



Okero v Board of Governors Bukura Agricultural College & 2 others (Employment and Labour Relations Cause E007 of 2023) [2023] KEELRC 1857 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEELRC 1857 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS CAUSE E007 OF 2023**

**JW KELI, J
JULY 28, 2023**

BETWEEN

SAMUEL OKERO CLAIMANT

AND

**BOARD OF GOVERNORS BUKURA AGRICULTURAL COLLEGE ... 1ST
RESPONDENT**

THE PRINCIPAL BUKURA AGRICULTURAL COLLEGE ... 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. The applicant, an employee of the 1st respondent following suspension from work , vide notice of motion application dated 6th June 2023 sought the following reliefs :-
 - i. That for reasons to be recorded this application be certified urgent , service thereof be dispensed with and the application be heard *ex parte* in the first instance in respect of prayer 2 hereof.
 - ii. That this Honourable court be pleased to make an order directing the respondents to unconditionally lift the suspension of the claimant from employment and order for his immediate reinstatement pending the inter parties hearing and determination of this application and claim.
 - iii. That costs of this application be provided for.
2. The application was premised on the grounds that the claimant had been suspended from employment on 22nd May 2023 and that the suspension was contrary to the provisions of the *Employment Act* and the *Constitution* and the employer’s human resources policy and procedures manual. That the said manual did not provide for suspension. That the suspension was done without disciplinary process on vague charges of unsatisfactory performance and failure to adequately respond to audit queries,



- the suspension led to slashing his salary and benefits, the Board had no authority to evaluate his performance thus the action of his suspension was arbitrary and unlawful.
3. The application was supported by the applicant's affidavit sworn on the 6th June 2023 which attached documents in support of the application being letter of appointment, several appraisal reports, the letter of suspension, his response and a document under memo titled internal audit exit meeting.
 4. In addition the applicant further filed on even date a memorandum of claim dated 6th June 2023 seeking for the lifting of the suspension and for payment of the withheld emoluments during the suspension and for an injunction to restrain his employer from terminating his employment.
 5. The application was opposed. The Hon Attorney General entered appearance for the respondents and filed grounds of opposition dated 11th July 2023 and inter alia stated that the application was premature as the aim of the suspension was to investigate audit queries which the applicant failed to respond to and the same raised financial impropriety necessitating his suspension. That the Board under the *Bukura Agricultural College Act* had powers to discipline its staff. That the court should accord the institution which had its internal administrative policy to manage its staff using the internal mechanisms. That the Board is yet to convene as per its calendar to review the suspension decision. That the claimant never returned the letter he was served with informing his suspension.
 6. The court directed that the application be canvassed by way of writer submissions . The parties complied.

Determination

7. The issue for determination in the application was whether orders sought were merited.
8. The claimant was by letter dated 22nd may 2023 authored by acting Principal and CEO suspended by the Board from duty for failure to respond to audit queries adequately and for wanting performance for a period of 6 months with effect from 22nd May 2023. The letter of suspension of the applicant was dated 22nd May 2023(SO4). It stated the applicant had been suspended as his performance as manager finance and accounts had not been satisfactory. It was stated that on several occasions he had failed to adequately respond to audit queries /issues raised and the details of the issues was listed. He was suspended for 6 months on basis of audit to be carried out with half basic salary and full house allowance as per their Human resources manual. During the suspension he was to report to immediate supervisor on Mondays and when required. The applicant stated the suspension was unlawful as the Board had no authority to suspension him, that he question the wanting performance based on past appraisals and that the Human resources policy and procedure manual had no provision for suspension.

Applicant's submissions

9. The applicant submits that there was no replying affidavit to his application hence his prima facie case had not be rebutted. That he had established a prima facie case with his probability of success. The applicant relied on the classic case on *Giella v Cassman Brown Co. Ltd* 1973 E.A 358 setting three condition for grant of temporary injunction being prima facie case with probability of success, the interlocutory injunction will not normally be granted unless the applicant will otherwise suffer irreparable harm which could not be adequately compensated by award of damages and if the court in doubt decide the case on balance of convenience. The applicant further relied on the decision in *Mrao Ltd v First American Bank of Kenya and 2 others* [2003] eKLR to effect that the material placed before the court would lead it to conclude there exists a right which had been apparently been infringed by the opposite party to call for an explanation for rebuttal by that party.



10. It was the application submissions that the respondents had not rebutted his case for failure to file replying affidavit but filed grounds of opposition which should address pointes of law and no more and relied on authorities. Court of appeal in *Daniel Kibet Mutai and 9 others v Attorney General* [2019] eKLR cited with authority the decision in *Peter O. Nyakundi & 68 other v Principal Secretary State Department of Planning Ministry of Devolution and another* [2016] eKLR where the court held that grounds of opposition filed are only deemed issues of law and are general averments and could not amount to proper or valid denial of allegations made on oath.
11. The Applicant Submits That he likely to suffer injuries that cannot cannot be compensated with damages being economic suicide as he had elderly parents with medical bills, young children and rent to settle.
12. The applicant submits that the balance tilts to his convince in view of long career of 20 years as professional accountant . That he be reinstated in the interim and relied on several authorities which the court looked into.

Respondents' Submissions

13. The respondents submits that the applicant was suspended to enable forensic audit of books of account he was handling to avoid interference after queries were raised by the Board his employer. The applicant's employment had not been terminated but suspended and relied on the decision in *Bartholomew Wanyama v Moses Gitari and 2 others* (Industrial court No. 973 of 2011) where the court held that suspension from duty was to allow independent investigations and was interim measure and not form of termination. That during suspension the employee remains in employment and had legitimate expectation he would be afforded hearing in defence on any adverse findings that may arise from investigations during the suspension.
14. The respondents submit that the claimant reports quarterly to the Board hence subject to the board on performance. They further relied on the provisions of *Bukura Agricultural College Act* of 1999 section 2(1)(e) states:- ' in the performance of its functions under this Act, the board shall make statures generally for the administration of the college and in particular for (e) prescribing the terms and conditions of service including the appointment , discipline , dismissal and retirement benefits of the staff of the college.' Hence the suspension was within the powers of the board. It was the respondents case the application was premature.

Decision

15. The court holds that Suspension is necessary not unlawful being an interim measure pending investigations as held in *Bartholomew Wanyama b Moses Gitari and 2 others* (Industrial court No. 973 of 2011) (supar). The letter of suspension disclosed the reasons for suspension which is for definite period with ½ salary(SO4). Section 71 of the *Public Service Commission* provides for suspension of a public officer as follows:- . '71. Suspension (1) Where a public officer has been charged with a serious criminal offence, an authorized officer shall suspend the public officer from the exercise of the functions of the public office pending consideration of the public officer's case under this Act. (2) An authorized officer may suspend a public officer against whom proceedings for dismissal have been taken if, as a result of those proceedings, the authorised officer determines that the public officer ought to be dismissed. (3) A public officer who is suspended shall receive a half basic salary and full house allowance but other benefits shall be withheld by the authorised officer: Provided that an officer on suspension shall be paid medical allowance or medical insurance premium remitted whichever is the case..' the court finds that the timeline for suspension is not indicated though section 72 of the *Act* provides for regular update to the suspended officer failing which the officer should appeal to the Public Service



Commission. The court finds the Board is empowered to carry out disciplinary measures which would include suspension as envisaged under section 71(2) of the *Public Service Commission Act* as read with under *Bukura Agricultural College Act* of 1999 section 2(1)(e) which states:- ‘ in the performance of its functions under this Act, the board shall make statutes generally for the administration of the college and in particular for (e) prescribing the terms and conditions of service including the appointment , discipline , dismissal and retirement benefits of the staff of the college.’

16. The court ought not to interfere with internal disciplinary mechanisms of the employer unless there is a clear violation of the rights of the employee. The court from the pleadings did not find any violation of the rights of the claimant under the enabling laws as he was informed the reasons for the suspension and accorded his right to half salary and housing as per the law and the suspension was for a definite period with the employee being accorded opportunity for update on progress every Monday when he is to report to the supervisor. The PSC Human Resource Policies and Procedures Manual for the Public Service May, 2016 provides for period of completion of disciplinary process as follows:- ‘K3(4) Disciplinary cases should be dealt with promptly and finalized within a period of six (6) months. Where it is found impracticable to do so the Authorized Officer shall report individual cases to the Public Service Commission explaining the reason for the delay” the suspension is for 6 months hence permissible under the law.
17. I do find the employer in the instant case is a statutory/public body hence under the jurisdiction of Public Service Commission. The *Public Service Commission Act* defines a public body as follows:- In " includes— (a) any corporation, council, board, committee or other body which has power to act under and for purposes of any written law relating to the undertakings of a public utility or otherwise to administer funds belonging to or granted by the Government or money raised by rates, taxes or charges in pursuance of any such law; (b) a corporation, the whole or a controlling majority of shares which are owned by a person or entity that is a public body by virtue of any of paragraph (a) of this definition; (c) statutory public bodies; or (d) any public body brought under the jurisdiction of the Commission by an Act of Parliament for a specified function to the extent of that function;” The Act provides for appeal against decision of any public body . The claimant is a public officer and if not satisfied with the decision of suspension ought to have appealed at first instance before the Public Service Commission. Section 74 of the *Public Service Commission Act* provides for appeals as follows”:- ‘74. (1) Any person who is dissatisfied or affected by a decision made by an authorized officer or other authority in exercise or purported exercise of disciplinary control against any public officer under this Act may appeal to the Commission. (2) An appeal under subsection (1) shall be made in writing within ninety days from the date of the decision appealed against: Provided that the Commission may consider an appeal that was made out of time if, in the opinion of the Commission, the circumstances warrant such consideration. (3) The Commission shall not entertain an appeal by a public officer or a representative of a public officer, in respect of a particular decision, more than once. (4) Despite the right of appeal conferred on a public officer by this section, disciplinary action shall not be deferred or suspended pending the determination of the appeal. (5) After considering an appeal, the Commission may— (a) uphold the decision; (b) set the decision aside; (c) vary the decision as it considers to be just; (d) give such directions as it may consider appropriate with respect to the decision; (e) direct the refund, reinstatement of remuneration or release of any withheld payments due to the public officer as it considers to be just; (f) direct that disciplinary action be taken against any public officer who has failed to discharge a duty that was the public officer's responsibility to perform in relation to the disciplinary case and the concerned public body has suffered a loss; or 36 Public Service Commission No. 10 of 2017 (g) make any other appropriate decision in view of the circumstances of the case. (6) Where the Commission sets aside a decision under subsection (5)(b), the public officer shall revert to the previous status held and receive the attendant benefits as though the decision set aside was never made.’”



18. The court from the foregoing holds that there exists a clear procedure of redress of the grievance of the suspension before the Public Service Commission and that procedure has not been exhausted under the doctrine of exhaustion. I say so even without the respondents raising the issue as it is a matter of jurisdiction. The Court of Appeal defined with clarity the doctrine of exhaustion in Court of Appeal decision in *Speaker of the National Assembly v James Njenga Karume*. [1992] eKLR (Kwach, Cocker and Muli JJA) where the court held:- “ In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or an Act of Parliament, that procedure should be strictly followed”. This decision has been upheld as the law by all superior courts in Kenya. The court of appeal in a further decision in *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR held:- ‘ it is imperative that where a dispute resolution mechanisms exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked..’”
19. It is instructive to note the court found, on prima facie basis, the instant suspension lawful and there was no basis for the court to interfere with the internal disciplinary mechanisms and this is without prejudice to any findings by the Public Service Commission. As submitted by the applicant the *Employment and Labour Relations Court procedure rules* 2016 allow for grounds of opposition in response to the application. Rule 17 (9) ‘A party may respond to an application by filing grounds of opposition verified by an affidavit.’ The court then finds the response was proper.
20. In conclusion, the application is found to be premature before the court and so is the claim. The claimant as a public officer ought to lodge his appeal on grievances’ against the suspension before the Public Service Commission as per the section 74 *Act* (supra) for redress at the first instance. The first instance jurisdiction on the grievance lies with the Public Service Commission. This court downs its pen pursuant to doctrine of exhaustion of available statutory redress mechanism. The court lacks first instance jurisdiction in the grievance. The entire application is found to be prematurely before the court and is dismissed. The claim consequently is also premature and is struck out.
21. I have considered that there is ongoing employer employee relationship and in the interest of justice I make no order as to costs.
22. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 28TH DAY OF JULY 2023

JEMIMAH KELI

JUDGE

In the presence of:-

Court Assistant : Brenda

For Claimant : Grace Mburu

For Respondent: Absent

