



**Nganga v County Government of Mombasa & another (Cause
81 of 2022) [2023] KEELRC 1453 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1453 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 81 OF 2022
AK NZEI, J
MARCH 9, 2023**

BETWEEN

JOSEPHINE NDINDA NGANGA CLAIMANT

AND

MOMBASA COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT

THE COUNTY GOVERNMENT OF MOMBASA 2ND RESPONDENT

RULING

1. Before me is the Claimant's Notice of Motion dated October 18, 2022, filed on October 19, 2022 contemporaneously with the Claimant's statement of claim herein. The application was filed under a certificate of urgency, and was presented to the Court in Chambers on October 21, 2021. The Court certified the application as urgent and directed the Claimant/Applicant to serve the same forthwith, and fixed the same for October 25, 2022 for directions and/or further orders.
2. The Claimant was seeking the following orders in the said application:-
 - a. that service of the application be dispensed with in the first instance, and the application be certified urgent and be heard *ex-parte*.
 - b. that the Court be pleased to issue an interim injunction order restraining and preventing the Respondents or their officers, servants or agents from stopping the Claimant's salary pending the hearing and determination of the application inter-partes.
 - c. that the Court be pleased to issue an injunction order restraining and preventing the Respondents or their officers, servants or agents from stopping the Claimant's salary pending the hearing and determination of the claim herein.
 - d. that the Honourable Court be pleased to grant injunction order restraining and/or preventing the 1st and 2nd Respondents or their officers, agents or servants or any persons acting on their



direction or authority from taking any disciplinary action against the Claimant arising from or connected to the show cause letter issued by the County Chief Officer Medical Services dated August 11, 2022 pending hearing and determination of the claim herein.

- e. Costs
3. The 1st and the 2nd Respondents entered appearance on October 24, 2022, but did not file response to the application or attend Court on October 25, 2022; and on being satisfied that the application had been served on the Respondents, the Court made the following orders:-
 - a. the Notice of Motion is fixed for *inter-partes* hearing on November 10, 2022.
 - b. the Respondents may file responses to the application within 7 days of today.
 - c. in the meantime, an interim order of injunction is hereby issued restraining the Respondents, their officers, agents or servants from stopping or withholding the Claimant/Applicant's salary and from taking any disciplinary action against her pending inter-partes hearing of the application dated October 18, 2022.
 - d. the Claimant/Applicant shall serve this order on the Respondents within 3 days of today.
 4. The foregoing Order is shown to have been served on the Respondents on October 25, 2022, and alleged disobedience thereof is the subject in a separate application filed herein, on which a separate Ruling will also be delivered today.
 5. The Claimant/Applicant's application, which I have reproduced in paragraph 2 of this Ruling, is supported by the Claimant/Applicant's supporting affidavit sworn on October 18, 2022. It is deponed in the said affidavit, *inter-alia*:-
 - a. that the Claimant/Applicant was employed as a Community Health Extension Worker on May 26, 2011 under the National Government Economic Stimulus Programme and was deployed to Mombasa, and that upon formation of devolved governments, she was employed by the 1st Respondent.
 - b. that the Claimant/Applicant has undergone several acts of victimization, and discrimination by the Respondents including unlawful deduction of salary, unlawful demotion, stagnation of rank amongst others, which culminated in the filing of ELRC case No 132 of 2016, which was decided in the Claimant's favour.
 - c. that on August 17, 2022, the Claimant/Applicant received a letter from the County Chief Officer Medical Services asking her to show cause why she could not be dismissed from employment for failing to comply with integrity requirements by aspirants seeking elective posts to resign from employment, to which the Claimant/Applicant responded.
 - d. that the Claimant/Applicant subsequently proceeded on annual leave that was to end on November 17, 2022.
 - e. that October 12, 2022, the Claimant's bank called her to inform her that her loan repayment under salary check off system had not been remitted because her salary had not been banked, and that her loan was in arrears; a fact that the Claimant/Applicant confirmed on October 14, 2022.
 - f. that the County Chief Officer's actions just after the general elections and during the transition of the County Government was malicious, unlawful and lacking in legitimacy; and that the



Claimant/Applicant's Constitutional rights to fair administrative action and fair hearing have been infringed upon and are threatened as follows:-

- i. failing to provide information regarding the source of the complaint.
- ii. failing to objectively investigate the alleged complaint.
- iii. being subjected to an unlawful, biased and unfair decision.
- iv. failing to provide written reasons for the decision.
- v. failing to issue any notice prior to taking administrative action of stopping the salary.
- vi. presuming and pre-judging guilt.
- vii. constructively terminating employment without following due process.
- viii. taking disciplinary action without any investigations or a formal disciplinary hearing or an opportunity being availed to discount the alleged complaint.
- ix. failing to provide an effective mechanism for the Claimant to appeal or seek review of the administrative action.

6. The 1st and 2nd Respondents opposed the application vide a Replying Affidavit of Dr Shem Patta sworn on November 8, 2022 and filed in Court on November 9, 2022. It is deponed in the said affidavit:-
- a. that the claim herein, and by extension the Notice of Motion application, are frivolous, vexatious and an abuse of the Court process since the Applicant is clearly using the Court to perpetuate an illegality by endorsing her violation of the electoral law and accompanying regulations.
 - b. that the Claimant/Applicant participated in the 2022 general elections as one of the aspirants who sought election for the position of Member of Parliament for Changamwe Constituency under the Maendeleo Chap Chap party ticket.
 - c. that being a public servant, the Applicant was supposed to resign from employment prior to seeking to be elected Member of Parliament for Changamwe, but failed to do so.
 - d. that upon knowing of the Applicant's participation in 2022 general election, the 1st Respondent through the Chief Officer incharge of Medical Services sent the Applicant a letter dated August 11, 2022 requiring her to show cause why she could not be dismissed from employment for failing to resign prior to seeking an elective post as required by law.
 - e. that the Applicant responded vide a letter dated August 23, 2022.
 - f. that upon receiving the Claimant's response, the Respondents requested for documentation from the Independent Electoral and Boundaries Commission in respect of the Applicant's participation in the election, which was provided vide a letter dated November 27, 2022.
 - g. that the Applicant is unjustified in applying to restrain the Respondents from stopping her salary since she ought to have been out of the Respondent's employment when she took part in the 2022 general elections.
 - h. that by failing to resign, the Applicant has been drawing salary from the 1st Respondent irregularly, and ought to refund the same from the time when she ought to have resigned.
 - i. that the Applicant is not supposed to be in employment by now.



7. In my view, the principles governing grant of orders of injunction in employment matters are those governing grant of injunctions in other matters. The principles have long been settled in the case of *Giella vs Casman Brown & Co LTD* [1973].
8. In the present case, it is a common ground that the disciplinary process facing the Claimant/Applicant, including stoppage of her salary, was not initiated by Mombasa County Public Service Board (the 2nd Respondent), but by the 1st Respondent's Chief Officer incharge of Medical Services. Under Section 59(1) (a) and (c) of the *County Government Act* powers and functions of the 2nd Respondent include establishing and abolishing offices in the County Public Service, and exercising disciplinary control over, and remove persons holding or acting in those offices. Under Section 77 of the said Act, any person dissatisfied or affected by a decision made by the County Public Service Board may appeal to the Public Service Commission.
9. It follows that the institution of disciplinary proceedings against the Claimant/Applicant, including the stopping or withholding of her salary and conduct of investigations into her case by any County entity or officer other than the County Public Service Board is irregular, and therefore illegal. This is a point of law which the Court cannot fail to take note of, even suo moto. Prima facie, the Claimant/Applicant has an arguable case that is worth a day in Court, and one that has a possibility of success, in view of the aforesaid law.
10. On the Respondent's assertion that the Claimant/Applicant participated in the 2022 general elections by contesting for an elective post without first resigning pursuant to Section 43(5) of the *Elections Act*, the said Section provides as follows:-

“ A public officer who intends to contest an election under this Act shall resign from Public office at least six months before the date of election.”
11. Any alleged contravention of the foregoing statute by the Claimant/Applicant should have been the basis of an investigation by the County Public Service Board (the 2nd Respondent) and commencement of disciplinary proceedings by the Board in accordance with the applicable regulations, but not arbitrary stopping or withholding of the Claimant/Applicant's salary by or at the instance of a Chief Officer in the County Government (1st Respondent).
12. Stopping of an employee's/a public officer's salary is a disciplinary action, and should never be effected or even considered without first according the employee an opportunity to be heard, regardless of the accusation. Further, the provisions of Section 43(5) of the *Elections Act* cannot be read in isolation of the provisions of the *Public Officer Ethics Act*, and particularly Section 16 thereof on political neutrality. The issue of statutory limitation will also be key here.
13. The Claimant/Applicant did not, and has not resigned todate. She remains an employee of the 1st Respondent. If she is alleged to have contravened any law, due process must be followed, and by the lawful public body. In the meantime, she is entitled to continue drawing her salary as she is still working.
14. The Respondents have not told the Court what damage they will suffer if the orders sought herein are granted.
15. Finally, and having considered submissions presented by parties herein, I allow the Claimant's Notice of Motion dated October 18, 2023 in following terms:-
 - a. an order of injunction is hereby issued restraining and preventing the Respondents or their officers, servants or agents from stopping the Claimant's salary pending the hearing and determination of the claim herein.



- b. an order of injunction is hereby granted restraining and preventing the 1st and 2nd Respondents or their officers, agents or savants, or any person acting on their direction or authority from taking disciplinary action against the Claimant arising from or connected to the show cause letter issued by the County Chief Officer Medical Services and dated August 11, 2022 pending the hearing and determination of the claim herein.
- c. Costs of the application will be in the claim.

16. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH MARCH 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Claimant/Applicant

.....for Respondent

