



Mwaura v Kenyatta International Conventional Centre (Cause E382 of 2022) [2023] KEELRC 803 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 803 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E382 OF 2022
MN NDUMA, J
MARCH 23, 2023**

BETWEEN

JAMES MWAURA APPLICANT

AND

KENYATTA INTERNATIONAL CONVENTIONAL CENTRE ... RESPONDENT

RULING

1. The applicant moved Court vide a notice of motion application dated June 6, 2022 seeking for an Order in the following terms:-
 1. Spent
 2. Spent
 3. Spent
 4. That this Honourable Court be pleased to grant interim injunction against the Respondent barring it from unfairly terminating the employment of the claimant/Applicant pending the hearing and determination of the claim.
 5. That the Applicant be at liberty to apply for further orders and/or directions as the Honourable Court may deem just to grant.
 6. That the costs of this application.
2. The application is premised on grounds set out on the face of the application the butt of which is that the respondent has maliciously suspended the applicant from work and accelerated the process of the disciplinary hearing in order to terminate the employment of the applicant.
3. That the applicant faces imminent dismissal without justification.



4. That the applicant was not granted any and or any hearing before the suspension.
5. That the applicant will suffer irreparable harm unless the interim orders are granted. That the application be granted.
6. That the action taken against the applicant was actuated by a memo dated March 21, 2022 in which the Chief Executive Officer of the respondent instructed the applicant to process payment of USD 55,000\$ to Dubois Pelin and Associates which is an Entertainment Strategist company. That the applicant responded to the Chief Executive officer that he could not process the payment as there was no documentation to show how the procurement of the services of Messrs Dubois was undertaken.
7. That on March 28, 2022, the applicant wrote to the Chief Executive Officer informing him that he would be undergoing a surgery and wanted some days off which number of days would be determined by the doctor. That one Mr. Luvale would act in the applicant's office.
8. On April 1, 2022, the applicant received calls from the Secretary of the Chief Executive Officer asking the applicant to return to work as there were urgent documents that need applicant's attention.
9. On the same date, the applicant received documents through his office email which comprised a letter commencing disciplinary process against the applicant for negligently leaving office unmanned.
10. That upon return from surgery on April 12, 2022 the applicant received two memos dated March 3, 2022 and a 2nd notice to Show Cause dated April 8, 2022 requiring a response before April 14, 2022. The two notices to show Cause were done eight (8) days apart while the applicant was on sick leave.
11. On May 13, 2022, the applicant received the letter of suspension stating that the applicant had failed to properly hand over his duties when he went on sick leave and failing to promptly respond to emails.
12. The applicant was not given opportunity to be heard.
13. That the respondent is motivated by malice and ill will and is hell bent to dismiss the applicant from employment.
14. That it is in the interest of justice and fair play that the intended action be injuncted pending the hearing and determination of the suit.

Replying Affidavit

15. The respondent deposes on germane matters that on March 29, 2022, the applicant left office to attend to personal medical issues (surgery). That as at April 1, 2021, the office of the Chief Executive Officer had not received any formal communication on who will be in charge of the Directorate while the applicant was absent. That the applicant left a gap in the office. That the Chief Executive Officer allocated one Mr. Luvale Mugenda; Principal Accountant, some urgent tasks believing that the claimant would hand over his duties timeously. That Mr. Luvale performed the tasks given to him without being in possession of a letter authorizing him to act for the applicant.
16. That the claimant was issued a Show Cause letter dated April 1, 2022. The applicant responded to the letter on April 4, 2022. The applicant in his response regretted the inconvenience the office could have suffered in his absence. The response was insufficient and claimant was issued a first warning vide a memo to show cause dated April 8, 2022 and April 13, 2022.
17. That on May 13, 2022, the full Board of Directors met and received a report on Finance, Human Resource and Administration Committee on the applicant's performance arising from the management's presentation to the Committee on May 4, 2022.



18. The Board deliberated on the matter and resolved that disciplinary process be instituted against the applicant for gross misconduct. The applicant was issued Notice To Show Cause and was suspended from office with effect from May 13, 2022.
19. The applicant responded to the notice to show cause on June 2, 2022. That only the Board may terminate the employment of the applicant he being a member of management. The applicant is the Director Corporate Services and his position is strategic and his refusal to perform duties was a serious dereliction of duty.
20. That claims of ill will, malice and vendetta are unfounded. That the Court lacks jurisdiction to stop the Board from exercising its mandate to discipline the applicant.
21. That the applicant has not demonstrated any failure by the respondent to follow the Human Resource Policy Manual. That no employee is immutably immune from vertical and horizontal accountability to their employer.
22. That the application lacks merit and it be dismissed with costs. That the respondent relies in addition on the grounds of opposition dated June 15, 2022.
23. The parties filed written submissions and the applicant submits that the applicant has satisfied the prerequisites for grant of interim injunction in that the suspension was not procedural since it violated rules of natural justice, procedural fairness and fair administrative action. In particular, Section 11.4 of the Respondent's Human Resource Manual which provides guiding principles of disciplinary procedure were not followed.
24. In this pre-trial stage, the Court is loath to determine matters of fact on their merits. However, in arriving at a prima facie, view and finding of the issues in dispute here the Court has carefully considered the Notice to Show Cause dated April 1, 2022 by the Chief Executive Officer to the claimant vis a vis the robust explanation by the claimant dated April 4, 2022 on the issue of the claimant's absence while undergoing a medical surgery and the fact that he had discussed the matter with the Chief Executive Officer, who was out of the country at the time on telephone and had written a note of handing over to one Mr. Luvale vide a memo copied to the Chief Executive Officer.
25. Prima facie, the allegation that the claimant left a gap in the office while proceeding for medical surgery and on medical leave appears to be far-fetched. The real dispute appears to have been precipitated by failure by the claimant to process a payment of USD\$ 55,000 as directed by the Chief Executive Officer before he proceeded to undergo surgery and on medical leave.
26. That appears to be the silent elephant in the room that propelled extraordinary action being taken against the claimant whilst he was on medical leave and after undergoing a major medical surgery.
27. It cannot be gainsaid that the employer has the ultimate mandate to discipline an errant employee and the Courts are loathe to interfere with this cardinal role of an employer and for good reason and order.
28. Article 47 of the Constitution however has raised the bar in this respect and in particular provides:-
 - “(a) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative actions, the person has the right to be given written reasons for the actions.”
29. In this case, the impugned action is the suspension of the claimant by the full Board of the respondent.



30. It is pertinent to note that regarding the absence by the claimant to undergo surgery and subsequent taking of medical leave, the claimant was served a first warning by the Chief Executive Officer under a Show Cause letter dated April 8, 2022. The matter appeared to have been brought to finality in that letter by the Chief Executive Officer in the following terms:-

“This serves as your first warning for demonstrating slackness in handling your Directorate inaptly.

Lastly, since you were able to come into office last week and communicate to this office you are required to submit by end of the day Monday, April, 11, 2022 the below:-

1. When you plan to officially report back to enable the organization document the same properly.
2. Respond to numerous communication/memos submitted to you for action or implementation within the stipulated timelines.”

31. The first warning was formally communicated again to the claimant by the Chief Executive Officer vide a letter dated April 13, 2022. The Chief Executive Officer stated:-

“After analyzing your responses as explained in your various memos under reference, management finds the same unsatisfactory. Consequently, this serves as a First Warning to you on account of failure to undertake a proper handover of the Directorate functions while away on leave. Henceforth, you are advised to desist from engaging in such acts to avoid jeopardizing the organization’s strategic goals and objectives.”

32. The letter of suspension dated May 13, 2022 opens as follows:-

“The full Board of Director’s meeting of February 12, 2022 heard the Finance, Human Resource and Administration presentation arising from management’s presentation to the Committee on May 4, 2022 in respect of your work performance.”

33. This opener to the suspension letter, being the two dates referenced therein, is a factual impossibility.

34. The first accusation is a revival of the matter of absence during surgery and alleged failure to hand over. This matter had already been closed by the Chief Executive Officer by giving the claimant a first warning.

35. Issues 2 to 7 appear to have been raised against the claimant for the first time and with no appraisal report being referenced to and without any opportunity given to the claimant to explain the accusations.

36. The Court finds that the applicant has satisfied the requirements for grant of an interim mandatory injunction as set out in *Giella v Cassman Brown Company Limited* [1978] EA 358 to wit; that the applicant has established a prima facie case with a probability of success; that if the suspension is not stopped, the claimant would suffer irreparable harm, since the action taken bear the hallmark of a final exit without any hearing at all under the guise of an interim measure.

37. The Court recognizes the views of the Court of Appeal in *Kenya Revenue Authority v Menginya Salim Murgani* - Civil Appeal No. 108 of 2009 in which the Court held:-

“There is ample authority that decision making bodies other than Courts and bodies whose procedures are laid down in statutes are masters of their own procedures, provided that they



achieve the degree of fairness appropriate to their tasks, it is for them to decide how they will proceed.”

38. Reliance by the respondent on the above authority does not sell, on the face of stated failure by the respondent to follow strictly the disciplinary procedure, provided in the organisation’s Human Resource and Procedure manual.
39. The applicant had no reasonable opportunity in the circumstances of this case to know the basis of allegations against him before he was suspended. The Court relies on the decision in *Geothermal Development Company Limited v Attorney General and 3 others* [2013] eKLR when it was held:-
- “As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response.”
40. All facts considered, this is one of the rare circumstances where the suspension by an employer pending an intended disciplinary process cannot be allowed to stand on the basis that the process was so blatantly tainted as to constitute fatal blow to the contemplated action.
41. Accordingly, the application succeeds and the Court makes the following orders:-
- (i) An interim injunction is granted recalling the orders of suspension of the claimant from his employment pending the hearing and determination of the claim.
 - (ii) An interim Injunction is issued reinstating the applicant to his employment without loss of any remuneration and/or benefits pending the hearing and determination of the claim.
 - (iii) Costs in the cause.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 23RD DAY OF MARCH, 2023.

Mathews N. Nduma

Judge

Appearances

Maina Njuguna & Associates for the Claimant/Applicant

Odukenya for Respondent

Ekale - Court Assistant

