer by the name Tarasio Njeru Njagi on 6th August 2014 and failing to deposit the money into the Client's account, an issue which was also revealed during the System Audit.
 18. It is the Respondent's case that it could not have become aware of the said issues prior to receiving the report of the System Audit.
 19. It was further the averment of the Respondent that the Grievant caused the Respondent to be penalized to a tune of Kshs. 71,225.32 for failure to file returns to Kenya Revenue Authority in time.
 20. The Respondent states that it had reasonable grounds to require the Grievant to defend himself against the accusations levelled against him.
 21. The suit was disposed of by way of written submissions. The Claimant filed submissions dated 1st November, 2022 while the Respondent's submissions are dated 10th November, 2022.

Analysis and Determination

22. I have considered the pleadings and submissions. The issues arising for determination are the following:
 - a. Whether the suit herein is res judicata;
 - b. Whether the suspension of the Grievant was lawful;
 - c. Whether the Claimant is entitled to the orders sought in the claim.



23. The 1st issue is whether the issues raised in the suit herein is a duplication of the cause of action in Cause No. E693 of 2020 which was filed by the Claimant herein against the Respondent herein and therefore res judicata. Res judicata is provided for in sections 7 and 8 of the [Civil Procedure Act](#) as follows:

7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. (4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

8. Bar to further suit

Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.

24. The Respondent has urged the court to find that this suit is a duplication of Cause No. E693 of 2020 in which according to the Respondent the parties are the same and the issues in dispute are also the same. The Respondent argues that since the case was compromised by consent of the parties, the same issues cannot be the subject of a fresh suit as the issues are res judicata.

25. The Claimant did not respond to or address this issue in its submissions. It is unfortunate that the only pleadings filed by the Respondent in support of its averment on res judicata are a Notice of Motion dated 16th August 2021 and a supporting affidavit of Isaiah Munoru Mucheke sworn on 28th October, 2020. It is obvious that the affidavit and motion were not filed together as they bear different dates that are almost a year apart. The Respondent did not file the Memorandum of Claim which would inform the court of the issues in dispute in the said suit.



26. Be that as it may, I have carefully perused the pleadings filed by the Respondent. In the affidavit there is mention of the Grievant herein Robert Nyaga Joshua. However, the issues raised in respect of the Grievant in the affidavit relate to his alleged transfer on demotion and failure to pay him disturbance and responsibility allowance, both of which are mentioned in the instant suit. The thrust of the suit herein is the disciplinary process commenced against the Grievant by letter dated 16th June 2021 requiring him to attend a disciplinary hearing on 5th July, 2021. This is clearly explained in paragraph 1.15 of the Memorandum of Claim herein in which the Claimant pleads as follows:
15. That three months after signing the consent the Respondent again resorted to victimizing our members and on 16th June 2021 Robert was summoned again to appear before the Executive Board for disciplinary hearing on 5/7/2021 on the same allegations but this time they had changed dates. i.e allegations committed in 2014.
27. It is clear that the issues in the instant suit, although involving the same parties and overlapping with the issues in Cause No. E693 of 2020, are distinct and different from those in the said suit and arose after the conclusion of the earlier suit. It is thus my finding that the suit herein is not res judicata.
28. The second issue for determination is whether the disciplinary process and suspension of the Grievant was lawful. The Claimant alleges that the disciplinary process is laced with malice and is a witch hunt of the Grievant who has been the deputy/vice shop steward since 2015. It is further the Claimant's submission that the Respondent refused to avail to the Grievant documents that he needed to defend himself in the disciplinary hearing; that the Respondent has not demonstrated how the Grievant was involved in the loss of Kshs. 83,773.732.37 and that no evidence has been adduced on the deposit of Kshs. 20,000. On the KRA penalty the Claimant submits that the returns were for June 2020 which were filed on 16th September, 2020 while the Grievant was on leave.
29. It is further the Claimant's submission that the suspension of the Grievant was indefinite, and was on allegations of storming out of a scheduled disciplinary hearing. The Claimant denies that the Grievant stormed out of the disciplinary meeting of 12th July 2022. The Claimant avers that the Respondent has not addressed the issue on how the Grievant stormed out of the meeting and what triggered the said allegations.
30. It is further the Claimant's submission that the suspension is contrary to the provisions of the CBA which provide that suspension should be on half pay and for a period not longer than one month.
31. For the Respondent it is submitted that this suit is premature as the Claimant seeks to stop the Respondent from undertaking procedures that are stipulated by its Staff Policy and the CBA dated 10th January, 2020. That the CBA recognizes the power of the Respondent to suspend any of its' employees from duty. That Robert Nyaga Joshua was invited to a disciplinary inquiry by the Respondent scheduled for 12th August, 2021 to address issues that had been raised in the system audit Report dated 31st August, 2020 and failing to deal with internal as well as external correspondence expeditiously thereby causing penalties to be imposed on the Respondent by Kenya Revenue Authority.
32. It is the Respondent's averment that Robert Nyaga wrote to the Respondents on 30/06/2021 requesting for information to be availed, he further stated that in the enquiry, Isaiah Munoru would represent him. That in the letter dated 5th July, 2021, the Respondent informed Robert Nyoga that his request to be represented before the committee had been declined. The Claimant was further informed that he would be given access to all the documents he required. The perusal was to be undertaken at the premises of the Respondent as the documents were official and contained sensitive information.



33. The Respondent submitted that the Claimant in his letter dated 5th July, 2022 reiterated his demand to be represented at the disciplinary enquiry. He further requested for more time to prepare his response to the issues raised. The Respondent submitted that the disciplinary enquiry was postponed by the Respondent vide its letter to the Claimant dated 10th July, 2021. That the Respondent in the letter to the Claimant dated 3rd August, 2021 reminded the Claimant that the documents he had requested for were available for perusal at the Respondent's premises. That the Respondent informed the Claimant in the letter dated 3rd September, 2021 that he had been given the final chance to access all the documents he had requested for and that he was free to make notes.
34. The Respondent submitted that the allegation that the Claimant had been denied access to the documents he requested for was therefore without a basis as it was the Claimant who had refused to visit Respondent's premises to access and make notes from the documents he requested for.
35. The Respondent further submitted that the Claimant's averment that Robert Nyaga is entitled to representation in the postponed disciplinary hearing was without a legal basis as section 41 of the Employment Act (2007) does not give power to another employee or a shop floor union representative to represent an employee during disciplinary proceedings. That the said section 41 only permits an employee to have another employee or shop floor union representative to be present during the hearing, not to represent them. The Respondent submitted that the suspension of Robert Nyaga was proper and the disciplinary hearing was based on reasonable grounds and did not in any way violate the Constitution, Sections 41 and 43 of the Employment Act (2002) or the CBA.
36. The Respondent submitted that the suspension of the Robert Nyaga was not indefinite as alleged. That Robert Nyaga stormed out of the disciplinary inquiry on 12th August, 2021, as a result of which the Respondent suspended him from employment on 23rd August, 2021 pursuant to Rule 15.3 of the Respondent's Staff policy and the CBA. That in the said letter suspending him, the Claimant was given seven days to explain in writing the reasons for his behaviour and to provide the Respondent with written submissions on his defence on the disciplinary issues that he had been notified of. That the Claimant failed to avail the information requested by the Respondent within the time provided.
37. The Respondent submitted that the disciplinary proceedings against Claimant were still pending. That the disciplinary hearing scheduled for 7th March, 2022 was postponed on 4th March, 2022 by the orders of this court.
38. The Respondent submitted that the Claimant ought to have waited for the outcome of the disciplinary process before lodging the challenge to the disciplinary process in court.
39. The Respondent submitted that Robert Nyaga Joshua is subject to the Code of Conduct and Staff Policy of the Respondent and is therefore not immune to disciplinary proceedings that may be initiated against him by the Respondent. That the disciplinary proceedings against him were proper and that the cause herein is premature as the Claimant seeks to stop the Respondent from undertaking valid disciplinary proceedings against its employee.
40. The Respondent submitted that the Grievant has not alleged he is apprehensive of not being given a fair hearing in the disciplinary hearing that was postponed. That the Grievant will be accorded a fair hearing as the charges against him have been communicated to him. He has not challenged the competence of the Staff Advisory Committee to summon him to a Disciplinary hearing. The Claimant has not pointed out any breach of the law or the Staff Policy by the Respondent.



The Respondent relied on the decision in *Ann Wambui Kamuiru v Kenya Airways Limited* eKLR [2016] wherein the court held that a pending internal disciplinary process could not be stopped by a court unless it is proved it is irregular, thus:

“ 31. In the circumstances, can this Court intervene in a disciplinary procedure instituted by an employer before its conclusion”. This matter has already been discussed in many cases by this Court and other Courts.

32. There is a convergence in agreement that an employer who commences disciplinary proceedings must ensure due process, fair hearing and due regard to natural justice. The Courts on their part will not interfere with proper internal disciplinary processes unless the Court is satisfied that the process is marred with irregularities or it is stage managed towards dismissal.

33. The Court will interfere not to stop the process altogether but to put the correct process on course... ”

41. This was further reiterated by the court in the case of *Republic v County Secretary and Head of Public Service, Bomet County & another Ex parte Bernard Sowek* [2017] eKLR that:

“ 36. It is therefore this Court's position and finding that it will not interfere with the internal disciplinary process so far initiated. The stay prayed for will not be granted. I will urge the Applicant to proceed and respond as requested in the suspension letter.”

41. The Respondent submitted that this court cannot issue an order restraining the Respondent from conducting disciplinary hearing against Robert Nyaga as the process of the disciplinary hearing has not been concluded. That the Claimant ought to have subjected himself to the disciplinary proceedings and if he felt aggrieved by the decision made by the Respondent at the end of the process, he could come before this Honourable court for orders.

42. In conclusion, the Respondent submitted that the orders sought in the claim cannot be granted as they are not available to the Claimant based on the reasons stated above. That there must be an end to litigation, that the instant claim is malicious, an abuse of the court process, an afterthought and an attempt by the Claimant to resurrect prayers in Cause No. E693 OF 2020. The Respondent therefore urged the court to dismiss this cause in its' entirety with costs to the Respondent.

43. From the submissions of the parties it is clear that the Respondent had valid reason to take disciplinary action against the grievant following the System Audit Report which showed that during his tenure as the Accountant of the Respondent the sum of Kshs. 83,773,732.37 could not be accounted for.

44. All the issues raised by the Claimant and all explanations given by the Claimant are matters that should have been in the defence of the Grievant in response to the charges against him in the show cause notice. As an employer the Respondent has a right to discipline it employees as an administrative process. The court can only intervene if the process has been undertaken in violation of the Respondents procedures or if there are fundamental statutory or constitutional breaches. In *MTM v KIE Limited & Another* [2020] eKLR the court held that:

“ Courts have held that Courts will interfere with the internal disciplinary action only when the process is flawed. The interference will thus be to be put back on truck the disciplinary process but not to do away with it all together.”



45. Again in *Rosemary Waitherero Mburu v Kenya Airways Limited* [2020] eKLR this court held that:
- “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 in the right course.”
46. In the instant case the Claimant has not demonstrated that there was any breach of either the internal disciplinary processes of the Respondent or any fundamental statutory or constitutional breaches to warrant interference by this court in the disciplinary proceedings against the Grievant.
47. On the suspension the parties did not avail to the Court the terms and conditions of service for its employees where suspension is provided for. The CBA provides for suspension/interdiction at Clause 8(b) to the effect that the same should not exceed 1 month and that an employee on suspension/interdiction shall be paid half salary.
48. The Grievant was suspended by letter dated 23rd August 2021 and directed to respond to the issues that gave rise to the suspension within 7 days. It is clear from the record that the Grievant had not responded to the suspension letter as at the date of filing this suit. In his witness affidavit sworn on 1st November, 2022 the Grievant states at paragraph 37 and 38 that he was invited for a disciplinary hearing by letter dated 28th February 2022 but was not ready to subject himself to a flawed disciplinary action.
49. It is clear that the length of the suspension of the Grievant, though not stated in the letter of suspension, was to be dealt with at the disciplinary hearing which the Grievant declined to participate in unless his conditions were complied with by the Respondent. He is therefore the one who made it impossible for the Respondent to continue with the disciplinary process within the timelines set out in the CBA by refusing to subject himself to the disciplinary process.
50. His conditions for attending the meeting were that the Respondent issues to him the documents he had asked for in relation to the systems audit, the presence of a union official and the presence of auditors who carried out the systems audit.
51. As explained by the Respondent, the Grievant was given access to the Respondents Head Office to peruse the documents as communicated to the Grievant by letter date 3rd August 2021.
52. It was not reasonable for the Grievant to demand the presence of the Auditors at the disciplinary hearing as he did not explain what he wanted to auditors to respond to at the disciplinary hearing.
53. On the issue of representation, the Respondent explained that according to section 41 of the [Employment Act](#) the employee is entitled to be accompanied by a colleague or shop floor official. Shop floor official means one of the elected union representatives among the employees of the Respondent. The insistence of the Grievant that he must be represented by a union official is not a right and he could not make it a condition for attending the disciplinary hearing.
54. From the foregoing I find that the Claimant was the author of the situation he was complaining about. It is the Claimant who made it impossible for the Respondent to conclude the disciplinary process that led to the extended suspension of the Grievant beyond the one month provided for in the CBA.
55. For the forgoing reasons I find no merit in the Claim herein with the result that the same is accordingly dismissed.
56. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 13TH DAY OF JUNE, 2024



MAUREEN ONYANGO
JUDGE

