



**Nyaga v County Sacco Society Ltd (Cause E006 of 2022)
[2023] KEELRC 1060 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1060 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E006 OF 2022
ON MAKAU, J
APRIL 27, 2023**

BETWEEN

JANE NJOKI NYAGA CLAIMANT

AND

COUNTY SACCO SOCIETY LTD RESPONDENT

RULING

1. On 31st October, 2022 Marete J delivered judgment in this suit where he faulted the respondent for suspending the claimant. He further lifted the suspension and invalidated it *ab initio*. The respondent was also ordered to release claimant’s salary for the period of suspension and allow her to resume work unconditionally on 1st November, 2022 at 8.00 hours. Finally the claimant was awarded costs of the suit.
2. The respondent reinstated the claimant but asked her to apply for leave which she did and was granted leave of 43 days. While away on leave, she received the letter dated 20th November 2022 inviting her to attend disciplinary hearing for the same allegations which had led to the said invalidated suspension.
3. The claimant was aggrieved and brought the notice of motion dated 30th November, 2022 seeking the following orders:-
 1. That this Application be certified as urgent and be heard expeditiously ex-parte in the first instance and service be dispensed with in the first instance.
 2. That the Respondent be restrained from proceeding with the disciplinary hearing scheduled for 05/12/2022 pending hearing and determination of this Application.
 3. That an injunction do issue restraining the Respondent by themselves, their servants, employees and/or agents from terminating/dismissing and/or taking any disciplinary actions against the Applicant until hearing and determination of this Application.



4. That the disciplinary hearing process whose cause of action was invalidated ab initio and the Applicant resumed work unconditionally as per the judgment delivered on 31st October, 2022 is null and void ab initio.
 5. That the Respondent is restrained and prohibited from proceeding with any disciplinary hearing based on the same allegations of 11th January, 2022 which were the subject of the claim herein and the judgment of this court delivered on 31st October, 2022.
 6. Costs of this application.
4. The application is premised on the grounds set out in the body of the motion and claimant's supporting affidavits sworn on 30th November, 2022 and 7th February, 2023. In brief the claimant's case is that the judgment by Marete J invalidated the impugned suspension and insulated her from disciplinary hearing by the respondent on the basis of the same allegations that led to the invalidated suspension. Further the intended disciplinary hearing is unfair labour practice and it will prejudice and embarrass her.
 5. The respondent has opposed the application vide the Replying affidavit sworn on 28th December 2022 by the respondent's Chief Executive Officer Ms. Nicoleta Mumbi Patrick. In brief the affiant averred that the aforesaid judgment did not stop the respondent from continuing with the disciplinary process against the claimant but merely lifted the suspension and ordered for payment of withheld salary.
 6. Further she deposed that the claimant was invited to attend disciplinary hearing but she failed to attend despite her failure to secure injunction to stop the hearing. As a result, she was dismissed from employment on 17th December, 2022 and therefore the application has been overtaken by events.

Submissions

7. The claimant reiterated the averments in its said Affidavits, that is, the judgment by Marete J invalidated the disciplinary process against her and awarded her an unconditional reinstatement. As such she submitted that the invitation to attend the disciplinary hearing on 5th December, 2022 was irregular and contrary to the said judgment.
8. The respondent submitted that in the suit herein, the claimant sought six orders but Marete J, in his judgment granted any four of them, namely lifting of the impugned suspension, release of withheld salary, unconstitutional resumption of duty on 1st November 2022, and costs of the suit. Further that, the court declined to grant injunction to restrain the employer from dismissing the claimant, and an order to compel the respondent to withdraw threats of the envisaged disciplinary enquiry/ action against the claimant.
9. Based on the foregoing, it was submitted that the said judgment did not immunize the claimant against disciplinary proceedings commenced by the respondent. Further that, when the claimant failed to secure injunction against the disciplinary hearing, she should have attended the hearing but she did not, prompting the employer to dismiss her.
10. It was further submitted that an employer has the legal right to discipline its employees and the courts have recognized that right. Reliance was placed in the case of *Ann Wambui Kamuiru v Kenya Airways Limited* [2016] eKLR and *Republic v County Secretary and Head of Public Service, Bomet County & another Ex parte Benard Soweke* [2017] eKLR where the court held that it would not intervene to stop internal process altogether but only to put the correct process on course.



11. Finally it was submitted that the allegations raised against the claimant were serious and she ought to have subjected herself to the disciplinary process and if in the end she was aggrieved, then challenge the same in court. Be that as it may, the court was reminded that the claimant has since been dismissed from employment and therefore the application herein is moot and ought to be dismissed with costs.

Analysis and determination

12. The issues for determination herein are:
- a. Whether there judgment by Marete J on 31st October, 2022 insulated the claimant from disciplinary action in respect of the matters leading to suit herein.
 - b. Whether the application herein is overtaken by events.
 - c. Whether the orders sought are merited.

Insulation from disciplinary action

13. The trial Judge noted in page 3 of his judgment that the claimant prayed for the following:-

- “i. That the court do order the Respondent to unconditionally lift the suspension of the claimant from employment and order immediate reinstatement and/or resumption of duty.
- ii. That the court do order Respondent to pay the claimant all withheld remunerations and/or salary during the period of suspension.
- iii. That the court do make an order of injunction restraining the Respondent either by themselves, employees, servants and/or agents from terminating/ dismissing the claimant from employment.
- iv. That the court do compel the Respondent to withdraw threats of envisaged disciplinary inquiry action against the claimant as no offences have been proven.
- v. Costs of this claim.
- vi. Any other relief the court may deem necessary and just to grant.”

14. Having considered the evidence, the court granted the following orders on page 6 of the Judgment:-

- “i. That the suspension of the claimant by the Respondent be and is hereby lifted and invalidated *ab initio*.
- ii. That the Respondent be and is hereby ordered to release all withheld salaries arising out of this suspension to the claimant.
- iii. That the claimant be allowed to resume work unconditionally on 1st November, 2022 at 800 hours.
- iv. That the costs of the claim shall be borne by the Respondent.”

15. Having considered the submissions and the judgment rendered on 21st October, 2022, it is clear that the trial court did not grant the following prayers:-



- a. Injunction to restrain the respondent or its agents from terminating or dismissing the claimant from employment.
 - b. Compel the respondent to withdraw disciplinary inquiry or action, against the claimant for the offences cited for her suspension.
16. The court never went to the merits of the allegations levelled against the claimant. All the court dealt with was the issue whether suspension was necessary pending the disciplinary hearing. In that respect, the Judge held that:
- “Overall this matter tilts in favour of the claimant. I agree with her case that suspension is not warranted in the circumstances. This is because the issue in dispute is simplistic and would not require an elaborate method of process to configure and thrash out...
I therefore find a case for lifting the suspension in the circumstances.”
17. In view of the foregoing matters, I find and hold that the judgment by Marete J did not insulate or immunize the claimant from disciplinary process or action for the offence that led to her suspension. The suit did not question the merits of the reason or legality of the disciplinary process against the claimant. It only questioned the merits of the suspension.

Whether the motion is overtaken by events

18. The answer to the second question is straight forward. Having found that the judgment herein did insulate or immunize the claimant from disciplinary action, the only protection would have been court order from the instant application when it was filed under certificate of urgency. Unfortunately, the applicant did not satisfy the court that the interim order was merited.
19. As the matters stand now, the claimant failed to attend the disciplinary hearing and she was dismissed from service. The application herein seeks to stop the disciplinary hearing which has been concluded. Consequently, I agree with the respondent that the application is overtaken by events and I dismiss it with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 27TH DAY OF APRIL, 2023.

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with rule 28(3) of the [ELRC Procedure Rules](#) which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

