



REPUBLIC OF KENYA



KENYA LAW
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Muchoki v Nakuru Water and Sanitation Services Company Limited (Cause E002 of 2023) [2023] KEELRC 468 (KLR) (21 February 2023) (Ruling)

Neutral citation: [2023] KEELRC 468 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E002 OF 2023
HS WASILWA, J
FEBRUARY 21, 2023

BETWEEN

CARDITOR WANJIRU MUCHOKI CLAIMANT

AND

NAKURU WATER AND SANITATION SERVICES COMPANY LIMITED RESPONDENT

RULING

1. Before me for determination is the Claimant/ Applicant's Notice of motion dated 3rd January, 2023, filed pursuant to Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and all other provisions of the law seeking for the following Orders;
 1. Spent.
 2. Spent.
 3. Spent.
 4. Spent.
 5. THAT pending hearing and determination of this claim, this Honourable Court be and is hereby pleased to issue an order directing the Respondent to unconditionally lift the suspension of the Claimant from employment and the Claimant be immediately reinstated with no loss of seniority, privileges, salaries, allowances and benefits.
 6. THAT pending hearing and determination of this claim, this Honourable Court be and is hereby pleased to issue an order directing the Respondent to immediately pay the Claimant's withheld emoluments during the period of suspension.



7. THAT pending hearing and determination of this claim, this Honourable Court be and is hereby pleased to Restrain the Respondent by way of temporary injunction from terminating the employment of the Claimant either by itself, its employees, its servants, and/or agents.
 8. Costs of the Application be borne by the Respondent.
2. The application is based on the following grounds; -
- a. That the applicant was employed by the Respondent sometimes in 2009 as the assistant Human Resource officer, a position that she held till 2013 when she was promoted and became the acting Human Resource officer for about 5 years till 2018 when she was confirmed as the Human resource officer.
 - b. Early 2020, the Respondent promoted the applicant to be the acting Human Resource and Administration manager, while they wait to source for a substantive manager and in mid-2022 they advertised for the said position which applicant applied and was successful. She was issued with employment letter dated 29th June, 2022 confirming her as the Human Resource and Administration Manager.
 - c. She served in the said position till 29th November, 2022 when she received a suspension letter which did not disclose the reason for suspension. Furthermore, that the suspension letter was open ended with no end at site.
 - d. She avers that the suspension was not preceded by any notice or disciplinary hearing. It is her case that the suspension is unlawful as it is not backed up with any law as per the Human Resource manual.
 - e. Further that the suspension has cause her immense financial challenges as she is now paid half salary when she has various financial commitments.
 - f. She urged this Court to move with speed and grant her interim Orders sought in the application.
3. The application is also supported by the supporting affidavit of the Claimant deposed upon on the 3rd January, 2023, which basically reiterated the grounds on the face of the application as stated above.
4. The Application is opposed by the Respondent who filed a replying affidavit sworn by James Nganga Gachathi, the Respondent's managing director on 12th January, 2023. In the said affidavit, the affiant avers that the Applicant who was the Human Resource and Administration manager was tasked with informing one Kenneth Ndegwa(Deceased) of his deployment from the position of Administrative Officer Grade 8 to Billing Officer Grade 8 which position did not affect the employees' salaries and benefits.
5. The Respondent's Commercial manager and head of Department later on informed the said employee of the changes. Consequently, the employee handed over his department to the legal officer and proceeded on leave but died while still on leave.
6. He stated that the Claimant was suspended alongside another employee by the name Clement Mburu Koigi to allow for investigations into any acts that might have led to the death of the Kenneth Ndegwa, which act of suspending employees is a prerogative of the employer.
7. The affiant also took issue with the prayers sought in the application and stated that the same are similar to the prayers sought in the main suit and to allow the same now would be prejudicial to the Respondent.



8. The Affiant prayed for the application to be dismissed because it is seeking for final orders in an interlocutory application.
9. This Court gave direction for the application to be disposed of by written submission with the applicant filing on the 20th January, 2023 and the Respondent on the 26th January, 2023.

Applicant's Submissions.

10. The Claimant submitted on two issues; whether the application has met the conditions for grant of the Orders sought and whether the application should be allowed.
11. On the first issue it was submitted that Respondent in the replying affidavit did not deny any of the contents of the Application in relation to fact and therefore the same should be admitted by this Court as the true position. It was argued that the Respondent is silent in both the letter of suspension and its replying affidavit on the policy it used in arriving at the decision to suspend her. It was argued that, the Respondent's Human Resource manual provide for suspension at clause 8.2.1 and 9.2 which gives particular offenses that an employee commits before being subjected to the said procedure which was contrary to suspension given by the Respondent because it was silent on offense committed by the Applicant to warrant the suspension.
12. The Applicant submitted that the move by the Respondent to suspend her without stating the offense committed is in violation of Article 25(c), 28, 41 and 47 of *the Constitution*. To support this argument the Applicant relied on the case of MWK & Another V Attorney General & 3 others [2017] eKLR where the Court relied on the South African case of S v Makwanyane, where O'Regan J pointed out that "without dignity, human life is substantially diminished" and pronounced the prime value of dignity in the following terms:-

“The importance of dignity as a founding value of the ... Constitution cannot be overemphasized. Recognizing a right to dignity is an acknowledgment of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right is therefore the foundation of many of the other rights that are specifically entrenched in Chapter 3.”
13. To give context on violation of Article 47 of *the Constitution*, the Applicant relied on the Court of Appeal decision in Judicial Service Commission V Mbalu Mutava & Another [2015] eKLR where the Court held that;

“ Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”
14. The Applicant submitted further that actions of the Respondent have violated the applicant's right to fair trial, dignity, fair administrative Action and fair labour practices, which cannot be restored by damages, thus the loss is irreparable. Furthermore, that the suspension led to the Respondent paying



the applicant half pay which has strained her financially. To support this argument, she relied on the case of Donald C Ayunde V Kenya Forest Service [2015] eKLR where the Court held that;

“The Respondent has in the submissions urged me to find that the Claimant/applicant has not established a prima facie case to demonstrate that he will suffer irreparable damage unless the orders prayed for are granted as any withheld emoluments would be payable at the end of the suspension period, that the balance of convenience favours the Respondent whom the Court must not hinder in the administration of its policies. I do not agree with the Respondent. Withholding salary exposes the Claimant to financial embarrassment that cannot be remedied by the mere release of the withheld salary.”

15. The Applicant also relied on the case of Waithaka V Industrial and Commercial Development Corporation [2001] eKLR where the Court held that

“As regards damages, I must say that in my understanding of the law, it is not an inexorable rule that where damages may be an appropriate remedy, an interlocutory injunction should never issue. If that were the rule, the law would unduly lean in favour of those rich enough to pay damages for all manner of trespasses. That would not only be unjust but it would also be seen to be unjust. I think that is why the East African Court of Appeal couched the second condition in very careful terms by stating that normally an injunction would not issue if damages would be an adequate remedy.”

16. The applicant also submitted that the balance of convenience lies with her, because the Respondent has not given the reason for suspending her both in the letter and in the replying affidavit. Further that the Respondent did not follow any procedure before terminating the applicant.

17. On whether special circumstances exist to warrant the issuance of the orders sought, the applicant submitted that the suspension was not preceded by any notice or reason thereof. That the suspension was open ended contrary to the Human Resource manual that gives a time limit within which an employee may be suspended. To support this the applicant relied on the case of Kenya Breweries Limited and another V Washington O Okeyo [2002] eKLR where the Court of Appeal cited the case of Locabail International Finance Ltd. V. Agroexport and others [1986] 1 ALL ER 901 at pg. 901 which stated:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

18. On whether the orders sought should be granted the applicant submitted that she was suspended for unknown reason which was not disclosed either to the Claimant and to this Court. She argued that the suspension fell short of the dictates of the Human Resource manual and the law for failing to give reason for the termination and the timelines thereof. On that basis, the applicant urged this Court to allow the claim as prayed.



Respondent's Submissions.

19. The Respondent also submitted on two issues; Whether the Court should issue mandatory and prohibitory orders at the interim/Interlocutory stage of the suit and whether the Claimant is entitled to prayers as sought.
20. On the first issue, the Respondent submitted with regards to prayers no. 5 and 6 of the Application that the Claimant has sought to stay the operationalization of the suspension letter dated 29.11.2022 and in effect seek reinstatement. While prayer (7) of the Application seek to stop the Respondent from terminating the employment of the Claimant pending the trial of the main suit. According to the Respondent, these prayers constitute both mandatory and prohibitive injunctive orders at the interlocutory stage of the suit, which cannot be granted at the interlocutory stage in absence of the existence of special circumstances. They relied on the case of Robai Kadili Agufa & Another -vs- Kenya Power & Lighting Co. Ltd [2015] eKLR that cited the case of Nation Media Group & 2 others vs John Harun Mwau [2014] eKLR where the Court of Appeal said:-

“It is strite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances ... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

21. The Respondent submitted that the conditions for granting of such orders were well stated in the locus classicus case of *Giella v Cassman Brown & Company Limited* [1973] EA which listed them as follows:
- a) An applicant must show a prima facie case with a probability of success;
 - b) An interlocutory 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;
 - c) If the Court is in doubt, it will decide the application on the balance of convenience.
22. On whether a prima facie case has been established. The Respondent submitted that an employer is allowed the prerogative to suspend an employee on good basis such as to allow investigations or as required. He argued that the Claimant herein was suspended from employment through a letter dated 29th November, 2022 to allow investigations as to the conduct of the Claimant that may have resulted to the death of the Respondent's employee, Kenneth Ndegwa (deceased) who died shortly following his deployment and communication by the Claimant. On that basis, the Respondent argued that the suspension from employment was justified in the circumstance. In this they relied on the case of – *Donald Uvula Vs. Kenya Forest Services* [2015] elk, which held that;

“suspension being a process not provided for by law, must be considered in line with the criteria set in the decision of the Supreme Court of Canada in the case of -vs- *Industiral Alliance Life Insurance Co.* [2014] 3 S.C.R 195, 2004 SCC 55. The Court in this case distinguished “disciplinary” suspension. For purposes of the case, disciplinary suspension was defined as “punitive measure for a reproachable act made during work, while administrative suspension is a preventive measure which can be taken when the interest of the employee's business require it, even in absence of an act made by the employee while working. In the *Cabiakman* case the Court set the criteria for administrative suspension as follows: sufficient link between the reproached act and the type of employment; the nature of the accusations; the existence of reasonable grounds to believe that maintaining,



even temporarily, the employment relationship would be prejudicial to the employer or his reputation; the existence of immediate important inconvenience that cannot be practically countered by alternative measures (for example: assigning the employee to another post); and, the necessity of protecting the public.”

23. The Respondent submitted further that the reason for suspension was not given in the suspension letter but can be construed from the replying affidavit filed in response to the application herein. He argued further that the suspension is an administrative issue that is still pending investigation and final decision and the Court should be slow to interfere with the Respondent’s internal management as aptly opined by justice M. Mbaru in *Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 Others* [2014] eKLR where her ladyship held that the Court should not interfere with an ongoing internal disciplinary process except in exceptional circumstances,
24. They thus submitted that the Court should allow the Respondent conclude its investigation to avoid a situation where the Court will interfere with the Respondent’s administrative and disciplinary procedures.
25. They also relied on the case of *Aviation and Allied Workers Union vs- Kenya Airways Limited* [2012] eKLR thus;

“...Thus, similarly this Court would be reluctant to involve itself in a disciplinary process commenced by the employer unless in an appropriate case. It is established that 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 into 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 rules 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 continuing it would result into manifest injustice in view of the circumstances of the case.”

26. On whether the applicant will suffer irreparable harm, it was submitted that the applicant has not satisfied this conditions and argued that once the investigation is completed and the applicant exonerated, the applicant might be reinstated without loss of benefits, status and privileges. Therefore, that the loss can be compensated.
27. On whether the orders sought should issue, the Respondent submitted that the applicant has failed to demonstrate any of the grounds required in the issuance of the orders sought. Furthermore, that the orders sought are final orders that can only be granted after hearing and determination of the main suit.
28. I have considered the averments of the parties herein.
29. In considering whether to allow or disallow the application, I will consider whether the applicant has established a prima facie case against the Respondents to warrant issuance of the injunctive orders.
30. The applicant was suspended from duty vide a letter dated 29th November, 2022 which letter was tarse as follows;

“Dear Carditor,

RE: SUSPENSION



This is to inform you that you are hereby suspended from duty effective from the date of this letter.

Yours faithfully,

J. N. Gachathi

Managing Director”

31. The letter as evidenced above didn't indicate the length of the suspension and the reasons for the suspension.
32. I have considered provision of the Respondent's HR Manual dealing with discipline or grievance handling at 8.2.1 which state as follows:-

“.....Disciplinary Procedure for Minor Misconduct

Disciplinary procedures will be initiated if an employee's work standards lapse or there is a breach of office rules and regulations.

The following are the procedures to be followed for disciplinary action:

- i. An oral warning pointing out the nature of the offence is communicated to the employee.
 - ii. If no improvement is shown, a written warning will be issued and will form part of the employee's personal record for one year and the shop steward of the Union shall be informed accordingly.
 - iii. If after the written warning, no improvement is shown by the employee, a second written warning will be issued and in case of Union staff the union Branch Secretary shall be copied.
 - iv. Issuance of a third written warning could result in the employee's suspension and/or subsequent dismissal.
 - v. Provided that an employee completes one year from the date of second warning without further misconduct, any warning entered in his/her employment record shall be cancelled.
 - vi. The duration for suspension shall not exceed 60 days and the affected officer(s) will be informed of the outcome of his/her case immediately thereafter”. The disciplinary committee shall ensure the cases are deliberated and completed within the stipulated period. If the case is not completed within the above stipulated duration due to the inability of the officer concerned failing to present himself/herself to the committees. The committee will take any disciplinary action to conclude the case.
 - vii. The committee may at its sole discretion recommend termination of service or other disciplinary measures as it deems fit”.
33. At 8.2.2 the HR Manual provides as follows as procedure for gross misconduct:-

“.....Procedure for gross misconduct

The following procedure shall be followed:



Before deciding whether to submit for a penalty, it is necessary together with the general policies, to consider:

- i. The gravity of the offence
- ii. The individual's disciplinary record
- iii. General service and whether the proposed penalty is reasonable in the circumstances.

Any submission concerning the disciplinary proceedings against an officer must be factual and complete and should include:-

- i. Name of officer
- ii. Designation
- iii. A full statement covering the misconduct or accusations against the officer
- iv. Action so far taken by the responsible officer
- v. A statement of defence made by the officer to exonerate him/her
- vi. The comments of the responsible officer regarding the officers defence and the gravity of the offence.
- vii. A specific recommendation on the cause of action or punishment to be administered. This may include:
 - a. Summary dismissal
 - b. Termination of service
 - c. Stoppage or withholding of increment
 - d. Deferment of increment
 - e. Recovery of cost

34. It has not been indicated whether the applicant was suspended for a minor or gross misconduct in order for this Court to assess whether the Respondent have instituted a proper disciplinary process or not due to the reasons above.

35. I find the process leading to suspension of the applicant, the duration, the offence remains vague. It is therefore my finding that the suspension cannot stand.

36. Court will not normally interfere with internal disciplinary processes of an employee and employer but will occasionally do so when the process is flawed or irregular and in the circumstances to allow a proper process to take place.

37. The process herein being flawed is irregular and hereby set aside and the applicant ordered to return to work with back pay.

38. The Respondents are free to institute proper disciplinary processes if they so wish within 3 months.

39. The Respondent will pay costs of the application.

RULING DELIVERED VIRTUALLY THIS 21ST DAY OF FEBRUARY, 2023.



**HON. LADY JUSTICE HELLEN WASILWA
JUDGE**

In the presence of:-

Koigi for Claimant –

Olili holding brief for Chepkulul for Respondent – present

Court Assistant – Fred

