



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. E895 OF 2021**

**JOEL OSINDO OBURA.....CLAIMANT**

**-VERSUS-**

**PRINCIPAL SECRETARY (STATE DEPARTMENT FOR SOCIAL PROTECTION)**

**MINISTRY OF PUBLIC SERVICE, GENDER,**

**SENIOR CITIZENS AFFAIRS AND SPECIAL PROGRAMS.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. Through a Notice of motion application herein dated 1<sup>st</sup> November 2021, the Claimant/Applicant seeks for the following orders:

- (i) That the application be certified as urgent, service of the same be dispensed with in the first instance and the same be heard on a priority basis.*
- (ii) That this Honourable Court be pleased to certify this suit as urgent and directions be given as to the hearing of this matter.*
- (iii) That this Honourable Court be pleased to dispose off this matter within 30 days to allow the applicant to resume duties without any loss of benefits.*
- (iv) That this Honourable Court be pleased to dispose of this matter within 30 days from the date of filing owing to its urgency.*
- (v) That this claim be determined by documentary evidence and the Claimant be granted leave to file affidavit evidence and written submissions.*
- (vi) Costs of this application be provided for.*

2. The application is premised upon the grounds obtaining on the face of the application, grounds which are buttressed in the supporting affidavit sworn by the Claimant/Applicant on the 1<sup>st</sup> November 2021.

3. In response to the Applicant's application, the Respondents have filed grounds of opposition dated 6<sup>th</sup> day of December 2021.

4. In reaction to the grounds of opposition, the Claimant/Application filed "a replying affidavit" that he swore on the 20<sup>th</sup> day of December 2021.

5. The Claimant/Applicant contends that he joined the Public Service in March, 2016 as a social development officer and got stationed at Makueni County as his first working station. He got confirmed on permanent and pensionable terms in 2018.

6. The Applicant states that he is the registered owner of all that parcel of land comprised in title number KARACHUONYO/KOGEMBO/314, and in fortification of this he exhibits copy of the tile deed in regard thereto, and a letter from the Land Adjudication offices Homabay County dated 1<sup>st</sup> December 2020.

7. It is his contention that he acquired the ownership to the land through inheritance from his deceased mother who was the 1<sup>st</sup> wife of his father, Henry Obuya Opar. He lived on this land peacefully from 1990 until the year 2020 when he acquired title thereto. This stirred wrangles between him, his step mother and her sons, over the ownership.
8. He further states that the estates of his deceased parents have not been subjected to any succession process, though each household had been given its own share of the properties.
9. It is his case that as a result of frustrations by his step brother, Ben Odoyo, he filed a Civil suit No. ELC 12 of 2020 at the Oyugis Law Courts wherein he sought that the said brother be restrained from constructing a permanent house on the land. He withdrew the matter later on for the sake of peace.
10. On the 29<sup>th</sup> July 2021, his step brother, Dan Henry Onyango, who works with the Kenya Prisons Service laid a complaint against him at Kindu Bay Police Station under OB. No. 20/29/07/2021, alleging commission of fraud against him, *inter alia*.
11. Consequently, the Applicant was arraigned in court whereat he was charged with various counts and subsequently released on a cash bail of Kshs. 5000.
12. Upon the arraignment in Court, the DCI Rachuonyo North Sub-County wrote a letter to the Principal Secretary intimating that the Applicant had committed a crime, and sought for an administrative action taken against him.
13. He alleged that through a letter dated 15<sup>th</sup> September 2021, the Director Human Resource Management wrote to the Principal Secretary and sought for authority for his interdiction on an account that he had been connected to a criminal offence, in the above-mentioned matter.
14. That a day after the afore-stated letter to the Permanent Secretary, the Applicant was served with a suspension letter dated 16<sup>th</sup> November 2021, and subsequently another one of 18<sup>th</sup> October 2021. He contends that his suspension was effected under the Public Service Disciplinary Manual (May, 2016), despite the fact that the criminal matter arose from a domestic dispute.
15. The Applicant takes a position that the decision to suspend him ought to have been preceded by a notice to show cause or an invitation extended to him to appear before the Ministerial Human Resource Advisory Committee to defend himself against the administrative action.
16. He argues that since he is not under investigation by his employer, and therefore no possibility that he will interfere with prosecution witnesses, he should be allowed to resume duties as his suspension serves no purpose to his employer. The suspension has only helped to occasion sufferings on him.
17. He asserts that the matter herein is simple and straight forward. It should be heard on a priority basis.

### **The Respondent's Response**

18. The Respondents assert that the Claimant/Applicant having been charged with a criminal offence, was suspended in accordance with the provisions of section 71 of the public Service Act, and therefore the contention that the suspension was unjustified lacks merit.
19. The section provides:

*“71. (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 the 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 authorized 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 authorized officer.*

*Provided that an officer on suspension shall be paid medical allowance or medical insurance premium remitted whichever is the case.”*
20. According to the Respondents, none of the governing legislation, policies, and regulations require a public officer charged with a criminal offence to be taken through a disciplinary hearing, before suspension. The Public service Commission Discipline Manual, 2016 and more specifically paragraphs 4.2 and 4.3 thereof are instructive on this.
21. The Respondents hold that the orders sought in the Applicant's Notice of motion application dated 1<sup>st</sup> November 2021 can only be granted after the substantive hearing of the claim.
22. That the suspension letter is clear. The Claimant/Applicant was allowed to report to work at times agreed between him and his supervisor. Consequently, the prayer that he be allowed to resume duties is unwarranted.
23. The Respondent argue that the relief of reinstatement cannot be granted as an interim measure. On this position, they are emboldened by

the holding in **Alfred Nyungu Kimungui vs Bomas of Kenya [2-13] eKLR** thus:

*“Ordinarily, reinstatement of an employee is a substantive remedy, not a temporary relief. The law does not contemplate that reinstatement issues [sic] as a provisional measure. It is a remedy that should normally be granted upon full hearing of the employer and the employee.”*

**Determination**

24. I have carefully considered the rival positions taken by the parties herein over the Applicant’s Notice of motion application, and the manner in which the Applicant has coached his prayer 3 of the same. I am of the view that granting of the prayer shall be tantamount to determining the claim herein by affidavit evidence, and at an interlocutory stage. The prayer is fashioned in a similar manner to prayer (c) of the statement of claim.

25. By granting the prayer the outcome of the cause shall be pre-empted therefore.

26. The matter is not as simple and straight forward as the Claimant/Applicant suggests. It cannot be determined upon basis of affidavit evidence and submissions. Therefore, to agree with the Claimant’s/Applicant’s position, will be equal to obliterating the importance of, and purpose served by cross examination in matters in an adversarial system. Consequently, I am not convinced that prayer 5 of the application should be granted.

27. I have considered the genesis of the matter herein, the action taken by the Respondents against the Claimant/Applicant, the time that he has so far served under the suspension, and the consequential effect of the suspension on him, and come to a conclusion that the overriding objective of this Court shall support a direction that his matter be heard on a priority basis.

28. Noting that pleadings have closed, and by reason of the foregoing premise, I hereby certify the cause as ripe for hearing and that it shall be heard on a priority basis.

29. Costs of this application shall be in the abide the outcome of the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2022.**

**OCHARO KEBIRA**

**JUDGE**

In Presence of:

Mr. Mulili for the Respondent.

Applicant in person.