



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. E019 OF 2020

KENYA COUNTY GOVERNMENT WORKERS UNION.....CLAIMANT

VERSUS

COUNTY GOVERNMENT OF MIGORI.....1st RESPONDENT

MIGORI COUNTY PUBLIC SERVICE BOARD.....2nd RESPONDENT

COUNTY SECRETARY, MIGORI COUNTY.....3rd RESPONDENT

RULING

1. Alice Adhiambo Otieno, Tom Aoro, Joseph Mwita, Peter Jaoko, Vincent Odago, Samson Anyango Ngare and Jackton Apiyo (the Grievants) were employed by the County Government of Migori (the County Government). The Grievants are members of the Kenya County Government Workers Union (the Union).
2. On or around 17 November 2019, the Chief Officer, Finance wrote to the Grievants informing them of interdiction and the ground was set as *dismal performance and failure to supervise revenue collection in Uriri Sub-County*.
3. The interdiction(s) were to facilitate further investigations and the Grievants were also instructed to make responses within 7-days why disciplinary action should not be taken against them.
4. When the Union got informed of the interdictions, it wrote to the County Secretary on 20 February 2020 contending that the interdictions were not procedural, and unlawful. The Union demanded that the interdictions be rescinded.
5. The County Government did not respond and the Union sent another letter dated 11 May 2020.
6. Alarmed at the intransigence of the County Government, the Union moved the Court under a certificate of urgency on 16 November 2020 seeking the following orders
 - (a) ...
 - (b) The Honourable Court be pleased to lift the interdiction of the employees pending the hearing and determination of the case.

(c) The Honourable Court be pleased to lift the interdiction of the employees and order that they immediately be reinstated into employment pending the hearing and determination of this application.

(d) The Honourable Court does order that the 1st Respondent to pay the employees' withheld salary from November 2019.

(e) The Honourable Court be pleased to restrain the Respondents from dismissing or undertaking any disciplinary action that is likely to prejudice this case pending the hearing and determination of this application and the case.

(f) The cost of this application be borne by the Respondents.

7. On 16 November 2020, the Court directed the Union to serve the application.

8. When the application came up on 19 November 2020 for further directions, there was no satisfactory evidence that the Respondents had been served.

9. The Court directed the Union to serve afresh and set mention for 26 November 2020.

10. However, the Court was not satisfied with the service again and directed the Union to effect service pending the giving of further directions on 10 December 2020.

11. On 2 December 2020, the firm of Lumumba & Ayieko Advocates filed a Notice of Appointment to act for the Respondents.

12. During the appearances on 10 December 2020, the Court gave the following directions

(i) The Union to file /serve all documents/further affidavit before 18 December 2020.

(ii) The Respondents to file/serve responses to the Motion before 15 January 2021.

(iii) The Union to file/serve submissions before 21 January 2021.

(iv) The Respondents to file/serve submissions before 3 February 2021.

13. The directives were not complied with and none of the parties deemed it courteous to write to the Court to inform it of any challenges.

14. In the view of this Court, the failure to file/serve submissions in proceedings where it has been agreed and/or directed that parties proceed by way of submissions is akin to failure to prosecute the application or suit, as the case may be, and the Court would be entitled to dismiss such application or suit.

Hearing before interdiction

15. In the motion at hand, the Union contended that the interdiction(s) of the Grievants was unfair because they were not afforded an opportunity to be heard before the interdiction(s).

16. To support the contention, the Union drew the attention of the Court to the Public Service Commission's "Human Resources Policies and Procedures Manual, May 2016."

17. The Court has looked at the extract of the Discipline Manual for the Public Service, May, 2016 filed in Court by the Union. It does not provide for a hearing before interdiction.

18. Since the interdiction was to facilitate further investigations, the Court is not ready to accept that the Grievants were entitled to a hearing before the interdictions.

Unfair interdiction

19. The Union next challenged the interdictions on the basis that the Discipline Manual for the Public Service, May 2016 provided that interdictions should not exceed 6-months.

20. The Union also claimed that the interdictions were unfair because the Grievants had been denied half-salary they were entitled to during the interdictions.

21. The Court has looked at the Discipline Manual for the Public Service, May 2016. At paragraph 1:1 it contemplates that it would apply to a county public service upon adoption.

22. No evidence was placed before this Court that it had been adopted by the County Government of Migori.

23. This Court is aware that there is in existence a *County Public Service Human Resource Manual*, May 2013. It applies across the board and it is unfortunate that the advocates on record did not allude to it. They ought to have known of its existence.

24. This latter Manual provides at clause D.31 (d) that an employee on interdiction is entitled to half-salary, full house allowance and medical cover (unlike suspension which is without salary).

25. However, the Manual does not have a clause on the 6-month period alleged by the Union.

26. In so far as the interdiction letters did not inform the Grievants of an entitlement to half salary, full house allowance and medical cover, and with no evidence before the Court to show that the same have been paid, the Court finds that the Union has established on a *prima facie* basis that there has been unfairness.

27. The Union also challenged the fairness of the interdictions on the ground that the failure to summon the Grievants for disciplinary hearings more than 9-months after was contrary to the constitutional normative principle of fair administrative action.

28. The Court agrees with the position as advanced by the Union as it cannot be that the County Government has lacked the structure to expeditiously conduct and conclude investigations and thereafter take the Grievants through a disciplinary hearing.

Conclusion and Orders

29. From the foregoing, the Court orders as follows

(a) An order is hereby issued lifting the interdiction of the Grievants pending the hearing and determination of the Cause.

(b) An order is hereby issued directing the Respondents to pay the Grievants withheld salaries from November 2019 and full salaries unless dismissed lawfully.

30. The parties did not file submissions within agreed timelines. Each party to bear own costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 3rd day of February 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For the Union Mr. Odero instructed by Bernard Odero & Co. Advocates

For the Respondent Mr. Ayieko instructed by Lumumba & Ayieko Advocates

Court Assistant Chrispo Aura