

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION NO. E085 OF 2020

JOHNSON OTIENO ADERA.....PETITIONER

VERSUS

EXECUTIVE DIRECTOR,

ANTI-COUNTERFEIT AUTHORITY.....1ST RESPONDENT

BOARD OF DIRECTORS,

ANTI-COUNTERFEIT AUTHORITY.....2ND RESPONDENT

ANTI-COUNTERFEIT AUTHORITY.....3RD RESPONDENT

RULING

1. Before me is a notice of motion application by the Petitioner that seeks an interim order staying the decision of the Respondent contained in the letter dated 20th November 2020 interdicting the Petitioner herein. The motion is supported by the grounds on the face of the motion as well as the annexed affidavit of the Petitioner in support. In brief, the Petitioner asserts that the 2nd Respondent on 20th November 2020 made a decision at its 71st meeting to interdict him while Section 70 of the Public Service Commission Act and paragraph 10.33 of the 3rd Respondent's Human Resource Policies and Procedures Manual vest such power in the 1st Respondent. He asserts there is no basis to interdict and thus the said interdiction is illegal, unreasonable, irregular and procedurally unfair, without foundation or basis and *ultra vires*. The Petitioner asserts that at the same meeting of 20th November 2020 the 2nd Respondent decided to issue a notice to show cause to the Petitioner and that the power to do so is vested in the 1st Respondent. He also asserts that the 1st Respondent never acted on any complaint or allegation and that it is the 2nd Respondent that usurped the powers of the 1st Respondent at its meetings of 20th November 2020 and consequently the notice to show cause was issued *ultra vires* and is therefore illegal and irregular and procedurally unfair. The Petitioner asserts that an interdiction precedes a notice to show cause and it is only after the investigations are complete that the 1st Respondent if she determines that there is need for disciplinary action that she can issue a notice to show cause. He asserts the HR Policies and Procedures Manual of the 3rd Respondent caps the interdiction to 6 months yet the letter of 20th November 2020 has set no time limit for the interdiction.

2. The Respondents are opposed to the motion and argues that there was no evidence adduced that the interdiction letter was signed by the 2nd Respondent as opposed to the 1st Respondent who signed the letter of 20th November 2020. The Respondents assert that disciplinary process is the prerogative of the employer and that the Court is only called upon to interfere if there is evidence of malice, unfairness or breach of the law or laid down procedures. The Respondents assert that nothing shows malice and that prohibiting the employer from undertaking the disciplinary process is unreasonable or amounts to Court intermeddling and staying the supervisory or administrative role of the employer. The Respondents assert that it is in the interest of the public to unearth the issues in the legal department which the Petitioner heads. The Respondents assert that there is nothing placed before the Court to demonstrate the breach of rights or procedure.

3. The matter was argued orally and parties invited to file written submissions. Mr. Kenyatta for the Petitioner submitted that the interdiction of the Petitioner was without jurisdiction and illegal as the letter seeks the Petitioner to respond to the Board of the Board of the Anti-Counterfeit Authority. He submitted that the Board has no authority to issue an interdict of the employee of the Agency. He submitted that there is no provision in the manual for the role to be usurped or arrogated to interdict the employee. He submitted that this was a clear breach of the manual and the interdiction is not lawfully exercised by the 1st Respondent. He cited the case of **Hon. Simon Rotich Ruto v Judicial Service Commission & Another [2019] eKLR** and submitted that to the extent that the interdiction was empty of the requisite authority and was *ultra vires*, null and void *ab initio*. He submitted that for the Petitioner, the Human Resources Policies and Procedures Manual states under paragraph 10.34(i) of the Manual that interdiction can only be made to allow for investigations. He submitted that mirrored the Public Service Commission Human Resource Policies and Procedures Manual. The Petitioner submitted that the Board cannot substitute itself and take over duties of the CEO. Counsel submitted that the letter interdicting the Petitioner was for an indefinite period contrary to the provisions of the Human Resources Manual of the Respondent. The Petitioner submitted that there was no basis for the interdiction and investigation as there was no complaint against the Petitioner. He submitted that one cannot be interdicted and given a show cause at the same time. He submitted that the Respondents have not answered the Petitioner's grievances even in the response from the Respondents.

4. In their reply, the Respondents submitted that the basis of the interdiction was the compliance and audit report from the office of the Auditor General dated 29th July 2020 which report expressed numerous irregularities including corrupt practices among other vices in the legal department headed by the Petitioner herein. It was submitted that the disciplinary process is the prerogative of the employer and a Court can only be called upon to intervene where there is evidence of malice, unfairness or breach of the law or laid down procedures. Counsel for the Respondents Ms. Akuno submitted that there was nothing placed before the Court to show there was any malice, unfairness or breach of the law or procedures. She submitted that the employer should be allowed to carry out the disciplinary process to unearth the heavy issues

raised in the audit report. She submitted that prohibiting the employer from undertaking the disciplinary process is unreasonable and would amount to intermeddling by the Court. She cited the case of **Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR** where the Court held that the employer has the discretion to decide on what disciplinary process to adopt provided there is compliance with the law. The Respondents submitted that stopping the Petitioner from facing the disciplinary process would set a bad precedent that an employee in the public service cannot be called to account for any reason. Counsel submitted that the motion has no merit and is calculated to defeat justice and the Court should not assist the Petitioner to do so. The Respondents submitted that no prejudice will be suffered by the Petitioner and if the Court ultimately finds in his favour he can be compensated by way of damages as the main Petition is pending.

5. The Petitioner is a public servant serving at the 3rd Respondent in the legal services department as its head. An issue has arisen that compelled him to seek redress from the Court. He seeks refuge against the interdiction letter issued on 20th November 2020 contemporaneously with the show cause letter. The 3rd Respondents Human Resource Policies and Procedures Manual provides as follows under paragraph 10.32.4(i) – *The formal disciplinary procedure starts with a “show cause letter”. The employee will be informed in writing by the supervisor of the nature of the complaint or allegation. The employee will be required to submit his response within at least seven days.* Further in the manual, the provision on interdiction is captured in paragraph 10.34(i) which is to the effect that: *Interdiction is a procedure applied on serious disciplinary cases that require investigations involving any breach of the rules and regulations in order to allow establishment of the fact(s) of the case.* The letter of 20th November 2020 is signed by Ms. Fridah Kaberia the Acting Executive Director of the 3rd Respondent. In the manual this is what is required as the supervisor of the Petitioner should issue the letter.

6. Courts are wary not to be seen to be interfering with the managerial prerogatives at the workplace as has been held time and time again. The Court is only permitted to intervene where there is malice or failure to follow the letter of the law. In this case what seems at odds in the letter dated 20th November 2020 is that the letter does not accord with the 3rd Respondent’s Human Resources Policies and Procedures Manual. The coupling of the interdiction and the notice to show cause is apposite what the Policies and Procedures Manual provides. For clarity the two should have been separated and that being the requirement, the interdiction letter must therefore comport with the 3rd Respondent’s HR Manual. Any derogation from this places the letter in the uncomfortable arena of being *ultra vires* the framework of discipline at the 3rd Respondent. In the premises the Court grants a temporary injunction for 14 days against the letter of 20th November 2020 as the letter is not in keeping with paragraphs 10.32.4(i) and 10.34(i). The Respondents to bear the costs for the motion herein which I assess at Kshs. 30,000/-.

It is so ordered.

Dated and delivered at Nairobi this 25th day of January 2021

Nzioki wa Makau

JUDGE