



**Ogaja v Owino & 5 others (Cause E049 of 2024)
[2024] KEELRC 2102 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2102 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E049 OF 2024
NZIOKI WA MAKAU, J
JULY 29, 2024**

BETWEEN

OGAJA OGAJA CLAIMANT

AND

SAMUEL OMONDI OWINO 1ST RESPONDENT

KENNEDY ORWENJO 2ND RESPONDENT

MAKONYANGO 3RD RESPONDENT

GEOFFREY KOTONYA 4TH RESPONDENT

PHELIX OREYO 5TH RESPONDENT

COUNTY GOVERNMENT OF SIAYA 6TH RESPONDENT

RULING

1. The Claimant filed his application expressed to be brought under provisions of *the Constitution* of Kenya 2010, *Labour Institutions Act* of 2007 and any other enabling legal authority extending its authority to this Court. The application sought:-
 - i. Spent
 - ii. Spent
 - iii. That the Honourable Court be further pleased to consider the Claimant’s complaints as grave nature threatening not only his personal life and job, but also the Public Service generally;
 - iv. That the Honourable Court issues declaratory orders that acts, omissions and commissions of Omondi Owino was a criminal conspiracy together with other respondents to intentionally



and maliciously cause the Claimant's death arising from frustrations through stoppage of his salary at a time he was critically ill and hospitalized;

- v. That the Honourable Court issues orders declaring intentions, conducts, acts, omissions and commissions of the respondents leading to stoppage of the Claimant's salary, personal, impersonal, motivated by unofficial interests, malicious, vexatious, frivolous, procedurally unlawful, unconstitutional, discriminating, dangerous to his life, hence null and void and that the County Government releases and reinstates his salary and employment status forthwith;
 - vi. That the Honourable Court be further pleased to declare the County Government of Siaya to have been infringing violating and denying the Claimant his constitutional/legal rights and fundamental freedoms through unfair labour practices.
 - vii. That the Honourable Court issues orders directing and compelling the appointing authority of the County Government to invoke constitutional powers to remove the 1st to 5th Respondents from holding the public offices on grounds of abuse of office and integrity;
 - viii. That the Honourable Court issues orders compelling the County Health Management Team to immediately approve and effect the Claimant's request for promotion and transfer as requested.
 - ix. That the respondents besides reinstatement of the Claimant's salary be forced to meet costs of special and general damages;
 - x. That the Honourable Court awards any other orders and relief it deems feet to meet ends of justice; and
 - xi. That the Honourable Court issues orders barring and restraining the County Government any of its officers or employees from intimidating frustrating harassing or infringement of the Claimant's constitutional labour rights or threatening him in any manner on grounds that he has raised these complaints.
2. The Claimant argued the motion in person. He submitted that the 1st to 5th Respondents' acts of commission and omission were at a time that was critical for him since he was unwell and hospitalized at Avenue Hospital. He said the actions threatened his life at a time he was most vulnerable and were dangerous to him. He posited that the documents the Respondents had annexed in the Replying Affidavit were inadmissible as they were not properly marked and further that the affidavit was not commissioned as required in law. He wondered how the Court could rely on these documents. He argued that the stoppage of salary would have been the result of the discipline organ of the County Health Department known as the Advisory Committee. He submitted this committee of the County Public Health Department was not triggered into action. He stated that any action absent the structure of discipline in the County was unconscionable. He argued that he was never called to answer charges before the Advisory Committee as required and that the action of stopping his salary was caused the 1st Respondent. He referred the Court to the letter authored to the County Human Resources Manager and submitted that the action that was undertaken was a direct result of his guidance to the official. He thus asserted the stoppage of salary was attributable to the 1st Respondent and he cannot run away from it. He urged the court to take judicial notice of the last paragraph of the letter which read thus "In view of the above, the Department has forwarded this case to your office for guidance and to take any necessary action as guided". He argued the 1st Respondent has denied giving directions to stop salary and transferred the responsibility to the Director HRM. The Claimant posited that when he approached her regarding the stoppage her response was that she was directed. He stated that the defence by the Respondents is between a 'yes' and a 'no'. He argued that the 1st Respondent denies



- and admits. He says that the Respondents lie that he hasn't been seen at his workplace since September 2023.
3. The Claimant submitted that the payslip he had exhibited and the letter annexed by the Respondents shows a different employee number. He asserts the one on the letter by the Respondents is for a deceased employee who used to work in Ambira Dispensary the place he is alleged to have absconded from. He denies working there and asserts he works in Ugunja where he was posted as the public health officer for Ugunja Ward. He says he has worked as the sub county public health prosecutor which proves that everything the Respondents have stated is false. He stated that every time he is headed to the office he branches of at Siaya and they never informed him that he was being looked for. The Claimant referred to his application for leave dated 30th January 2024 which he said he made when he was on medication. He stated that he has been attending Avenue Hospital from 16th September 2023. He argued that his salary was stopped without him being given an opportunity to defend himself. He informed the Court that he stopped medication in April 2024 due to paucity of funds which he attributed to the Respondents. He said he had no money even on his NHIF account. The Claimant thus urged the grant of the prayers sought.
 4. Mr. Werre for the Respondents submitted that the affidavit before the Court is commissioned since the Respondents on noticing the one initially filed had an error, a duly commissioned copy was filed. He relied on the replying affidavit thus filed and urged the Court to find that the Respondents did not conspire to stop the Claimant's salary as alleged by the Claimant. He submitted there was nothing produced to show the alleged conspiracy. He said that the Claimant absented himself from work from September 2023 and various efforts were made to trace him to no avail leading to the stoppage of salary in March 2024. The Respondents asserted through the County Attorney that the Chief Officer considered the absenteeism to be a matter of discipline and referred the matter to the Human Resources Manager to deal. The Attorney submitted that the salary was stopped and disciplinary action commenced against the officer. He submits that the salary stoppage was lawful as the Claimant cannot account for his absence from work for the months of September 2023 to March 2024. He said the Claimant has not been to work to date. He submitted that the Claimant attached a discharge summary showing discharge from hospital on 20th March and argued the Claimant could not account for the 4-5 months he has been absent from work. On the issue of leave sought on 30th January 2024, the County Attorney submitted that the procedure for seeking leave in the public service is well known. He submitted that no leave form is attached to prove the employee sought leave. He submitted that the County Government has not declined to release the Claimant's salary and all the Claimant has to do is account for the time he was away from work. The Respondents submit that to date the Claimant has not availed a medical report to cover for the period of his absence. It was submitted that one of the principles of equity is that one must approach it with clean hands. The Attorney submitted that one cannot run away from work and when asked to account run to court to cry foul when salary is stopped. He submitted that the application before the court is malicious and only seeks to embarrass the Respondents. He urged the Court to refuse to be dragged to the arena where the employer is disciplining the employee.
 5. In his brief reply, the Claimant submitted that Part IV of the public service discipline manual delineates the terms and conditions of discipline. He posited that he had not absented himself from work and that the Respondents had the express authority to establish his whereabouts. He argued they should be put to strict proof on their effort to look for him. He said the officer is to be looked for and then offered the opportunity to give an explanation. He says this was not done in his case. He submitted the defence by the Respondents is cooked up. He submitted that the Respondents had been asked to settle the salary issue and they had refused hence the action before court.



6. The initial point the Court has to determine is the issue of locus standi raised. The Claimant sought the Court to establish whether the County Attorney has locus standi as the 1st to 5th Respondents had been sued in their personal capacity and the Claimant wondered why the County Attorney was appearing for them. The County Attorney has appeared for the 6 defendants herein. He is the legal advisor to the 6th Respondent and by suing the 1st to 5th Respondents who are employees of the 6th Respondent, it is not improbable the 6th Respondent retained the County Attorney to represent it as well as the 5 Respondents. It would seem it was prudent to engage the County Attorney in the matter instead of outside counsel. As such, I find the County Attorney has locus standi to appear and represent the 6 Respondents herein.
7. The Claimant moved the Court seeking inter alia reliefs that were to the effect that this Court makes a finding against the 1st to 5th Respondents and declares them guilty of criminal charges such as attempted murder, abuse of office and conspiracy to commit a felony contrary to the Penal Code. It was his position that the Court issues arrests warrants against the 1st to 5th Respondents and any other persons as the Police officers may find culpable. He seeks that they be held in custody until this matter is heard and determined. The issue before the Court relates to absenteeism from work and the subsequent salary stoppage. The Claimant asserts the 1st to 5th Respondents should be subjected to penal sanctions – he specifically seeks that they be incarcerated for the duration of the trial of his case for the alleged inhumane manner they treated him by purportedly endangering his life. He charges them with attempted murder, abuse of office and conspiracy to commit a felony contrary to the Penal Code. The Claimant moved against 5 officials of the County Government of Siaya.
8. The Claimant has sought for orders that this Court cannot grant. In addition, the Court has not discerned the alleged criminal conspiracy nor has basis been laid for the arrest of either the 1st to 5th Respondents before me or any other person as the Police may find culpable for the acts the Claimant complains of. I have no authority to command the arrest and incarceration of the 1st to 5th Respondents pending hearing of the suit for their alleged infractions of the law. There is no provision in *the Constitution* or law for the holding of defendants pending the hearing and determination of a civil trial. The UN Covenant on Civil and Political Rights provides at Article 11 thereof that No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. That means the 1st to 5th Respondents cannot be incarcerated for their alleged failure to fulfil contractual obligations. As no nexus has been shown between the prayers sought and the alleged misdeeds of the Respondents, the only polite thing to do is decline the application before me. The Claimant should expend his energy answering the 6th Respondent's plea – where were you between the months of September 2023 and March 2024? If the Claimant answers that question, I am sure the 6th Respondent will be more than happy to reinstate his salary. In the absence of an explanation, the 6th Respondent is entitled to withhold pay since the employee was absent from work without any authority. I think I have said enough to demonstrate that the application before me is unmerited and is accordingly dismissed albeit with no order as to costs. The matter will be placed for directions on 19th September 2024 to ascertain readiness for hearing of the main suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF JULY 2024

NZIOKI WA MAKAU

JUDGE

