



**Wathinja & 3 others v County Secretary, County Government of Nyandarua & 2 others (Cause E056 of 2021) [2022] KEELRC 1267 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1267 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE E056 OF 2021  
DN NDERITU, J  
JULY 21, 2022**

**BETWEEN**

**JOSEPH WANUMA WATHINJA ..... 1<sup>ST</sup> CLAIMANT  
JOSHUA OGAMBA BOSIRE ..... 2<sup>ND</sup> CLAIMANT  
VERONICA WANGUI MWAURA ..... 3<sup>RD</sup> CLAIMANT  
ANDREW KARUIRU NDATHO ..... 4<sup>TH</sup> CLAIMANT**

**AND**

**COUNTY SECRETARY, COUNTY GOVERNMENT OF NYANDARUA .... 1<sup>ST</sup>  
RESPONDENT  
COUNTY EXECUTIVE COMMITTEE MEMBER, AGRICULTURE, LIVESTOCK  
AND FISHERIES, NYANDARUA COUNTY ..... 2<sup>ND</sup> RESPONDENT  
PUBLIC SERVICE BOARD, COUNTY GOVERNMENT OF OF  
NYANDARUA ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**I. Background**

1. In a Notice of Motion dated October 12, 2021 filed under a certificate of urgency the Claimants pray for the following:
  1. That this application be certified as urgent to be heard *exparte* in the first instance.
  2. That the Honourable Court be pleased to order the Respondents to pay the Claimants September 2021 salary arrears.



3. That this Honourable Court be pleased to grant an injunction against the Respondents, its agents, servants and employees from harassing, intimidating and or negatively interfering with the activities and lawful duties of the Claimants pending hearing and determination of the Application.
  4. That this Honourable Court be pleased to grant an injunction against the Respondents, its agents, servants and employees from harassing, intimidating and or negatively interfering with the activities and lawful duties of the Claimants pending hearing and determination of this suit.
  5. That this Honourable Court be pleased to stay any disciplinary action against the Claimants pending hearing and determination of the Application.
  6. That this Honourable Court be pleased to stay disciplinary action against the Claimants pending hearing and determination of this suit.
  7. That pending hearing and determination of this suit, this Honourable Court do order the Respondents to reinstate the Claimants salaries.
  8. That the Honourable Court be pleased to order the Respondents to pay the costs of this application.
2. The application is expressed to be brought under Section 12 of the *Employment and Labour Relations Court Act* and Rule 17 of the *Employment and Labour Relations Court (Procedure) rules 2016* and all enabling provisions of the law. It is based on the grounds on the face of the application and supported by the affidavits sworn by each Claimant on October 12, 2021 and several documents attached to each of the affidavits.
  3. In response to the application the Respondents filed a replying affidavit sworn by James Karitu, CECM Agriculture of the 3<sup>rd</sup> Respondent, sworn on December 6, 2021 with several annexures attached.
  4. The Claimants filed a further affidavit each, all sworn on February 18, 2021 with various attachments to each of the affidavits.
  5. By consent, Counsel for the parties addressed the court by way of written submissions. Kirimi Mbobua & Co. Advocates for all the Respondents filed on December 7, 2021 and Wachira Wanjiru & Co. Advocates for all the Claimants filed on February 22, 2022.
  6. The application was certified urgent on October 14, 2021 and this court issued the following orders pending the hearing and determination of the application inter partes:-
    - (1) That pending the inter-partes hearing and determination of the Notice of Motion dated October 12, 2021 the Respondents be and are hereby ordered to pay the Claimants/Applicants salary arrears for the months of September and October, 2021 and to continue so paying such monthly salaries as they fall due pending the hearing and determination of the application inter-partes or until further orders of this court.
    - (2) That the Respondents by themselves, their agents, servants, or others howsoever be and are hereby enjoined from taking any disciplinary action against the Claimants/Applicants pending the hearing and determination of this application inter-partes.
    - (3) That the Respondents are directed to file and serve their responses to the Notice of Motion within seven (7) days from 2<sup>nd</sup> November, 2021 and the Claimants/Applicants shall file and serve their responses thereto within seven (7) days of service.



- (4) That the application be disposed of on priority basis and that the same be canvassed by way of written submissions to be filed by the Claimants/applicants within seven (7) days of (3) above and the Respondents to respond thereto within seven (7) days of service.
  - (5) Costs so far be in the cause.
7. The parties have now filed their pleadings (there is no defence on record so far) as enumerated above and this court has now to examine them and render a ruling on the application pending the hearing and determination of the main cause. This court therefore is obliged to examine all the materials placed before it and determine each one of the substantive prayers in the application.

## II .Claimants' Case

8. In their statement of claim dated 12<sup>th</sup> October, 2021 the Claimants pray for the following:-
- 4.1 This Honourable Court do order the Respondents to pay the Claimants outstanding salaries.
  - 4.2 This Honourable court be pleased to grant an injunction against the Respondents, their agents, servants and employees from harassing, intimidating and to negatively interfering with the activities and lawful duties of the Claimants.
  - 4.3 This Honourable court do quash the decision of the 1<sup>st</sup> Respondent creating the office of the Chief Officer, Agriculture Livestock and Fisheries for being illegal, null and void.
  - 4.4 This Honourable court to quash the decisions of the Office of the Chief Officer, Agriculture, Livestock and Fisheries.
  - 4.5 In the alternative if prayers 4.2 and 4.3 herein are not granted, this Honourable court do order the Respondents to establish a new reporting structure and duties for position of the Chief Officer, Agriculture, Livestock and Fisheries.
  - 4.6 This Honourable court do order the Respondent to bear the costs for this suit as provided under Section 12(4) of the *Employment and Labour Relations Court Act*.
  - 4.7. This Honourable court do make further orders as it shall deem fit as provided for under Section 12 (3)(viii) of the *Employment and Labour Relations Act*.
9. The Claimants' case as pleaded is that they are all employees of the 3<sup>rd</sup> Respondent working in the Department of Agriculture, Livestock, and Fisheries.
10. The Claimants state that through Executive Order No. 4 of 2020 the Governor of the 3<sup>rd</sup> Respondent established the Department of Agriculture, Livestock, and Fisheries with four (4) Directorates namely Division of Agriculture, The Directorate of Veterinary Services, The Directorate of Livestock Production, and The Directorate of Fisheries.
11. In the same Executive Order, the Claimants state that the Governor appointed two chief officers, Dr. Joseph Maina, as Chief Officer for Agriculture, and Dr. Rose Oyolo, as the Chief Officer for Livestock and Fisheries, after the two were vetted by the County Assembly.
12. The 1<sup>st</sup> Claimant deposes that he was appointed in-charge of the Directorate of Agriculture by the said Dr. Maina and he held that position until 9<sup>th</sup> December, 2021 when he was redeployed to Ndaragwa Sub-county where he was based as at the time of filing of this cause.
13. The 1<sup>st</sup> Claimant states that on August 10, 2021 he received a letter from the office of the Chief Officer, Agriculture, Livestock, and Fisheries deploying him from Ndaragwa Sub-County to Mirangine



- Agriculture offices, and that he was supposed to report to Agricultural officer Ol-Kalou Sub- County for allocation of duties. He alleges that this was a demotion without reason or explanation as he was being moved from a Sub-County Agricultural office to a ward office.
14. He posits that the purported transfer was revoked by the Chief Officer of Agriculture, Dr. Maina, in a letter dated August 6, 2021. He is categorical that the office of chief officer, Agriculture, Livestock, and Fisheries does not exist and that if one is purported to exist the same is illegal, null and void.
  15. The 1<sup>st</sup> Claimant states that in view of the foregoing he continued to work from Ndaragwa Sub-County as that was his officially designated place of work.
  16. Subsequently, on September 27, 2021 the 1<sup>st</sup> Claimant received a letter dated 7<sup>th</sup> September, 2021 requiring him to show cause why disciplinary action should not be taken against him for, *inter alia*, failing to report to Mirangine Ward office. He responded explaining that the deployment had been revoked by Dr. Maina as stated above.
  17. The 1<sup>st</sup> Claimant alleges that as at that point his monthly salary was withheld yet there were no disciplinary proceedings against him and no reason or explanation had been availed to him. Of course the salary was reinstated by court through the interim orders issued on 4<sup>th</sup> November, 2021.
  18. He states that he continues to report to work each working day at Ndaragwa Sub-County.
  19. All the other Claimants have similar averments to those of the 1<sup>st</sup> Claimant above in their respective supporting and further affidavits.
  20. The 2<sup>nd</sup> Claimant, Joshua Ogamba Bosire, depons in his supporting and further affidavits that he received a letter on September 27, 2021 requiring him to show cause why he should not be disciplined for failure to report to Kipipiri Sub-County as the Sub-County Fisheries Officer and for failure to handover his former office. He responded to the show cause letter on October 5, 2021 by which time his monthly salary had been withheld, without any reason or explanation.
  21. He explains that he has always reported to work as required and as such the show cause letter was uncalled for and unnecessary.
  22. He states that he was appointed in-charge of the Directorate of Fisheries on October 30, 2017 but on June 30, 2021 he was transferred to Kipipiri as the Sub- County Fisheries Officer. He alleges that upon reporting to Kipipiri he found out that there was no fisheries department and that the new director that he was expected to hand over to never report.
  23. He alleges that the office of the Chief Officer, Agriculture. Livestock, and Fisheries occupied by Dr. Rose Oyolo does not exist in law and that if it does, in whatever form, then it is unlawful, null, and void.
  24. The 3<sup>rd</sup> Claimant, Veronica Mwaura, depons that on 27<sup>th</sup> September, 2021 she received a letter requiring her to show cause why disciplinary action should not be taken against her for failure to report to Engineer, Kinangop Sub-County, as a Sub-County Agricultural Officer and for failure to handover her former office. She responded to the show cause letter on October 4, 2021 at which point her monthly salary had been withheld.
  25. She argues that the appointment of Dr. Rose Oyolo as Chief Officer, Agriculture, Livestock and Fisheries is a nullity.
  26. She alleges that she was transferred to work at Kinangop Sub-County (Engineer) as Sub-County Agricultural Officer vide a letter dated 30<sup>th</sup> July, 2021. However, she depons that the said transfer was



revoked by Dr. Maina, the Chief Officer, Agriculture, vide a letter dated 6<sup>th</sup> August, 2021 and that it is on that basis that she did not report for duty to Kipipiri, Kinangop Sub-County.

27. The 4<sup>th</sup> Claimant, Irene Kirigo Wambugu, deposes that on 27<sup>th</sup> September, 2021 she picked a letter requiring her to show cause why disciplinary action should not be taken against her for failure to report to Ndaragwa Sub- County Livestock Officer and for locking her current office premises and thereby denying access to the same by other officers. She responded to the said show cause letter on October 7, 2021 and at that point her monthly salary had been withheld.
28. She claims that she complied with the deployment letter and indeed reported to her new work station and that the officer she was to handover to did not report and hence there was no one to handover to.
29. Like all the other Claimants she alleges that she is being harassed, intimidated, and targeted for questioning irregular and unlawful appointments carried out by the Respondents.
30. The 5<sup>th</sup> Claimant, deposes that on September 27, 2021 he received a letter requiring him to show cause why disciplinary action should not be taken against him for failure to report to Kipipiri Sub-County as the Sub- County Agricultural Officer and for failure to handover his former office. He states that he responded to the show cause letter on October 4, 2021 and that at that point his monthly salary had been withheld.
31. He alleges that his deployment had been revoked by Dr. Maina on August 6, 2021 and that the office occupied by Dr. Rose Oyolo does not exist and as such she cannot issue any directives or author letters in a legally non-existent capacity.
32. He therefore alleges that the letter dated 30<sup>th</sup> June, 2021 by Dr. Rose Oyolo purporting to deploy him to work at Kipipiri Sub-County Headquarters as Sub-County Agricultural Officer is null and void. He alleges that he has remained at his Ol-Joro Orok Sub-County, his station of work prior to the deployment and that he reports to work each day.
33. He views the intended disciplinary action as harassment and intimidation by the Respondents for his questioning the legality of the position held by Dr. Rose Oyolo and other related issues of his perceived mismanagement.
34. The Claimants reiterated the above positons in their respective further affidavits and annexed various letters in support of the application and pray that the application be allowed with costs.

### **III. Respondents' Case**

35. As indicated above, the Respondents reacted to the application by way of a replying affidavit sworn by James Karitu, the CECM Agriculture of the 3<sup>rd</sup> Respondent, sworn on 6<sup>th</sup> December, 2021.
36. He admits that all the Claimants are employees of the County Government of Nyandarua, the 3<sup>rd</sup> Respondent. He deposes that the 1<sup>st</sup> Claimant conducted himself in unprofessional manner through insubordination and incitement of other staff when he posted insulting and derogatory messages on the social media forum of Department of Agriculture. He states that it is on the basis of this gross misconduct that the Respondent decided to initiate disciplinary proceedings as alluded to by the 1<sup>st</sup> Claimant in his supporting and further affidavits.
37. He alleges that Dr. Maina had no authority to revoke the deployment of the Claimants as he was already terminated when he authored the letter of September 6, 2021 and that the Claimants were aware of that fact as the same had been communicated officially to them and indeed all other employees.



38. He states that Dr. Rose Oyolo was lawfully appointed to the office of chief officer, Agriculture, Livestock and Fisheries and that the Claimants were obligated to obey the deployment as the letters thereof were issued by an officer(s) in authority from the 3<sup>rd</sup> Respondent. He states that the appointment of Dr. Rose Oyolo has not been challenged in court and that there are no orders barring her from executing her duties including deploying the Claimants as she did.
39. He claims that all the Claimants defied the deployment letters and the Respondents are right in initiating investigations with a view of taking disciplinary actions. He states that if the Claimants are dissatisfied with any appointments by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Respondents they should take legal action instead of engaging in misconduct through insubordination and incitement.
40. He pleads with this court to acknowledge that the Respondents are in law entitled to discipline the Claimants and indeed any other employee(s) in accordance with the laws and policies as established. He insists that it is the Claimants who are in violation of the law for gross misconduct in refusing and failing to obey lawful and proper instructions from a person placed in authority by the employer. He pleads with this court not to interfere with the right of the employer in taking disciplinary action against the employees, the Claimants herein.

#### **IV. Issues For Determination**

41. The prayers by the Claimants have been reproduced elsewhere in this ruling. Prayers 1 and 2 are already spent. Prayer 3 was not granted in the ruling of November 4, 2021 but at this stage it is prayer 4 that is relevant and appropriate. Prayer 5 was granted in the said ruling. It is now prayer 6 that demands for the attention of this court at this stage. Prayer 7 is also for determination at this stage pending the hearing and determination of the cause.
42. In the circumstances, the issues for determination by this court are in prayers 4, 6, 7, and 8 and this court shall consider and determine each of those prayers as hereunder.

#### **V. Harassment and Intimidation**

43. It has to be made clear from the onset that disciplinary action or investigation of alleged misconduct by an employer does not amount to intimidation or harassment. An employer has a right to discipline all its employees without exception for orderly and proper execution and performance of duty and work by the employees for optimum productivity. So long as the disciplinary action is carried out in accordance with the law and policies applicable, no court should take away that role and right from an employer.
44. This court has gone through the entire pleadings filed by the Claimants, supporting and further affidavits, and even the written submissions, and finds no evidence whatsoever that the Claimants have been harassed or intimidated by the Respondents, their agents, servants or employees in any way or manner.
45. However, this court adds that so long as the Claimants are employees of the 3<sup>rd</sup> Respondent they must be accorded all support and facilitation necessary for them to execute their lawful duties.
46. In the circumstances, and in view of lack of any evidence of harassment or intimidation from the Respondents, and in view of the fact that the 3<sup>rd</sup> Respondent as the employer of the Claimant is expected to facilitate the Claimants for optimum productivity, this court is unable to grant prayer 4 in the application. This court is in agreement with the Counsel for the Respondents on this issue that no evidence has been availed in support of the same.



## V. Stay of Disciplinary Proceedings

47. In prayer 6 the Claimants pray that this court be pleased to stay any disciplinary action against them pending the hearing and determination of this cause. In the interim, pending the hearing and determination of this application, the Claimants were granted prayer 5 in the ruling of November 4, 2021. Now that both sides have placed their available evidence on record, it is upon this court to decide this issue on merit pending the hearing and determination of the cause.
48. This court has categorically stated above that an employer has a right, both in law and practice, to discipline employees for good order and optimum productivity so long as such disciplinary action and process is carried out in accordance with the law and policies applicable.
49. The circumstances and issues that precipitated the intended disciplinary action by the Respondents against the Claimants have been alluded to and set out in an earlier part of this ruling.
50. All the Claimants were served with show cause letters and they all responded to the same. The disciplinary process would have continued bar the court ruling of November 4, 2021.
51. All the Claimants are accused of insubordination by falling to report to new stations upon deployment, among other misconduct. The 1<sup>st</sup> Claimant is also accused of incitement and for using abusive and derogatory language on digital social wall against other employees, and especially senior officers.
52. In their supporting and further affidavits the Claimants have explained in detail why they did not report to the new stations except for 2<sup>nd</sup> and 4<sup>th</sup> Claimants who stated that they had already reported to their new stations. To a large extent the Claimants allege that the officer who initiated their disciplinary proceedings is holding a non-existent and illegal office or position and that they are not obliged to obey such orders or directions from that officer, Dr. Rose Oyolo.
53. It is important to note that all the show cause letters to all the Claimants were authored and signed by Kevin Ikuu, the acting County Secretary and Head of Public Service. It is not alleged that Mr. Ikuu had no power or authority to issue the said letters. Each of the Claimants responded to the show cause letter and the matters were still pending processing and completion by the time this cause was filed in court and orders of 4<sup>th</sup> November, 2021 issued.
54. While the deployment letters were signed by Dr. Rose Oyolo, whom the Claimants accuse of occupying an unlawful office/position, there is no evidence that the said office or position has been declared illegal.
55. It would appear that the Claimants have issues with some appointments that have been made by the Respondents and their perceived mistreatment and mishandling of their previous supervisor, Dr. Maina, who is embroiled in a legal tussle with the Respondents about his alleged removal or dismissal from office. Surely, there cannot be reasons for the Claimants to refuse or fail to obey lawful orders from person(s) placed in authority by the employer. If the Claimants have identified illegal or unlawful actions from the Respondents the lawful avenues for redress are widely open, may they be the courts, EACC, DCI, IG, or any other available public offices or institutions.
56. The contents of the supporting and the further affidavits by the Claimants as filed in court appear to this court to be appropriate responses to the allegations of misconduct in disciplinary hearings. This court is not and cannot be the forum for hearing and determination of disciplinary hearings between employers and employees as that is not within the constitutional and legislative mandate of this court. It would be most inappropriate for this court to take the place of the employer in deciding whether employees are guilty or not for alleged misconduct.



57. This court (ELRC) has set out good jurisprudence on when it may interfere with the internal disciplinary process. This court may interfere if and where the proceedings are initiated with a pre-determined outcome, where rules of natural justice are violated, where there is a threat or violation of the constitutional rights, where legislative or procedural rules that are applicable and abused, or where overall the process is manifestly unjust and unfair.
58. The cause before this court and the prayers in the claim have been set out elsewhere in this ruling and the same do not concern whether Dr. Rose Oyolo is occupying a lawful position or office. It is also not about whether Dr. Maina was lawfully or unlawfully terminated or removed from office. In any event both officers are not parties to this cause.
59. Whatever the office or position that Dr. Rose Oyolo occupies, it is clear that she is a senior officer with the 3<sup>rd</sup> Respondent. The letters to show cause to the Claimants were authored by Mr. Kevin Ikua, the acting County Secretary and Head of Public Service. Those officers had the authority from the 3<sup>rd</sup> Respondent to take the actions that they took. I see no procedural or substantive errors so far committed in the disciplinary process and none has been pointed out to this court.
60. Counsel for the Claimants has strongly submitted on the issue of whether Dr. Rose Oyolo occupies a lawful office or position. However, all the good submissions are irrelevant to a great length as the concerned officer is not a party in this cause. Let the Claimants, if they so wish, take the appropriate legal action to have that issue determined with finality. It is illustrative to note that Article 47 of *the Constitution* must be complied with if the Claimants wish to have that issue heard and determined.
61. There are a multitude of authorities on when and how this court may interfere with internal disciplinary process. In *George Wekesa v Multimedia University of Kenya* (2016)eKLR, Wasilwa J quoting Nderi J in *Nixon Bingo v The Alliance for Green Revolutionary in Africa* stated as follows:-
- "Courts of law should be very slow to interfere in the internal disciplinary process at work place unless it is manifestly clear that the action by the employer derogates materially from the internal disciplinary process and the law."
62. This court is of the view and holds that it has neither been demonstrated that the internal disciplinary tools and procedures have been abused or violated, nor has it been shown that the disciplinary proceedings have been initiated in bad faith with the sole purpose of harassing, embarrassing or terminating the Claimants – See Ndolo J in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* (2014) eKLR and Radido J in *Victoria Ipornai v Sanlam Kenya PLC*(2018) eKLR.
63. This court has said enough to demonstrate why it sees no reason for interfering with the Respondents' rights to initiate internal disciplinary action against the Respondents at this stage.
64. However, the Respondents are urged and cautioned to adhere strictly to all constitutional, legal, and internal policy guidelines in carrying out any disciplinary action against the Respondents. This court shall not hesitate in stopping irregular or uprocedural and therefore unlawful internal disciplinary action whenever such process is brought to the attention of the court.
65. In the circumstances, although this court had issued interim orders in the ruling of 4<sup>th</sup> November, 2021 stopping disciplinary action against the Claimants, upon examination of all the materials placed before this court the said interim order is hereby set aside. However, the Respondents are urged to abide by paragraph 64 above if they decide to carry on with the internal disciplinary process.



## **VI. Salaries**

66. In the ruling of 4<sup>th</sup> November, 2021 this court ordered the Respondents to pay the Claimants salary arrears that were then due and payable and to continue so paying such monthly salaries as and when they fall due pending the hearing and determination of this application or until such further orders of this court.
67. It is not disputed that the Claimants are employees of the 3<sup>rd</sup> Respondent and the Respondents have admitted so in their replying affidavit. There is no way that the Claimants can continue working without pay as such denial of monthly salary would be a fundamental breach of the employment contract and in violation of Article 41 of the Constitution and Sections 17, 18, 19, 20 and 21 of the *Employment Act*.
68. In the circumstances, as long as the Claimants are employees of the 3<sup>rd</sup> Respondent, they shall be paid their monthly salaries as and when they fall due unless where the law provides otherwise.

## **VII.Costs**

69. In the discretion of this court the costs of this application shall be in the cause.

## **VIII. Disposal**

70. In line with the reasoning, views, and holdings expressed throughout this ruling this court orders as follows in respect of the Notice of Motion dated 12<sup>th</sup> October, 2021:-
- a. That pending the hearing and determination of this cause the Respondents are ordered to pay the Claimants any salary arrears that may be due and owing and to continue paying such monthly salaries as and when the same fall due except where the law or the contract or terms of service provide otherwise.
  - b. The Costs of this application shall be in the cause.
  - c. Except what is granted as above, the other prayers in the application are hereby denied and dismissed.

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

.....

**DAVID NDERITU**

**JUDGE**

