



REPUBLIC OF KENYA



KENYA LAW
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**Serem v Tourism Regulatory Authority & 3 others (Employment and Labour Relations
Petition E028 of 2022) [2023] KEELRC 429 (KLR) (2 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 429 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E028 OF 2022**

MN NDUMA, J

FEBRUARY 2, 2023

BETWEEN

LUCY SEREM PETITIONER

AND

TOURISM REGULATORY AUTHORITY 1ST RESPONDENT

**KENNEDY LWENYI (ACTING DIRECTOR GENERAL, TOURISM
REGULATORY AUTHORITY (OR THE PERSON FOR THE TIME BEING
HOLDING THAT OFFICE) 2ND RESPONDENT**

**FREDRICK JACK OMONDI (DIRECTOR OF STANDARDS AND QUALITY
ASSURANCE, TOURISM REGULATORY AUTHORITY) 3RD RESPONDENT**

**ERNEST SILA MATHURA (REGIONAL MANAGER/DIRECTOR
OF CORPORATE SUPPORT SERVICES, TOURISM REGULATORY
AUTHORITY) 4TH RESPONDENT**

JUDGMENT

1. The petition dated February 15, 2022 by Lucy Serem against the respondents seeks orders in the following terms:-
 - a. A declaration that the 1st Respondent has violated the petitioners' fundamental rights and freedoms as protected under Articles 25, 27, 28, 41, 47, 48 and 50 of the Constitution.
 - b. A declaration that the Petitioners be compensated the amount of money that the Court deems sufficient and/or appropriate by the 1st respondents for the violation of the petitioners' rights and fundamental freedoms under Articles 25, 27, 28, 41, 47 and 50 of the Constitution.
 - c. An Order of Certiorari be issued to bring into this Honourable Court and quash the purported Notice to Show Cause issued by the Respondent.



- d. This Honourable Court be pleased and do hereby grant an Order of Permanent injunction, restraining the Respondent's his representative, employees, servants and/or agents or anybody working under or for them from purporting to discipline and/or dismiss the petitioner from employment.
 - e. General and Punitive Damages for unlawful actions of the 2nd to 4th Respondents.
 - f. Any other or further relief that this Honourable Court may deem fit to grant.
 - g. The costs of this Application be provided for.
2. The petitioner is the Manager, Human Resource of the Tourism Regulatory Authority.
 3. The petitioner states that she has diligently served the Authority but has faced tremendous obstruction from the 1st to 4th respondents with a view to protect their personal interests in the organization including that the 1st and 3rd respondents were not qualified to be appointed to the positions they held.
 4. That on February 10, 2021, the petitioner was served with a 7 days' Notice to Show Cause with a view to unlawfully remove her from the position she held. That the 2nd to 4th respondents have demanded that she hands over confidential employment records relating to their employment in order to change the Human Resource Manual with a view to make their employment compliant with the terms and conditions of service of the Authority.
 5. That the Notice to Show Cause and the intended disciplinary process intended to be initiated against the petitioner is ill informed and only intended to prevent her from exercising her lawful mandate as the Human Resource Manager.
 6. That the petitioner has been subjected to an administrative action that is unlawful and unreasonable in that:-
 - (a) The petitioner did not commit any offence;
 - (b) The petitioner did not fail to discharge her duties per the terms of her contract;
 - (c) The respondent abused their powers in purporting to commence a disciplinary action against the petitioner.
 7. That the respondents have violated Articles 27, 28, 41, 47(1) and (2) and 48 of the *Constitution*. That in addition the petitioners have violated the provisions of the *Employment Act*, 2007 and Section 4 of the Fair Administrative Actions Act by illegally and maliciously attempting to subject the petitioner to a disciplinary process for lawfully conducting her work and protecting the lawful interest of the Tourism Authority.
 8. That it is in the interest of justice and fair play that the petitioner be granted the prayers sought.
 9. The facts in support of the petition are set out in the Affidavit of the petitioner attached thereto. The petition is also buttressed by the bundle of documents attached including Career Progression Guidelines for the staff of Tourism Regulatory Authority (TRA) October, 2016.
 10. That the petition be allowed and the reliefs sought granted accordingly.
 11. The respondent filed replying affidavit to the petition deposed to by Carolyne Sein on July 17, 2022.



12. The respondent deposes that the petitioner had for a protracted period of time underperformed leading to citations against her for her below performance and dereliction of duty. That the petitioner was hired and appointed as a Human Resource Manager by the 1st respondent in June, 2017.
13. That by a memo dated October 12, 2020 the 1st respondent issued a notice to show cause letter to the petitioner to explain why she should not face disciplinary action based on her absconding work since the May 5, 2020.
14. That the petitioner responded to the Notice to show cause letter by a letter dated October 16, 2020 and same was received by the Director General via email on October 17, 2020.
15. That further disciplinary action against the petitioner was constrained as her job group (TRA-Grade 3) warrants adjudication before the Board of Authority whose term had expired at the time.
16. That the petitioner was further cited by the 1st respondent in a warning letter dated October 13, 2012 and an internal memo dated October 14, 2021 addressed directly to the petitioner and office of the Manager, Human Resource and Administration respectively.
17. The letters pointed to lack of a quarterly report by the petitioner indicating her key performance indicators as per the respondent's Strategic Plan 2018-2022.
18. That this petition was filed pursuant to a Notice to Show Cause dated February 7, 2022 following confirmed absence of the petitioner in the meetings of a committee for the Review of the Human Resource instruments appointed by the 2nd respondent by a memo dated August 11, 2021. That the petitioner was appointed Secretary to guide the committee by virtue of being the Human Resource Manager.
19. That the 1st respondent's actions to initiate review of its Human Resource instruments appointing the petitioner to the Committee on Review of Human Resource Instruments and expecting her guidance cannot be considered to be unlawful or illegal decision under any law. That the petitioner is the 1st respondent's Human Resource Manager and the same docket falls under her.
20. That the petitioner submitted her reservations on the progression of review of the Human Resource Instruments by a memo dated October 5, 2021, two months after her appointment as Secretary.
21. The issues raised by the petitioner were discussed by the Committee in its meeting of October 7, 2021. The Petitioner did not attend the meeting and her non-attendance was without apology. That the petitioner did not attend subsequent meetings and the Chairman of the Committee Mr Moses Lasaibile raised the issue of her continued absence from meetings to the 2nd respondent. The Notice to Show Cause was served on her to explain why she should not face disciplinary action for insubordination.
22. The petitioner did not respond to the Notice to Show Cause but filed the petition. That the petitioner did not exhaust internal disciplinary procedures already in the Human Resource Policies and Procedure manual to which the petitioner is bound by fact of her employment.
23. That clause 11.5 provides for issuance of a Notice to Show Cause pursuant to a disciplinary procedure set out under Clause 11.3. That the action taken by the respondent is pursuant to the Human Resource manual and the *Employment Act*.
24. That the Petitioner has not satisfied the requirement for a final injunction to be issued against the respondent. That the injunction if issued would cripple the operations of the respondent. That the myriad accusations made by the petitioner against the respondents are without basis and do not



support the grant of the orders sought. Issues raised against 2nd to 4th respondents are indeed irrelevant to the issues for determination. That the application be dismissed with costs.

Determination

25. The parties filed written submissions and list of authorities which the Court has carefully considered together with the evidence adduced by the parties in their depositions.
26. The Court notes that the petitioner is seeking a mandatory injunction to stop a disciplinary process from being conducted against her by the employer. The petitioner alleges that the intended disciplinary action is ill informed, malicious, unlawful and intended to prevent the petitioner from conducting her lawful duties some of which adversely affect the respondents who are not qualified to be employed by the respondent in the first place.
28. The onus is on the petitioner to prove that the intended action is a gross violation of the terms and conditions of her employment; the *Employment Act*, 2007 and other relevant statutes and that the process if not stopped will gravely violate her constitutional rights guaranteed under Sections 27, 28, 41 and 47 of the *Constitution*, 2010.
29. The Court has considered the rival evidence by the parties and the decision of Wasilwa, J in *MTM – Vs- KIE Limited & Another [2020] eKLR*, where the Court stated:-

' Courts have held that Courts will interfere with internal disciplinary action only when the process is flawed. The interference will thus be to put back on track the disciplinary process but not to do away with it all together.'
30. This was repeated in *Rosemary Waitberero Mburu –vs- Kenya Airways Limited [2020] eKLR* thus:-

' 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.'
31. In the present case, the disciplinary process commenced with a Notice To Show Cause letter to the petitioner dated October 12, 2020. The petitioner responded to the Notice To Show Cause by a letter dated October 16, 2020.
32. There was delay to proceed with the disciplinary process because the term of the Board which had the mandate to conduct the disciplinary process against an employee in grade TRA – Grade 3 like the petitioner had expired.
33. That particular disciplinary process abated in the Court's view by effluxion of time.
34. However, a new Notice to Show Cause was issued against the petitioner dated February 7, 2022. The notice to show cause relates to continued insubordination and dereliction of duty by the petitioner. The petitioner did not respond to this Notice to Show Cause but instead filed this suit on February 15, 2022 seeking final injunction to stop the disciplinary process.
35. The Court is not satisfied that the petitioner had sufficient reason to approach the Court before responding to the Notice to Show Cause and going through the intended disciplinary process guided by the 1st respondent's Human Resource Manual which provides an elaborate process for disciplinary hearing and appeal from the decision of a disciplinary committee.



36. The claimant has failed to prove on a balance of probabilities that the intended disciplinary process was ill intended, malicious and a violation of her statutory and constitutional rights set out in the petition.
37. To the contrary, the balance of convenience favours the respondents to lawfully and fairly conduct the pending disciplinary process against the petitioner and arrive at a just conclusion having given the petitioner a fair chance to defend herself.
38. Were the Court to stop this process, this would be detrimental to a conducive employment and labour relationship of senior management in the important Tourism Authority. It would be against public interest to issue the orders sought.
39. In any event, the petitioner, if adversely affected by the outcome of the process has recourse to this Court.
40. Accordingly, the petition lacks merit and is dismissed with no order as to costs.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 2ND DAY OF FEBRUARY, 2023.

MATHEWS N. NDUMA

JUDGE

Appearance

Mr. Muga for petitioner

Mr. Ogari for respondent

Ekale – Court clerk

