



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO. 108 OF 2020**

**BENARD BARASA SUNGUTI.....CLAIMANT**

**VERSUS**

**NAIROBI COUNTY CHIEF OFFICER FOR URBAN PLANNING.....1<sup>ST</sup> RESPONDENT**

**NAIROBI COUNTY CHIEF OFFICERS FOR ICT.....2<sup>ND</sup> RESPONDENT**

**THE NAIROBI CITY COUNTY GOVERNMENT.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant, Benard Barasa Sunguti instituted this claim vide a Statement of Claim dated 21<sup>st</sup> February 2020 against Nairobi County Chief Officers for Urban Planning and for ICT and against the Nairobi City County Government. He avers that he has worked as a Public Health Officer with the 3<sup>rd</sup> Respondent County Government for about 12 years. He further avers that the 1<sup>st</sup> Respondent herein has removed him from his work station and generally denied him access to his office at City Hall without any reason or notice and rendered him unable to perform duties. That the 1<sup>st</sup> Respondent has also has refused to distribute to the Claimant Development Applications for vetting yet he distributes the same to the Claimant's juniors. That the 2<sup>nd</sup> Respondent has refused to open an online account to facilitate the Claimant's vet building plans applications, yet he has opened the accounts for other junior staff. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have exposed him to unnecessary psychological trauma, economic hardship, fiscal embarrassment and insubordination by the junior staff and that he is bound to suffer irreparable loss and damage due to the actions of the Respondents which amount to unlawful constructive dismissal from his employment. The Claimant prays for judgement against the Respondents for the following orders:

- a. Permanent injunction restraining the Respondents from removing the Claimant from his work station.
- b. Permanent injunction restraining the Respondents from denying the Claimant access to his office.
- c. General Damages for constructive dismissal.
- d. Costs.
- e. Any other relief that the Honourable Tribunal may deem fit to grant.

2. The Claimant states in his Witness Statement that the 1<sup>st</sup> Respondent has no power to remove him from his working station and that such actions amount to unlawful and unprocedural dismissal. That it is in the interest of justice that the Respondents and their agents and/or servants be restrained from unlawfully and unprocedurally removing him from his work station. The Respondents filed their Amended Response to the Claim on 12<sup>th</sup> June 2020 averring that there is a misjoinder of parties in so far as the Respondents are not the Claimant's employer. They deny that they have rendered the Claimant incapable of discharging his duties and responsibility or denied him access to his office as alleged and that in any case, City Hall is a public entity open to all. They aver that the Claimant has also not exhausted all the internal mechanisms to move the Honourable Court and that the issues he raises are purely administrative and ought to be heard by the Nairobi County Public Service Board. They further aver that the Claim herein falls within the purview of the Physical and Land Use Planning Act (13) of 2019 Laws of Kenya and can only be handled by a duly qualified and a registered Planner. That both the Urban Planning sector and Public Health sector are no longer within the control of the 3<sup>rd</sup> Respondent having been taken over by the National Government. That the 1<sup>st</sup> Respondent denies dismissing the Claimant and avers that the Claimant's allegations border on personal feelings and preference which cannot be equated to constructive dismissal and that the Claimant has not caused and or done anything to warrant the alleged unlawful and unprocedural dismissal. That Development Plans are distributed as and when they are available and at the discretion of the employer and that the 2<sup>nd</sup> Respondent avers that allocation of staff duties is the employer's consideration, and which is not open to the

employee to choose which duty to perform. The Respondents aver that the Claimant is misleading this Court by pleading that he is facing economic hardship and fiscal embarrassment when he continues to draw from the 3<sup>rd</sup> Respondent all of his salary, benefits and allowances in full and appertaining to his duties, responsibility and position. That the balance of convenience tilts in favour of the Respondents having established that the Claimant does not have any rights to the suit and no loss shall be occasioned to him. They deny that the Claimant is entitled to any of the reliefs sought and pray that the suit be dismissed with costs on a higher scale for being an abuse of the court process.

3. The Claimant adopted his witness statement as his evidence in court and further relied on and produced the bundle filed together with the Claim as exhibits in this case. He stated in examination in chief that his duties according to the County Government Act are as a Public Health Officer seconded to Urban Planning. That his mandate is to vet development applications, which is a legal requirement under the Physical Planning Act and the Public Health Act and that the said vetting is not a monopolistic event for urban planning. That the vetting is done electronically through an online account opened by the 2<sup>nd</sup> Respondent and that he is the in-charge in the department. That he has tried looking for his table and computer which were taken away while he had gone for tea break but the items cannot be traced and that he was removed from the vetting of the plans during the commotion. That the Public Health Department has not been able to effectively discharge its mandate which makes vetting incomplete and that the denial of an online account meant he was unable to vet the development applications until December.

4. The Claimant denied that he has not exhausted internal mechanisms and states that he did write memos which are part of his exhibits but which were never responded to. He also denied that the services were transferred to Nairobi Metropolitan Services (NMS) and stated that only policy issues were taken to NMS while the operational issues remain in Nairobi County. He also confirmed that his salary is paid by Nairobi City County.

5. In cross-examination, the Claimant stated that the online account was opened in December 2020 but is not complete and that they have 3 types: supervisory, operational and inspection accounts. That he on his part should be having a supervisory account but the one opened for him was an operational account and is thus incomplete. The Claimant stated he speculates that they want him out and in re-examination he stated that his complaint is in relation to his working environment; his working station. The Respondents did not call any witnesses and relied on their amended defence.

6. The parties were to file written submissions and the Claimant in his submissions asserts that the 3<sup>rd</sup> Respondent has been his employer for 12 years and is thus rightly joined to the suit within the provisions of the law and that he has also clearly stated in his Claim the causes of action against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. That the Respondents also admitted in their Response that he continues to draw salary and benefits from the 3<sup>rd</sup> Respondent thus proving there is a contract of service between him and the 3<sup>rd</sup> Respondent. He urges the Court to dismiss the issue of misjoinder. He submits that he gave evidence in court that he was working from a hotel near City Hall at the time of giving evidence and which evidence was never controverted by any of the Respondents. That the actions of the 1<sup>st</sup> Respondent of removing furniture and computers from his office and denying his access to the office amounts to unfair labour practices and was contrary to Section 13(1) of the Employment Act which demands that such changes ought to be put in writing. He submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' actions also breached the common law duty of an employer to provide work to an employee and which was reiterated by the Court of Appeal in the case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR**. The Claimant submits that he exhausted all the internal mechanisms to have his grievances settled by the Respondents but was not successful as can be demonstrated in his letter dated 3<sup>rd</sup> December 2019 addressed to the Chief Officer Health Services and copied to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. Regarding the reliefs he seeks in the Cause, he cites the case of **Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR** which expounded on the scope of permanent injunctions and held that the same is granted upon the merits of the case after evidence in support of and against the claim has been tendered. He further submits that the conditions for the grant of permanent injunctions were discussed by the court in the case of **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** to include: establishment of a *prima facie* case; demonstration of irreparable injury likely to suffer if the injunction is not granted; and showing that the balance of convenience is in favour of the applicant. He submits that he has established a *prima facie* case and urges the Honourable Court to protect his rights by granting the Orders sought. The Claimant further submits that if he is not granted the orders sought, he is set to suffer irreparable loss and damage that cannot be adequately compensated by an award of damages because the Respondents are making it so intolerable and difficult for him to work and which will force him to resign. He invites the Court to consider the third condition that is the balance of convenience, in the event the Court has doubt on whether to grant the injunction as sought. That the balance in granting the orders of permanent injunctions sought tilts in his favour since he is on the verge of resigning and that this Court ought to compel the Respondents to undertake their prerogative as his employers and allocate work to him and to do so in a conducive working environment.

7. The Respondents submit that the Claimant admitted to the Honourable Court during examination in chief that he is still the Respondents' employee and also informed the Court that an **Operational Online Account** was opened in his favour in December, 2020. That the Claimant's further admission that he has been carrying out his duties via his Phone and in a Cyber is relevant and effective move when managing and using the Operational Online Account. They submit that the Claimant also admitted that he was not the only occupant of his former work station as two other officers were moved to a different department and that it was the Claimant's further admission that he accessed the Respondents' premises on 10<sup>th</sup> January 2021 to follow up on a public health matter in line with his duties. That the Claimant also admitted to having not received any termination notice or warning letters or subjected to any disciplinary proceedings and that the Claimant has admitted he is receiving his full salary as required by law. They submit that the Claimant did not adduce any evidence to support his assertion that he had exhausted all the internal mechanisms before invoking the Court's intervention. The Respondents submit that they rely on the case of **Peterson Guto Ondieki v Kisii University [2020] eKLR** wherein Lady Justice Mbaru quoted the case of **Elizabeth Washeke & 62 Others v Airtel Networks (K) Ltd & Another [2013] eKLR** in defining unfair labour practice. That as can be seen from the Claimant's own admissions in the preceding paragraph, it is untrue he has been subjected to unfair labour practices by his employer. The Respondents submit that constructive dismissal is a concept accepted in employment and labour relations and was well expounded by the Court of Appeal in the case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** and that it is not sufficient for an employee to plead constructive dismissal as evidence is required to demonstrate the conduct of the employer was intolerable and led to a resignation from employment. That it is evident in the instant case that the Claimant was and still is an employee of the Respondents and therefore the allegations of constructive dismissal are unfounded in law and ought to be dismissed with costs. The Respondents submit that an injunction is an equitable remedy to which the principles of equity apply and that the Court of Appeal at Nairobi in **Eric V.J. Makokha & 4 Others v Lawrence Sagini & 2 Others [1994] eKLR, Civil Application No. 20 of 1994 (12/94 UR)** addressed itself to the issue of grant of an injunction where the action sought to be restrained has already taken place and held that equity does not act in

vain and that a court cannot stultify itself by making orders which cannot be enforced or grant an injunction which will be ineffective for practical purposes. The Respondents submit that the Claimant faces no eminent danger of any kind of dismissal and that it is apparent he faces no risk of suffering an irreparable damage should the Court not grant the injunction sought. Further, that the balance of convenience tilts in favour of the Respondents and they pray that the Court dismisses the claim in their favour. The Respondents submit that they stand to suffer loss due to negligence exhibited by the Claimant who is expected to discharge duties and responsibility assigned to him but opts to demand and choose which duties he prefers to perform. They wholly rely on the case of **Peterson Guto Ondieki** (*supra*) where the Court dismissed the claims upon finding they were made without merit, even though there was no attendance by the respondent to challenge the claims made.

8. The Claimant from all accounts continues to draw a salary from the 3<sup>rd</sup> Respondent. He thus is not dismissed though the seeds of a constructive dismissal seem to have been planted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The Claimant by virtue of the position he holds in the 3<sup>rd</sup> Respondent is entitled to an office and a workspace in the 3<sup>rd</sup> Respondent's premises and he is not to visit City Hall as any other citizen would. The Court deprecates the conduct of the Respondents who seem to lend credence to the need for the Nairobi Metropolitan Services to take over conduct of affairs at City Hall as those entrusted with the responsibility of doing their work have failed to do so or do such a poor job of it that the City in the Sun no longer has any lustre. Granted that the Claimant is still an employee it is the finding of this Court that he is entitled to the following reliefs:-

- a. Permanent injunction restraining the Respondents from removing the Claimant from his work station.
- b. Permanent injunction restraining the Respondents from denying the Claimant access to his office.
- c. Provision of an office and computer by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent facilitated by the 3<sup>rd</sup> Respondent.
- d. Opening of a supervisory account by the 2<sup>nd</sup> Respondent under the operational online account portal of the 3<sup>rd</sup> Respondent.
- e. Costs of the suit capped at Kshs. 100,000/-.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH 2021**

**NZIOKI WA MAKAU**

**JUDGE**