



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

ELRC PETITION NUMBER E025 OF 2021

ZACHARIA MWANGI NJERU.....PETITIONER

-VERSUS-

COUNTY SECRETARY, COUNTY GOVERNMENT OF NAKURU.....1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD,COUNTY

GOVERNMENT OF NAKURU.....2ND RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

JUDGMENT

1. INTRODUCTION

1. In a petition dated 12th October, 2021 and filed in court on 13th October, 2021 the Petitioner herein, **ZACHARIA MWANGI NJERU**, through Hari Gakinya Advocate prays as follows:-

(i) A declaration that the Respondents have jointly discriminated against him and his employment and that his rights have been violated by the Respondents.

(ii) That the Respondents be compelled to pay his salary arrears and to reinstate him in his employment.

(iii) Costs for the petition.

2. The petition is supported by an affidavit sworn by the Petitioner on 8th October, 2021 with several annexures thereto.

3. Upon service, the Respondents appointed Maureen Litunda, Advocate to act for them and she filed a notice of appointment dated 18th October, 2021 on 2nd November, 2021.

4. Further, the Respondents filed a response to the petition by way of a replying affidavit sworn by **BENJAMIN NJORGE**, the occupant of the office of the 1st Respondent, sworn on 14th December, 2021 and filed in court on the same date with several annexures thereto, which annexures had already been produced by the Petitioner as annexures to his supporting affidavit.

5. The Respondents' Counsel also filed a notice of preliminary objection on 14th December, 2021 dated on even date.

6. The Petitioner had filed an interim application seeking interim orders of reinstatement to his employment but the same was withdrawn by consent of both Counsel on 24th November, 2021 in favour of proceeding with the petition to enable an early disposal.

7. Further, it was agreed by Counsel for both sides that the matter proceeds by way of written submissions. Petitioner's Counsel filed his submissions on 8th December, 2021 with Respondents' Counsel filing the response on 7th January, 2022. Petitioner's Counsel filed a reply on 1st February, 2022.

II. PETITIONER'S CASE

8. As distilled from the petition and the written submissions, the Petitioner's case in a nutshell is that he was employed by the 2nd Respondent as a Sub-County Administrator on 17th April, 2015 after he applied for the said position in a competitive process following an advertisement of the vacancy.

9. The Petitioner states that on 22nd September, 2016 the 1st Respondent wrote to him on allegations of gross misconduct. The Petitioner responded to the said allegations on 26th September, 2016 wherein he denied gross misconduct on his part. After further exchange of correspondences the 1st Respondent wrote to the Petitioner on 7th November, 2016 as follows:-

“Arising from the foregoing, it is very clear that your representations have failed to exonerate you from all the accusations labeled against you beyond any reasonable doubt.

This office seeks to recommend for disciplinary action to be taken against you for your acts of gross misconduct and misuse of office. However, before such line of action is contemplated, it has been found necessary to interdict you from your duties with immediate effect pending further investigations. While on interdiction, you are entitled to half salary and should not leave your duty station without permission from your supervisor.”

10. After the interdiction the Petitioner applied for a job with the County Assembly of Nakuru but the Respondents failed and or refused to cooperate in having the Petitioner take up his new role as a Principal Administrative Officer.

11. Since his interdiction on 7th November, 2016 the Petitioner states that he has not been called for any disciplinary hearing and that he has not been informed of the outcome of the investigations.

12. On 21st January, 2021 the Petitioner wrote to the 1st Respondent enquiring about the outcome of the investigations against his alleged gross misconduct but the 1st Respondent did not respond thereto. In the same letter the Petitioner threatened to take legal action if the Respondents failed to take remedial action.

13. It is on the basis of the foregoing that the Petitioner seeks for the remedies set out at the onset of this judgment.

III. RESPONDENTS' CASE

14. The Respondents' position is captured in the replying affidavit of **BENJAMIN NJOROGE**, the notice of preliminary objection, and the written submissions by their Counsel.

15. The Respondents argue that the petition is bad in law and misconceived and that the Petitioner should have challenged the interdiction in accordance with the human resources policies and procedure manuals for the Public Service. The Respondent argue that the Petitioner is guilty of offending the principle of exhaustion and as such the Respondents argue that this court lacks jurisdiction to hear and determine this petition.

16. It is on the basis of the foregoing that the Respondents have prayed that this petition be dismissed with costs.

IV. ISSUES FOR DETERMINATION

17. This court has dutifully and very carefully considered the pleadings filed, evidence placed before the court by way of affidavits and documentary evidence in the annexures thereto. The court has also read the written submissions by Counsel for both parties. The following issues commend themselves to this court for determination:-

(a) Does this court have the requisite jurisdiction to hear and determine this petition?

(b) If (a) above is in the affirmative, is the petitioner entitled to the prayers sought?

(c) Costs.

V. JURISDICTION

18. Jurisdiction is everything and a court that labours without jurisdiction does so in vain. Any orders or declarations made by a court without jurisdiction are null and void *ab initio*. And therefore, the moment a court discovers that it has no jurisdiction over the subject matter it must down the tools and make no other step – see Nyarangi J (as he then was) in the owners of the **Vessel Lilian 'S' -Vs- Caltex Oil Kenya Ltd.**

19. The issue of jurisdiction of this court in dealing with the subject matter has been raised by the Respondents in the notice of preliminary objection (P.O). This issue is also raised in paragraphs 15 and 16 of the replying affidavit to the petition. The issue of jurisdiction has also been raised by Respondents' counsel in her written submissions.

20. Paragraph 15 and 16 of the replying affidavit to the petition clarify that the Respondents' view on the lack of jurisdiction by this court is that if the Petitioner was dissatisfied with the decision to interdict him, as communicated by the 1st Respondent vide the letter dated 7th November, 2016 the petitioner ought to have challenged the said decision as provided for in the human resources policies and procedure manuals.

21. However, the Petitioner, and in my view the Respondents missed this point, did not challenge the interdiction and what he is complaining about in this petition is that after the interdiction the Respondents did not take any other or further steps to resolve the issue and either terminate him or set aside the interdiction.

22. In the letter of interdiction dated 7th November, 2016 which is quoted verbatim in an earlier part of this judgment, the Respondents undertook to investigate the alleged gross misconduct by the Petitioner and take an appropriate action. It is now over five (5) years since, yet the Petitioner has neither been summoned to a disciplinary hearing nor served with a decision of the Respondents based on the investigations promised in the letter of interdiction as alluded to above.

23. In their pleadings and written submissions the Respondents admit that the Petitioner is an employee of the 2nd Respondent who is on interdiction. It is so stated in paragraph 3 of the written submissions and paragraph 5 of the response to the petition.

24. While it may be true that the Petitioner did not challenge the interdiction in accordance with the **Public Service Human Resources Policies and Procedure Manual, 2016** and the pleadings suggest so, that does not mean that the petitioner has no recourse to this court given that over five years later the Respondents have not taken any steps to finalize the matter. It is the Respondents who interdicted the Petitioner on grounds of alleged gross misconduct and whether the Petitioner challenged the interdiction or not the Respondents had a legal duty and obligation to follow the entire process and bring the matter to a logical conclusion within reasonable time.

25. Interdiction or suspension with or without pay is not equivalent to a dismissal or termination and hence the Respondent always had a legal duty to carry out the entire process and either dismiss or terminate the Petitioner or lift the interdiction.

26. It is illogical and unreasonable for the Respondents to argue that since the Petitioner has not challenged the interdiction that they can now hold the interdiction in abeyance indefinitely.

27. **Article 47 of the Constitution** gives every person, including the Petitioner, a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Placing an employee (the Petitioner) on interdiction for a period of over five years cannot be said to be expeditious, efficient, lawful, reasonable, and procedurally fair. The Respondents have conducted themselves in the contrary of these values and principles. The Respondents have conducted themselves in an illogical and unreasonable manner in failing to take appropriate administrative action against the Petitioner within reasonable time and that conduct on their part is unfair, unlawful, and unconstitutional.

28. **Article 41 of the Constitution** gives every person, including the Petitioner, the right to fair labour practices. Such fair labour practices include those established under written laws including the Employment Act. Holding an employee on interdiction for over five years is not a fair labour practice as envisaged under **Article 41 of the Constitution**. It is unfair, illogical, and unreasonable and hence the Petitioner has a right to bring this matter to this court for adjudication.

29. There is no argument that the dispute between the parties relates to an employment relationship between the Petitioner and the Respondents. In fact, the Respondents have admitted that the Petitioner is their employee on interdiction in their pleadings, as stated in another part of this judgment.

30. **Article 162 (2) (a)** of the **Constitution** creates this court (ELRC) to deal with employment and labour relations disputes. The jurisdiction of this court is further expounded under the **Employment and Labour Relations Courts Act** and the **Employment Act**. There is no doubt that the dispute between the Petitioner and the Respondents relates to employment relationship between the Petitioner and the Respondents.

31. This court has said enough to illustrate and demonstrate that the dispute between the Petitioner and the Respondents is properly before this court and that this court has the requisite Constitutional and legal authority and jurisdiction to hear and determine the same.

32. In the circumstances, the first issue is returned in the affirmative.

VI. REMEDIES

33. This court has already found that it is illogical, unreasonable, unconstitutional, and unlawful for the Respondents to have placed the Petitioner on interdiction for a period of over five years since 7th November, 2016.

34. To the best of the understanding of this court the Petitioner is not challenging the interdiction *per se*. The Petitioner is challenging the delay by the Respondents in finalizing the disciplinary process. The Petitioner is aggrieved by the fact that while the letter of interdiction dated 7th November, 2016 promised that investigations would be carried out and action taken, he has neither been invited for a hearing nor informed of the outcome of the investigations. The entire process has been held in abeyance for over five years. That is what the Petitioner is complaining about and hence the doctrine of exhaustion as submitted by counsel for the Respondents does not apply here and the arguments on the same are rather misplaced.

35. In view of the foregoing the preliminary objection by the Respondent and their reply to the petition must fail.

36. The delay by the Respondents in concluding the matter is not only unconstitutional and unlawful, as demonstrated above, but also against the same manual which the Respondent are relying on that provides that disciplinary action should be commenced within 14 days after suspension/interdiction and be concluded within 30 days or reasonable time. Five years is certainly not a reasonable period in dealing with such an issue and the delay is found to be grossly inordinate, unconstitutional, unlawful, illogical, and unreasonable.

37. In his petition, the Petitioner seeks for three prayers and this court shall now deal with each one of them as hereunder.

38. In the first prayer the Petitioner seeks for a declaration that the Respondents have jointly discriminated against him and that his rights have been violated.

39. This court has already found the violation of **Articles 41 and 47** by the Respondents in the manner in which they have handled the employment dispute with the Petitioner. The conduct of the Respondents violates the rights of the Petitioner to fair labour practices under **Article 41**. The Respondents are also in violation of **Article 47** by denying the petitioner a fair administrative action that should be expeditious, efficient, fair, reasonable, lawful, and procedurally fair.

40. This court has no difficulties at all in declaring the conduct of the Respondents unconstitutional based on the provisions above and the respondents are found to be in violation of the rights of the Petitioner under **Articles 41 and 47 of the Constitution of Kenya**.

41. Prayer two is to the effect that the Respondents be ordered to pay to the Petitioner salary arrears and to reinstate him to his employment.

42. First, the Petitioner has not been dismissed or terminated whatsoever. The Petitioner has been on interdiction since 7th November, 2016.

43. The Petitioner is still in employment of the 2nd Respondent and hence the remedy of reinstatement under **Section 49(3)(a) of the Employment Act** does not apply to him in the circumstances.

44. Having found that the Respondents have violated the constitutional rights of the Petitioner under **Articles 41 and 47 of the Constitution**, and that it is not in dispute that the Petitioner is still an employee of the 2nd Respondent, this court has no difficulties in allowing the second prayer to the extent that the Respondents be and are hereby compelled to pay to the Petitioner salary arrears in full for the period from 7th November, 2016 to date, subject only to lawful statutory deductions. This must be done before 30th May, 2022 and the Respondents shall continue to pay such monthly salary and allowances as and when they fall due and to allocate to the Petitioner duties as per his job description and letter of appointment.

45. Costs follow event and the Petitioner is awarded costs of this petition.

VII. DISPOSAL

46. In disposal of this petition this court makes the following orders:-

(a) A declaration be and is hereby made that the Respondents have jointly and severally violated the rights of the petitioner under **Articles 41 and 47 of the Constitution**.

(b) The Respondents are hereby ordered to process and pay all salary arrears and allowances payable to the Petitioner subject only to lawful statutory deductions for the period from November, 2016 to date and that the same be paid by 30th May, 2022 failure to which execution shall issue.

(c) That the Respondents shall continue to pay the monthly salary and allowances payable to the Petitioner as and when the same fall due and to allocate duties to the Petitioner as per his job description and his letter of appointment.

(d) The Petitioner is awarded costs of this petition.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 26TH DAY OF APRIL, 2022.

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DAVID NDERITU

JUDGE