



Kanake v Kenya Film Commission & another (Employment and Labour Relations Cause E014 of 2023) [2023] KEELRC 2005 (KLR) (9 August 2023) (Ruling)

Neutral citation: [2023] KEELRC 2005 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E014 OF 2023**

**AN MWAURE, J
AUGUST 9, 2023**

BETWEEN

JOSYLINE KANAKE CLAIMANT

AND

KENYA FILM COMMISSION 1ST RESPONDENT

**CHIEF EXECUTIVE OFFICER KENYA FILM COMMISSION 2ND
RESPONDENT**

RULING

1. The applicant filed a notice of motion vide the application dated March 29, 2023.
2. He makes the following prayers:
 - a. Prohibition restraining the respondents by themselves, their agents or authorized representatives from subjecting the applicant to further unfair disciplinary action or attempting to dismiss, remove from office demote in rank or even victimize the applicant in any way.
 - b. *Mandamus* compelling the respondents to with immediate effect reinstate the administration section functions which had been illegally transferred to directorate of strategy and planning.
 - c. Declaration that the process of punishing and disciplining the applicant and the interdiction was fatally flawed, unlawful and procedurally unfair for violating the constitution, the fair administrative action and therefore a nullity.
 - d. Declaration that the procedure followed to punish and interdict the applicant violated her right to a fair hearing, access to information, right to fair administrative action as well as principles of natural justice as guaranteed under the constitution and the fair administrative act.



- e. Declaration that the further punishment imposed on the applicant after lifting the interdiction was illegal, unfair unprocedural and was not based upon logical proof or evidential material.
 - f. *Mandamus* directing the respondents to give written reasons for the disciplinary action and punishment they imposed against the applicant and to furnish the applicant with the investigation report, relevant documents and material evidence relating to the matter.
 - g. *Mandamus* compelling the respondents to with immediate effect reinstatement of the applicant's half salary withheld from the date of interdiction.
 - h. Declaration that the amounts of applicants salary unlawfully withheld amounted to arbitral denial of access to her income and the same be refunded to the applicant with interest.
3. The applicant in her verifying affidavit deponed that she was a human resource and administration manager under grade KSC 3 Job group R and she further says that on February 2023 the 2nd respondent called her and asked her to surrender her HP elite book 830 laptop for some pretensions repairs. She says she had not complained that the laptop needed repair but nevertheless she surrendered the same.
 4. She says after that she received a notice to show cause why disciplinary action should not be taken for some financial loss. She says she was accused of changing applications including Microsoft, window operating system and enterprise planning and virtual resource private network (VPN) which allegations she avers were vague and generalized.
 5. She says she nevertheless responded to the show cause letter.
 6. She says despite responding to the show cause letter she was interdicted indefinitely *vide* the respondent's letter dated March 2, 2023.
 7. She says her interdiction was illegal and unfair. She says she was interdicted without the intervention of the board contrary to Kenya Film Commission human resource policy and procedures.
 8. She says she wrote a demand letter on March 24, 2023 through her advocates and the respondent responded to the effect that the applicant was still in 2nd respondent's employment.
 9. She says 2nd respondent was aiming to remove her via a memo dated March 27, 2023. She says the said 2nd respondent used to insult her and so she has suffered a lot including psychological torment.
 10. She beseeches the court to allow her to institute judicial review under section 9(1) of the *Fair Administrative Act* as provided and guaranteed by law.

The Respondents' case

11. The Respondents *vide* the 2nd Respondent's replying affidavit dated April 10, 2023, stated that upon employing the Applicant she was issued with a HP Elite Book G7 device pending procurement of a new laptop for her use which was later issued on October 13, 2022 a HP ENVYX360 Convertible.
12. That in accordance with the 1st Respondent's ICT Policy, the ICT department requested the Applicant to surrender the old laptop after the lapse of the grace period, however, the Applicant had transferred the said laptop to an officer in her department and disregarded the department's request and only returned the laptop on March 3, 2023 through a rider at 5.00pm after working hours and failed to sign the surrender form as required.



13. The Respondents' averred that its ICT department undertook routine ICT Assets inventory on all extra laptops including the Applicant's and averred this exercise was not targeted to set up the Applicant.
14. That upon review of the laptop the ICT department concluded that the initial software configurations and applications had been removed without the 2nd Respondent's knowledge and/or approval contrary to the [Kenya Information Communication Act](#) Section 83X & Y.
15. The Respondents' aver that the Applicant's actions are in breach of her duty of care of the institution's property as envisioned under Section 15 of the [Public Officers Ethics Act](#), Cap 183 and in light of this the 2nd Respondent issued the Applicant with a show cause letter dated March 14, 2023.
16. The Respondent state that the Applicant vide her response dated March 15, 2023 failed to satisfactorily respond to the charges raised against her and focused on accusing other employees not party to the matter and proceeded to allege the 2nd Respondent was out to frame her and was also putting her life in danger.
17. The respondents state that upon being dissatisfied by the Applicant's response to their letter to show cause and with due regard of the fact that the Applicant is a senior officer and was likely to interfere with investigations, the Respondents' issued the Applicant with an interdiction letter to facilitate investigation of the alleged misconduct in line with the Public Service Discipline Manual 2022 and clause 11.9.1 of KFC Human Resource policy.
18. The Respondent further aver it is aware the discipline of the staff in Grades KFC 1-3 falls under the purview of the Board and in consideration that the Commission currently has no Board of Directors, the Respondents' informed the office of the Ministry of Sports, Youth and Arts of the interdiction of the claimant. The respondents requested for the Ministry to appoint a senior officer to conduct investigations in accordance with section 10.39.1 of the KFC Human Resources Policy and Procedure Manual.
19. The 2nd Respondent further avers that section 1.19 of the Mwongozo stipulates the CEO provide leadership to senior management and staff therefore the Applicant's allegation that he has acted ultra vires and in excess of authority does not stand as he is the Applicant's immediate supervisor and responsible for the maintenance of her discipline.
20. The court considered the claimant's submissions dated April 19, 2023 as well as the respondent's submissions dated April 24, 2023.

21. Determination

In view of the foregoing, the court has been tasked to determine whether leave granted on April 12, 2023 by Hon Justice Nderi Nduma J should operate as stay to the Applicant's interdiction.

21. The Applicant vide Chamber Summons dated March 29, 2023 sought leave to commence judicial review proceeding seeking orders of prohibition and mandamus against the Respondents'. The Chamber Summons Application was heard before Hon Justice Nderi Nduma J, on 12th April 2023 and he subsequently granted the Applicant leave and directed the parties on the Applicant's request for orders that the leave granted operate as stay to the interdiction imposed on the Applicant and any other disciplinary proceedings which have commenced or due to be commenced pending the hearing and determination of the application.



22 Order 53 Rule 1(4) of the *Civil Procedure Rules* provides as follows in respect to the aforementioned:

' The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise.'

23. The case of *James Opiyo Wandayi vs Kenya National Assembly & 2 others [2016] eKLR* the court pronounced itself as follows with regard to its direction that the leave so granted ought to operate as a stay of the Speaker's decision pending the hearing and determination of the Motion.

' The principles that guide the grant of an order that the leave do operate as stay of the proceedings in question have been crystallized over a period of time in this jurisdiction. Where, the decision sought to be quashed has been implemented leave ought not to operate as a stay since where a decision has been implemented stay is no longer efficacious as there may be nothing remaining to be stayed. It is only in cases where either the decision has not been implemented or where the same is in the course of implementation and its implementation has not come to an end that stay may be granted.

In this case, the period of suspension of the applicant is still running. In other words the act complained of is not complete and has not come to an end. Accordingly, this Court is still seized of the jurisdiction to arrest the same from being completed.'

24 This was the position adopted by Dyson, LJ in *R (H) vs Ashworth Hospital Authority [2003] WLR 127* at 138 where the Lord Justice held that:

' The purpose of a stay in a judicial review is clear. It is to suspend the "proceedings" that are under challenge pending the determination of the challenge. It preserves the status quo. This will aid the judicial review process and make it more effective. It will ensure, so far as possible, that, if a party is ultimately successful in his challenge, he will not be denied the full benefit of his success. In *Avon, Glidewell*, LJ said that the phrase 'stay of proceedings' must be given wide interpretation so as to enhance the effectiveness of the judicial review jurisdiction. A narrow interpretation, such as that which appealed to the Privy Council in *Vehicle and Supplies*, would appear to deny jurisdiction even in case A. That would indeed be regrettable and, if correct, would expose a serious shortcoming in the armoury of powers available to the court when granting permission to apply for judicial review... Thus it is common ground that 'proceedings' includes not only the process leading up to the making of the decision but the decision itself. The administrative court routinely grants a stay to prevent the implementation of a decision that has been made but not yet carried into effect, or fully carried into effect.'

25. Gladwell LJ in *Republic vs Secretary of State for Education and Science, ex parte Avon County Council (No 2) CA (1991) 1 All ER 282* said that:

' An order that a decision of a person or body whose decisions are open to challenge by judicial review shall not take effect until the challenge has been finally determined is, in my view, correctly described as a stay.'



26. Maraga, J (as he then was) in *Taib A Taib vs The Minister for Local Government & Others Mombasa HCMISCA No 158 of 2006* was of the view that:

'...I also want to state that in judicial review applications like this one the Court should always ensure that the ex parte applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application. Therefore where the order is efficacious the Court should not hesitate to grant it. Even with that in mind, however, it should never be forgotten that the stay orders are discretionary and their scope and purpose is limited. What then is the scope and purpose of stay orders in the judicial review jurisdiction?'

27. The purpose of a stay order in judicial review proceedings is to prevent the decision maker from continuing with the decision making process if the decision has not been made or to suspend the validity and implementation of the decision that has been made. It is not limited to judicial or quasi-judicial proceedings as some people think. It encompasses the administrative decision making process (if it has not yet been completed) being undertaken by a public body such as a local authority or minister and the implementation of the decision of such a body if it has been taken. A stay is only appropriate to restrain a public body from acting. It is, however, not appropriate to compel a public body to act.

28. Reference is made to the Respondents' submissions that the arguments and issues raised in the chamber summons and those in the substantive motion are similar and that the grant of orders for the leave to operate as stay will determine the substantive case. In the case of *Kenyatta University & 3 others vs Wellington Kihato Wamburu & 3 Others [2017] eKLR* it was stated that:

'The court is also cautioned that in an application for leave to apply for Judicial Review and for stay, it has to be careful in what it states lest it touch on the merits of the main application for Judicial Review. Therefore, where the outcome of the Judicial Review might be contrary to the conclusion reached by the body or person whose decision is being challenged, stay of proceedings should be granted as it might lead to an awkward situation or foist upon the court a state of hopelessness where it finds that a decision which ought not to have been made had been concluded.'

29. The Applicant seeks to maintain the status quo pending the hearing and determination of the substantive motion and vide the Applicant's submissions they have raised an arguable case and the Respondents' will suffer no prejudice upon grant of stay orders by the court.

30. In consideration of the foregoing the court holds that the order issued operate as leave to restrain the respondent's or their representatives from subjecting the appellant to further unfair disciplinary action or attempt to dismiss remove from office or demote in rank or victimise the applicant pending hearing of the main motion which motion must not be kept pending in limbo indefinitely. The applicant to file their submissions to the main motion if they so wish within 30 days and respondents to file theirs also within 30 days upon service.

Mention on October 4, 2023 to confirm compliance and to give a date for judgment

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 9TH DAY OF AUGUST, 2023.

ANNA NGIBUINI MWAURE

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

