



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

MISCELLANEOUS APPLICATION NO. 02 OF 2020

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

FOR ORDERS OF CERTIORARI AND MANDAMUS

KELLUM ALUHA CHANDAL.....APPLICANT

VERSUS

THE CLERK TO COUNTY ASSEMBLY OF BUNGOMA.....1ST RESPONDENT

THE CHAIRMAN COUNTY ASSEMBLY

SERVICE BOARD – BUNGOMA.....2ND RESPONDENT

THE COUNTY ASSEMBLY SERVICE BOARD – BUNGOMA.....3RD RESPONDENT

THE COUNTY ASSEMBLY SERVICE BOARD – BUNGOMA.....4TH RESPONDENT

AND

COUNTY ASSEMBLY OF BUNGOMA.....1ST INTERESTED PARTY

THE HON. ATTORNEY GENERAL.....2ND INTERESTED PARTY

JUDGMENT

1. Leave to file substantive motion for Judicial Review for Orders of Certiorari and Mandamus was granted on 20/4/2020. The Order for leave was to operate as stay of suspension of the Applicant made on 17/1/2020 pending filing and determination of the Notice of Motion.

2. The Notice of Motion was filed on 4/6/2020 the applicant praying for the following reliefs:

(a) That the Applicant do move the Court for an Order of Certiorari to quash the decision of the 1st Respondent contained in a letter dated 17/1/2020 which suspended the Applicant indefinitely from employment and deductions of his salary.

(b) That the Court do declare the suspension was unlawful, null and void *ab initio*.

(c) That the suspension be lifted and the applicant be paid his dues of Kshs.102,000 per month inclusive of allowances of Kshs.61,000 effective from January, 2020.

(d) The applicant be granted general damages for pain, suffering and psychological trauma.

(e) Costs be provided.

3. The application is supported on grounds set out as (a) to (m) in the Notice of Motion and the Supporting Affidavit of the applicant dated 29/5/2020, the gravamen of which may be summarized that the applicant was employed by the County Assembly of Bungoma in the position of Assistant Sergeant at Arms in the Job Group F at a monthly salary of Kshs.102,700 with effect from 20/6/2018.

4. That in November, 2019 the applicant signed an imprest of about Kshs.1.150,800 for County Assembly activities to be held at Victoria Hotel in Kisumu for 15 members of the Assembly and 6 members of Assembly staff. That the applicant received the money into his account on 14/12/2019; that the applicant transmitted the money to the relevant members selected to attend training less allowance for 4 members who did not attend.
5. That before the applicant could reconcile and surrender the balance in the account of the said imprest in December, 2019 the Applicant received a letter of suspension from the Clerk of the Assembly, the 1st respondent purporting that the applicant had pocketed the imprest.
6. The letter by the clerk dated 17/1/2019 is attached to the application in which is alleged the applicant pocketed Kshs.232,000 meant for members of the County Assembly which was in the form of imprest warrant number 3636386 dated 21/11/2019 in contravention of part V, Section (f) (1) (C) of the Human Resource and Procedure manual 2016 governing the Code of Conduct of a Public Officer.
7. The letter suspended the applicant till the County Assembly Service Board convenes to give the applicant a hearing. The applicant was only entitled to payment of house allowance and medical benefits during suspension.
8. The applicant states the said suspension was unlawful and unfair and it be declared null and void and he be reinstated fully to his job with full salary and benefits.
9. The application is opposed vide a replying affidavit of John Ongwae Mosongo the Clerk of the Assembly, 1st respondent in which he deposes inter alia that the applicant had misappropriated funds of the Assembly by withholding allowances for 4 members of the County Assembly of Bungoma. That this was the reason the applicant suspended the applicant. The deponent attached documents marked "JOi" to show receipt of imprest by the applicant which was not released by the applicant to the intended members and the applicant did not account for the same.
10. That further the applicant and one Calistus Ndiyeira who are from the Sergeant at Arms department were to attend an international training at Kampala and the two were facilitated by the 1st interested party but the two did not participate in the said training despite having travelled to Uganda and having been paid for the training.
11. That the Applicant and his colleagues gave the 1st interested party fake training certificates in accounting for the facilitation and training funds. That the office of the Auditor General flagged the fake training certificates and raised an Audit Query in the annual report for Audit Report of 2019.
12. That an administrative action was taken and after lengthy deliberations the County Assembly Service resolved that the applicant be suspended. Document. That 'J 011" is annexed as evidence of the deliberations.
13. That the applicant was given a hearing by the Board and he requested for more time. Time was granted and the Board intends to conclude the process.
14. That the suspension followed due process and is lawful and fair and the application lacks merit and it be dismissed to allow conclusion of internal administrative process of the Assembly.
15. The applicant in a supplementary affidavit dated 26/6/2020 and further supplementary affidavit dated 17/8/2020 deposes that the purported hearing by the Board did not take place and that the suspension was indefinite. The applicant also filed written submissions on 18/8/2020.

Determination

16. The applicant being a Public officer must certify the requirements set out in the **Gatirau Peter Munya –vs- Dickson Mwenda Kithinji and 3 Others Application No. 5 of 2014, (2014) eKLR at paragraph 486** for grant of Conservatory Orders in Public domain by the Supreme Court to get a permanent injunction Prohibiting the County Assembly of Bungoma Service Board from proceedings with the intended disciplinary hearing and to lift the suspension from his employment on grounds of gross misconduct comprising misappropriation of public funds in the cause of the applicant's duties.
17. It is apt to note that the applicant has not in the Notice of Motion and the supporting affidavit and even in the two further affidavit filed any letter indicating that he had surrendered the imprest in respect of 4 County Assembly members nor has he denied having presented fake training certificates to the 1st interested party in accounting of funds given to him and his colleague for an international training in Kampala which the respondents state the applicant and his colleague did not attend despite receipt of funds for facilitation for the training in Kampala Uganda.
17. Clearly the applicant lacks clean hands even as he presses to be given equitable relief by this Court.
18. The facts set out in the replying affidavit in the replying of the clerk to the assembly in paragraphs 4, 5, 6, 7 and 8 remain uncontroverted by the applicant to date. Those facts are fatal to the application itself and the credibility of the applicant himself.
19. The Court is satisfied there is still pending a genuine administrative process by the authorized body, the County Assembly Service Board against the respondent, to determine the innocence or otherwise of the applicant.
20. The Court is not about to jump the gun and bypass that legitimate process by the lawfully mandated body.

21. In Geoffrey Macharia Wairimu –vs- Private Safaris (E.A) Limited [2014] eKLR, this Court stated

“The Respondent if the orders are granted would be deprived of the right to administer the contract of employment and the right to manage its business severally infringed by the claimant on the basis of prima facie fact. This is the reason why this Court has consistently declined to issue provisional measures that have the effect of prejudging the propriety of the employer’s disciplinary process and decision.”

22. This finding aptly applies to the circumstances of this case.

23. The applicant has not made out a case on a balance of probabilities to warrant grant of a declaratory, prohibitory or injunctive reliefs sought by the applicant before conclusion of a legitimate disciplinary process being conducted by this employer.

24. The application lacks merit and is dismissed with costs.

Dated and delivered at Nairobi this 11th day of February, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances

A.W. Kituyi Advocates for the Applicant

Omondi Bw’onchiri Advocate for the respondents and 1st interested party.

Hon. Attorney General for 2nd interested party (Did not participate).

Chrispo: Court clerk