



**Ndegwa v Kenya Railways Corporation (Cause E071 of 2022)  
[2022] KEELRC 12772 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12772 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E071 OF 2022  
MN NDUMA, J  
OCTOBER 6, 2022**

**BETWEEN**

**PATRICK NDEGWA ..... CLAIMANT**

**AND**

**KENYA RAILWAYS CORPORATION ..... RESPONDENT**

**RULING**

1. The claimant filed suit by a statement of claim on 4<sup>th</sup> February, 2022 challenging surcharge of his salary and demotion, a decision made by the Board of the respondent on 5<sup>th</sup> December, 2017. He was demoted from Job Grade ‘M4’ to ‘S1’ and the demotion took effect on 15<sup>th</sup> November 2017. The claimant was to repay 50% of the Kshs 1,143,982 which he had been found guilty of embezzling. The claimant appealed to the Board on 13<sup>th</sup> December, 2017. The Board deliberated the matter and declined the appeal on 21<sup>st</sup> December, 2017. The claimant appealed the decision of the Board to the Public Service Commission which upheld the decision of the respondent by a letter dated 7<sup>th</sup> January, 2019.
2. The respondent subsequently accused the claimant of manipulating the payroll system to alter his benefits and salary deductions. The respondent sent the claimant on compulsory leave by a letter dated 15<sup>th</sup> December, 2021 to allow for investigations on the matter. The claimant was to receive his salary and allowances pending the outcome of the investigations. The investigations were completed by end of December, 2021 and the claimant was charged with a criminal offence before Nairobi Chief Magistrates’ Court on 14<sup>th</sup> January, 2022 on charges of computer forgery and fraud as against the respondent, his employer. The claimant was subsequently placed on suspension without pay in terms of Clause 11.22.2 of the Kenya Railways Human Resource Policy and Procedure Manual.
3. The claimant seeks the following reliefs in the statement of claim.



- (a) A declaration that the claimant was not subjected to a fair hearing before reprimand, surcharge and demotion.
  - (b) Reinstatement to the grade and remuneration of the claimant before the illegal disciplinary action.
  - (c) Compensation for the wrongful, unlawful and unfair withdrawal of salary.
  - (d) General damages
  - (e) Costs and interest of this suit.
4. The claimant filed an application dated 3<sup>rd</sup> February, 2022 praying for orders that: -
    1. Spent
    2. Spent
    3. The Court be pleased to maintain the status quo between the parties as at 15<sup>th</sup> December, 2021 and in terms of the Respondent's letter of the same date pending the hearing and determination of the main suit.
  5. The application is opposed vide a replying affidavit of Richard Koskei sworn to on 18<sup>th</sup> February, 2022 in which the facts of this case are succinctly set out. The applicant in the supporting affidavit and further affidavit basis the claim on the fact that the respondent did not grant him a fair hearing before surcharging and demoting him and subsequently suspending payment of his salary pending the hearing and determination of the criminal charges levelled against the claimant.
  6. The respondent in addition has filed a Preliminary Objection to wit: -
    - (a) The Court lacks jurisdiction to hear and determine the matter in that, the application and the suit offend the provision of Section 87 of the *Kenya Railways Corporation Act* (Cap 397) Laws of Kenya and Section 90 of the *Employment Act*.
  7. The parties filed submissions with regard to the application and the Preliminary Objection.
  8. With regard to the issue of surcharge and demotion, it is not in dispute from the pleadings that the decision was taken by the respondent against the claimant with effect from 15<sup>th</sup> November, 2017. The demotion was from Job Grade 'M4' to 'S1'. The cause of action with regard to this matter arose on the 15<sup>th</sup> November, 2017. The appeal process to the Public service Commission was concluded on 1<sup>st</sup> March, 2019.
  9. This suit on this particular issue, ought to have been filed within 3 years from 15<sup>th</sup> November, 2017. The suit was filed more than four (4) years from when the cause of action arose. The claimant is therefore time barred to file any suit on the issue of surcharge and demotion.
  9. With regard to the issue of stoppage of his salary and suspension pending the hearing and determination of the criminal charges facing the claimant, the provisions of Section 87 of the *Kenya Railways Corporation Act*, Cap. 397 cannot be a legitimate bar to the claimant to file suit as he awaits the outcome of the criminal Court process. Time to file suit does not stop to run just because there is a criminal case pending.
  10. Once the claimant was placed on suspension in terms of clause 11.22.2 of the Kenya Railways Human Resource Policy and Procedure Manual, it is up to the corporation to decide whether to await conclusion of the criminal case before concluding the internal disciplinary process or not. The



respondent cannot use this as a legitimate bar to the claimant to access the Court on the issue of stoppage of his salary.

11. The Preliminary Objection is upheld with regard to the claim against surcharge and demotion. The application dated 3<sup>rd</sup> February, 2022 lacks merit in that the claimant has not made out a prima facie case and has not demonstrated that the suspension of his employment and salary whilst faced with serious criminal charges will prejudice him in a manner that cannot be remedied by way of damages upon conclusion of the suit before Court on merits. See [\*Mrao -vs- First American Bank of Kenya Limited and 2 Others.\*](#)
12. In the final analysis, the Court makes the following orders: -
  - (1) The suit is struck out with respect to all claims and reliefs founded on the surcharge and demotion of the claimant by the respondent.
  - (2) The rest of the suit to follow its normal course upon appropriate amendment of pleadings.
  - (3) Costs in the cause.

**DATED AND DELIVERED AT NAIROBI (ELECTRONICALLY) THIS 6<sup>TH</sup> DAY OF OCTOBER, 2022**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Agwara for respondent- Objector

Mr. Kambutho for claimant/Applicant

Ekale – Court Assistant

