



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**CAUSE NO. E377 OF 2020**

*(Before Hon. Lady Justice Maureen Onyango)*

**DR. PATRICK WAFULA KULOBA.....CLAIMANT**

**VERSUS**

**THE DIRECTOR/CHIEF EXECUTIVE OFFICER,**

**KENYA INDUSTRIAL RESEARCH AND**

**DEVELOPMENT INSTITUTE.....RESPONDENT**

**JUDGMENT**

The claim herein was instituted vide the claimant's Statement of claim dated 10<sup>th</sup> August, 2020 and filed on 11<sup>th</sup> August, 2020. It is the claimant's averment in the Statement of claim that he was employed by the Respondent herein in 1997 and is currently holding the position of Principal Research Scientist.

The claimant states that on 28<sup>th</sup> April, 2020 he sent a letter to the respondent outlining how his work was being hampered and in response the respondent issued the claimant with a Notice to show cause citing insubordination which the claimant responded to. On 3<sup>rd</sup> August 2020 the claimant was suspended indefinitely on grounds that his letter dated 28<sup>th</sup> April 2020 amounted to gross misconduct.

In his claim the claimant seeks the following reliefs:-

- a) A declaration that the suspension of the claimant is unfair, unconstitutional, illegal, null and void;
- b) An order directing the respondent to reinstate the claimant to work;
- c) A permanent injunction restraining the Respondent from proceeding with any further disciplinary proceedings against the claimant as indicated in the suspension letter of 3<sup>rd</sup> August, 2020
- d) An order of payment of salaries with the withheld salary;
- e) General damages;
- f) Interests on (e) and (f) above at courts rates;
- g) Cost of this suit; and
- h) Any other relief that this court will deem fit to grant.

Given the urgency of the matter the claimant filed his claim together with the notice of motion application dated 10<sup>th</sup> August 2020. The same was filed under certificate of urgency seeking the following reliefs: -

1. Spent

2. Spent
3. Spent
4. Spent
5. Pending the substantive hearing of the cause this court be pleased to stay the implementation of the decision contained in the respondent's letter dated 3<sup>rd</sup> August, 2020 and reinstate the claimant/applicant to his work
6. Pending the substantive hearing of this cause, this court be pleased to issue a temporary injunction restraining the respondent from proceeding with any further disciplinary proceeding as against the claimant/applicant.
7. Pending the substantive hearing of this cause, the court be pleased to reinstate the claimant/ Applicants full basic salary and other employment benefits
8. This court be pleased to issue such other orders and directions as may appear to the court to be just and convenient
9. The costs of this application be provided for.

The application is based on the grounds as set out on the face of the motion and is supported by the affidavit of Dr. Patrick Wafula Kuloba.

In response to the application and the claim the respondent filed its replying affidavit sworn by Prof. David K. Rotich Tuigong the Director/Chief Executive officer of Kenya Industrial Research and Development Institute (KIRDI) on 20<sup>th</sup> August, 2020.

The affiant in the affidavit averred that the suspension was in accordance with the KIRDI Human Resource Manual which requires the claimant to appear before the Board of Directors Disciplinary Committee. He maintains that the claimant was lawfully suspended and that the Employment Act does not take away managerial prerogative from employers. That therefore the claim and the application are pre-mature and the same should be dismissed with costs to the respondent.

Parties agreed to dispose of both the application and the Claim by way of written submissions.

#### **Submissions by the Parties**

The Claimant submitted that the indefinite suspension by the respondent was unlawful and the same is not provided for in the Employment Act. That the suspension was not in line with the KIRDI Human Resource Policies and Procedures Manual.

The claimant submitted that the suspension was not given in order to pave way for any investigations but rather was a form of punishment.

The claimant relied on the case of **Daniel C Avunde v Kenya Forest Service (2015) eKLR** where the court interpreted the term suspension thus *“my understanding of suspension of an employee is that it is intended to enable an employer carry out investigations where the presence of the employee may jeopardize the investigations, or where an employee has been convicted and is awaiting sentence as provided for in the public service code of regulations, or where the employee has or is suspected of having committed a criminal offence to the substantial detriment of the employer as provided in section 44(4)(g) of the Employment Act”*

The claimant also submitted that his suspension was indefinite contrary to the law and in this he relied on **Paul Mwaura Mbugua v Kagwe Tea Factory Ltd & Another (2012) eKLR** where the court held: -

*“an employee on suspension has a legitimate expectation that at the very least they will be afforded an opportunity to defend themselves against any adverse findings that may arise from investigations carried out during their suspension. To keep an employee on suspension without pay for over 7 months waiting for them to blink first is not only unlawful but also inhumane”*

It is on this basis that the Claimant/applicant maintained that the court has jurisdiction to grant the orders sought and relied on the case of **Gitonga Wanjau v Gathuthi Tea Factory Co. Ltd & 2 others (2016) eKLR** where the court stated that *“The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies purely on the applicant”*

The claimant urged the court to find the disciplinary action against the claimant pre-mature as the disciplinary process has not been established and the suspension not necessary as the investigations can be carried out while the claimant is at work.

#### **Respondent's Submissions**

The Respondent on the other hand maintained that the suspension is provided for in the KIRDI Human Resource Policies and Procedures Manual which forms part of the contract of the claimant. The respondent submits that disciplinary power rests with the Disciplinary committee of the board for which the claimant is yet to appear and states that the suspension is not indefinite.

The respondent submits that the claimant has rushed to court without exhausting the internal dispute resolution procedures. It relied on the case of **Geoffrey Mworira v Water Resource Management Authority & 2 Others Constitutional Petition**

No. 4 of 2015 eKLR where Ongaya J. held: -

*“the court will very sparingly interfere in the employer’s entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy or any other human resource function. To interfere the applicant must show the employer is proceeding in a manner that is in contravention of the provision of the constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstance of the case; or internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer’s internal process...”*

The Respondent further relied on in the case of **Alfred Nyungu Kimungui v Bomas of Kenya (2013) eKLR** where the Judge stated that –

*“The employment Act does not intend to take away the managerial prerogatives from employers”.*

The respondent submits that the disciplinary process initiated is an internal mechanism which is just beginning and the claimant is yet to appear before the disciplinary committee of the board of directors. It prays that the application be dismissed with costs to the respondent.

### **Analysis and Determination**

Having considered the facts of this cause, submissions and authorities cited by both the Claimant and the Respondent, the following are the issues for determination:

1. Whether the suspension issued on 3<sup>rd</sup> August, 2020 was lawful and fair
2. Whether the claimant is entitled to general damages?
3. Whether the Claimant is entitled to the reliefs sought

### **Whether the suspension issued on 3<sup>rd</sup> August, 2020 was lawful and fair**

The Claimant maintained that he wrote a letter to the respondent outlining how his work was being hampered by the Deputy Director, Research, Technology and Innovation. Instead of getting a response to the same he was handed a Notice to show cause claiming that the letter amounted to insubordination which he responded to. That vide a letter dated 3<sup>rd</sup> of August, 2020 the claimant applicant was suspended from the office for an unknown period with no basic salary.

KIRDI's Human Resource Policies and Procedures Manual Clause K8 provides for instances when an employee can be suspended which are:

*a) When disciplinary proceedings have been instituted against*

*an officer as a result of which the respondent considers that the officer ought to be dismissed*

*b) When the officer has been convicted of a serious criminal offence where a prison sentence maybe imposed other than in default of payment of a fine*

*c) For other offences which in the opinion of the respondent constitutes gross misconduct.*

The claimant/applicant contends that no disciplinary proceedings had commenced against him as provided for in the KIRDI's Human Resource Policies and Procedures. That he had not been convicted of a criminal offence and had not committed any offence other than complaining about the conduct of his immediate supervisor. The respondent in their response did not dispute having issued the claimant a suspension letter which did not indicate the suspension period.

The Respondent therefore had no basis to issue a letter of suspension of the claimant.

I find the indefinite suspension unlawful. Furthermore, the grounds for which the suspension letter was issued is not a valid ground. As provided in Section 46(h) of the Employment Act, an employee’s initiation or proposed initiation of a complaint or other legal proceedings against his employer is not a valid or fair reason for dismissal or imposition of a disciplinary penalty, except where the complaint is shown to be irresponsible or without foundation. This was a grievance raised by the claimant against his immediate supervisor which ought to have been investigated. This action by the Respondent reflects intolerance to complaints by employees against their superiors, which is unfair labour practice. The suspension further did not comply with the Respondent’s Human Resource Policies and Procedures Manual which provides as follows: –

*The procedures to be followed in dealing with discipline cases are as follows:-*

1. *Carry out a preliminary investigation and consultation as to the circumstances surrounding the act of misconduct.*
2. *Issue KIRDI officer with statement of the alleged offence ('show cause' letter) and the charges levelled against him/her and invite him to state in writing the grounds, if any, on which he relies to exonerate himself/herself.*

3. *The officer shall respond to the charges within twenty one (21)*

*days from the date of receipt of the 'show cause' letter.*

4. *The case shall be presented to the Disciplinary Committee for deliberation and recommendation.*

5. *If the officer fails to respond within the specified period or if in the opinion of the Committee, the explanation given is not satisfactory the committee shall forward the case with copies of the charge and the officer's reply if any, with their comments to the Director for decision.*

**Whether the Claimant is entitled to the reliefs sought**

Having found the Claimant's suspension unlawful and in contravention of KIRDI's Human Resource Policies and Procedures Manual, I make the following orders: -

**1. The suspension of the claimant by letter dated 3<sup>rd</sup> August 2020 is lifted and any disciplinary action anticipated as a consequence of his complaint letter dated 28<sup>th</sup> April 2020 is hereby terminated.**

**2. The Respondent is directed to reinstate the claimant back to work and release to him all withheld salary and emoluments arising from the suspension.**

**3. The Respondent shall pay the claimant's costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF JANUARY 2021**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this+ court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**