



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.284 OF 2020

MATILDA TENGE MWACHIA..... CLAIMANT

VERSUS

KENYA INDUSTRIAL ESTATE LIMITED..... 1ST RESPONDENT

MANAGING DIRECTOR,

KENYA INDUSTRIAL ESTATE LIMITED..... 2ND RESPONDENT

RULING

The ruling herein relates to two applications one dated 24th November, 2020 and the other dated 20th January, 2021.

Application dated 24th November, 2020 is based on the provisions of Section 5(1) of the Judicature Act and Section 3A, 1A and B of the Civil Procedure Act and seeking for orders that;

The managing director/chief executive officer of Kenya Industrial Estate Dr. Parmain Narikae being the accounting officer of the 2nd respondent be summoned before this court to show cause why he should not be committed to civil jail for blatantly and wilfully failing to comply with Orders of this court issued on 13th August 2020 and in particular failing to pay the claimant her salary for the months of July – October 2020.

On failing to show necessary cause, the said officer be committed to prison for a maximum period of six (6) months for contempt of this court's orders issue don the 13th August 2020.

The application is supported by the claimant's affidavit and on the grounds that on 6th July, 2020 she obtained temporary orders stopping the disciplinary process unlawfully commenced against her by the respondents and on 13th August, 2020 the court confirmed the orders by quashing the disciplinary process and directed the claimant to continue serving in her employment until due process is effected. The effect of these orders was to put the claimant in the position she was in prior to the disciplinary process and would therefore be entitled to her full salary and allowances.

In her supporting affidavit, the claimant avers that upon the court ruling and directions on 13th August, 2020 the respondents sought for stay orders pending appeal and which application was dismissed on 22nd October, 2020. As at 23rd October, 2020 the respondents elected to suspend the claimant from duty save she was entitled to her salary and allowances which dues have not been paid in clear disobedience of the court orders and directions. There is no reasonable cause to justify such disobedience and in the absence of any legitimate grounds, this amounts to contempt of court.

The claimant also avers that unless the court orders are complied with there shall be serious undermining of the rule of law and administration of justice. The disobedience of court orders by public officers has reached unprecedented levels rendering worthless the sanctity of court orders, the dignity of the court and the rule of law. The claimant is a widow with dependants who solely depend on her salary and has been rendered destitute by the failure of the respondents to pay her salary and allowances and for these reasons, there is contempt of court and the managing director Dr Parmain Narikae should be summoned to show cause why he should not be committed to civil jail for a period of 6 months.

The claimant also avers that despite making demands upon the respondents to pay her salary and allowances, they have refused and neglected to pay the salary due from July to October, 2020. The respondents refused her to resume employment and sent on suspension and in an effort to frustrate her deactivated her medical card so as to punish her. On 3rd November, 2020 the claimant fell ill and in need of medical attention and when she sought treatment she learnt that her medical card had been deactivated. Her lawyers wrote to the respondent in this regard without any response.

On 4th November, 2020 the respondents forwarded a cheque of Ksh.113, 860 as part of the salary for July and which cheque was dishonoured. This demonstrates that the respondents are unwilling to comply with court orders. These acts amounts to insubordination and disobedience of the court. The respondents and the managing director should be punished for contempt of court.

In reply, the respondents filed the Replying Affidavit of the 2nd respondent and Dr. Parmain Nakirae and who avers that on 13th August, 2020 the order orders that the claimant should submit to a fresh, legal disciplinary process. On 17th August, 2020 the respondents filed application seeking stay of execution of the ruling and the court issued interim orders staying the same pending hearing and determination of the application.

Dr Nakirae also avers that on the interim orders of 17th August, 2020 this meant the claimant could not report to work as directed on 13th August, 2020. These stay orders were discharged on 22nd October, 2020 and the 1st respondent opted to commence fresh disciplinary process against the claimant and for this reasons she was suspended.

On 23rd October, 2020 the 1st respondent resolved to commence fresh disciplinary process against the claimant. The subsequent suspension is lawful and in compliance with the human resource manual.

On 13th November, 2020 the 1st respondent issued a notice to show cause to the claimant highlighting the allegations made against her and gave her 21 days to respond. On 14th December, 2020 the claimant submitted her reply and the disciplinary process is still on-going. There is no disobedience of court orders as alleged and the instant application is filed in bad faith. The claimant was not chased away from her employment as alleged and the suspension was done lawfully.

Dr Nakirae also avers that the deactivation of the claimant's medical cover was done on 3rd July, 2020 when her employment was terminated until after the 22nd October, 2020 when it was activated upon the court ruling that disciplinary process should commence afresh. The claimant has annexed a confirmation that her medical cover is active. The alleged dishonoured cheque is without evidence and the reason there was payment of ksh.113, 860 was clarified vide letter dated 20th November, 2020. This payment was in part payment of advance allowances due to the claimant during suspension and not payment of terminal dues. The respondents have paid all the due payments and allowances and there is a medical cover.

The alleged disobedience of court orders and alleged failure to pay full salary and allowances is without foundation and what is claimed as salary arrears cannot form the basis of contempt of court proceedings. The only claim before court was to stop the disciplinary processes and not payment of any wages. Any non-payment of salary and allowances cannot be enforced through contempt of court proceedings and the instant application should be dismissed with costs.

The second **Application is dated 20th January, 2021** and based on the provisions of Articles 1, 2, 3, 75, 159 and 236 of the constitution, section 3, 12 and 20 of the Employment and Labour Relations Court Act and Rule 17 and 28 of the Court Rules and seeking for orders that;

a) The court be pleased to issue temporary injunction to stay the disciplinary proceedings based on the charges communicated vide respondent's letter dated 23/12/2020 and all consequential processes flowing therefrom against the application until the main suit being Nairobi ELRC No.284 of 2020 is heard and determined.

b) The court be pleased to issue an order directed to the respondents to allow the claimant too resume her duties with full salary, and without any form of victimisation whatsoever, pending the hearing and determination of the main suit herein.

c) In the alternative to prayer No.4 the court be pleased to issue a mandatory injunction to compel the respondents to pay the applicant her half salary and full allowances pending the hearing and determination of the suit.

d) Costs of this application be provided for.

The application is supported by the claimant's affidavit and on the grounds that the claimant has challenged the legality and validity of the charges levelled against her by the respondent and leading to filing of the instant suit and for the second time the respondent has commenced disciplinary proceedings over similar charges that have been impugned in the suit herein. The action of the respondent is to render the suit nugatory by infringing on the claimant's constitutional rights to equal benefit and protection of the law and access to justice.

Other grounds in support of the application are that the respondents commenced disciplinary action against the claimant without any investigations contrary to clause 11.14.1 of the HR Manual and without due process hence grossly violating articles 41 and 47 of the constitution. the offences and charges levelled are unknown in law, irregular and bad in law and there is no formal complaint against the claimant to justify being called to a disciplinary hearing all meant to circumvent the hearing of the main claim and choreographed with a set outcome to terminate employment.

The action by the respondent against two employees was in consonance with the Employment act, the Public Officers Ethics Act, Public Finance Management Act and the constitution and on prudent management of public funds. The action has no legal basis and the claimant has right under article 236 of the constitution not to be victimised for performing her duties in a public office.

In her affidavit, the claimant avers that upon filing the instant suit she challenged the disciplinary process that was unprocedural and upon the court hearing the application seeking injunctive orders the same was stayed and on 13th August, 2020 directed that she should continue serving her employment until the due process is effected but efforts to resume duty has been frustrated by the respondent who sent her on suspension which is unlawful.

The claimant also avers that she was issued with a notice to show cause and made a reply but on 23rd December, 2020 she was shocked to be invited to a disciplinary hearing on similar charges as addressed herein. The action of commencing a second disciplinary process based on the same allegations is an infringement of access to justice, discriminative, and unfair. There are no proper investigations. The allegations made against the claimant were with regard to her capacity as HR manager where she authorised recovery of salary for one of the respondents' drivers for being absent from duty. The subsequent disciplinary proceedings are victimisation contrary to article 236 of the constitution and in the interests of justice the second disciplinary proceedings should be stopped.

The **claimant also filed her Further Affidavit** on the grounds that the Court of Appeal has since dismissed the respondents application seeking stay of execution of the ruling of the court delivered on 13th August, 2020 and noted that no fresh disciplinary process could commence without the claimant being reinstated which the respondent has failed to address.

In reply, the respondents filed the **Replying Affidavit of Dr. Parmain Nakirae** the 2nd respondent and who avers that the instant application is defective and should be struck out as it is *res judicata* the issues addressed were similar to what the court addressed vide ruling delivered on 13th August, 2020 the court issued orders directing the respondent to commence fresh disciplinary process and there was no appeal against such orders and directions. The application is a clear abuse of court process.

Dr Nakirae also avers that the grounds sought to be addressed by the claimant are the same as the claimant has purported to address in an appeal to the Public Service Commission (PSC) and on 18th December, 2020 the PSC wrote to the 1st respondent seeking a response and the claimant was advised by the PSC to submit to the process.

There are no new grounds raised by the claimant to justify the instant application. Her employment is subsisting and the board of directors has since resolved to commence fresh disciplinary action against the claimant and which necessitated her suspension in accordance with the HR manual.

A show cause notice has issued and the claimant replied and was invited to a hearing scheduled for 28th January, 2021 but now stalled due to these proceedings. On 27th January, 2021 the claimant wrote seeking to adjourn the disciplinary process claiming she is in isolation and despite misgivings on the records submitted and to ensure fairness this was rescheduled vide letter dated 3rd February, 2021 for 10th February, 2021 but on 9th February, 2021 the claimant submitted a medical report with a recommendation of 5 days off and to ensure fairness the respondent rescheduled to 18th February, 2021 but on 17th February, 2021 she submitted a different medical report recommending 5 days off.

On three different occasions the claimant has obtained adjournments and having lodged the instant suit is not keen to have the issues addressed and this is further evidence of abuse of court process. The orders sought should be dismissed with costs.

Parties attended and agreed to file written submissions and the claimant submitted that the court on 13th August, 2020 directed that the claimant should continue serving in her employment until due process is effected against her or her employment is terminated for any other lawful cause. Instead of obeying these orders the respondent 23rd October, 2020 suspended the claimant indefinitely on zero salary for no good cause. On 13th November, 2020 a show cause notice issued and upon reply the claimant has been invited to a second disciplinary action which is irregular and unlawful on the face of the orders issued by the court. There is no investigations and no complaint is pending against the claimant.

The claimant has relied on the case of **Stephen Kaburia Rutere v Kenyatta National Hospital Board & another [2020] eKLR** that the respondent board had no power to employ and exercise the disciplinary powers over the claimant as such power was delegated to the staff disciplinary committee.

At the time the claimant was suspended there was no disciplinary action taken as required under the HR manual. The suspension is indefinite and without salary contrary to what the court held in **Patrick Wafula Kuloba v Director/Chief Executive Officer, Kenya Industrial Research & Development Institute [2021] eKLR** that the suspension notice did not indicate the period and hence unlawful. Such suspension on no salary is unlawful and unfair labour practice as held in **Fredrick Saundu Amolo v Principal namanga Mixed Day Secondary School & 2 others [2014] eKLR** and **Peterson Ndung'u & 5 others v Kenya Power & Lighting Co. Limited [2014] eKLR** that withholding of an employee's salary has no legal basis.

Unless the orders sought issue the claimant shall suffer irreparable damage and loss which cannot be compensated in damages and to preserve the substratum of the suit, the second disciplinary process be stopped and the claimant paid her full salary and allowances.

In reply the respondents submitted that the effect of the orders issued on 13th August, 2020 is that the respondent was allowed to commence fresh disciplinary proceedings against the claimant. The application seeking stay of these orders was dismissed and upon reinstatement the claimant was suspended to allow the respondent take her through the due process. This resulted from the fact that on 6th July, 2020 the claimant's employment was terminated and pursuant to the ruling of the court, there was reinstatement and resumption of salary payment. The medical cover was also reactivated.

There is no contempt of court as alleged, the respondent has followed the orders of the court and initiated the disciplinary process and issued notice to show cause to which the claimant replied but has since frustrated all invitations to a hearing. There is no proof of contempt of court as alleged and the application seeking to have the 2nd respondent attend to show cause why he should not be punished for contempt should be dismissed with costs.

The respondent also submitted that the claimant filed Memorandum of Claim on alleged unfair disciplinary process commenced against her through notice dated 30th April, 2020 and hence seeking the court to quash the same and to be allowed to resume her duties held as of 2nd

march, 2020. On 13th August, 2020 the court directed that;

(a) *The claimant is directed to submit to a fresh, legal disciplinary process if the respondent so wish.*

(b) *The process already in place and all consequences from the flawed process are declared null and void.*

(c) *In the interim, the claimant will continue serving in her employment until the due process is effected against her or unless her employment is terminated for any other lawful cause.*

On these orders the respondent's board deliberated and a decision taken to commence disciplinary process. Claimant was suspended and issued with a show cause notice to which she replied and has also commenced an appeal process with the PSC which advised her to submit to the process.

Disciplinary process is lawful and allowed under the HR manual and the respondents have acted within their powers to discipline its officer in cases found justified. This is based on findings of gross misconduct following investigations and a finding that the claimant be invited to attend and defend herself. Pending the disciplinary process the respondent was allowed to suspend the claimant as held in **Kenyatta University v Fred Obare [2017] eKLR**. In **Grace Gacheru v Kenya Literature Bureau [2012] eKLR** the court held that during suspension the employee has a legitimate expectation that all due salary and allowances should be paid once exculpated.

Despite the respondent inviting the claimant to attend for hearing she has continued to stall the process;

On 13th November, 2020 the claimant was issued with notice to show cause;

On 14th December, 2020 the claimant made a reply;

On 12th January, 2021 the claimant was invited for a disciplinary hearing for 28th January, 2021;

On 27th January, 2021 the claimant the claimant wrote indicating she was unable to travel from Mombasa to Nairobi;

On 3rd February, 2021 the respondent invited the claimant to a hearing for 10th February, 2021;

On 9th February, 2021 the claimant submitted a medical report that she was under treatment and on off duty for 5 days;

On 11th february, 2021 the claimant was invited for a disciplinary hearing for the 18th February, 2021; and

On 17th February, 2021 the claimant submitted a medical report that she was on 5 days off duty.

These only demonstrates that the claimant is not keen to have her case addressed as directed by the court on 13th August, 2020. She is in abuse of court process. The applications before court should be dismissed with costs.

Determination

The twin issues which emerge for determination are;

Whether there is contempt of court;

Whether the court should stop the *second disciplinary process*; and

Who should pay costs

A contempt of court application is not an ordinary day application. It should be based on precise and cogent reasons necessitating the court to stop all else and address the erosion of the rule of law. An applicant in a contempt application has the onus to prove the existence of contempt and, in discharging this onus, the applicant must show the existence of contempt of Court beyond reasonable doubt. The conduct of a respondent must be so gross that on the face of the given facts it is apparent there is contempt and the court has no option but to punish.

Indeed in contempt of Court proceedings, the Court must be satisfied beyond reasonable doubt that:

(1) There was a refusal to comply with the subject order(s);

(2) This refusal was wilful (deliberate); and

(3) The deliberate refusal to comply must be *mala fide*, in other words there must be a complete absence of any kind of *bona fide* justification for the refusal to comply (even if this justification relied on is ultimately found to be objectively unreasonable or unsustainable).

This is aptly addressed by the South Africa Labour Court in **National Union of Mineworkers and Others v B K H Mining Services CC t/a Dancarl Diamond Mine and Others, (1999) 20 ILJ 885 (LC)** that;

What must be proved according to that standard is: (a) that an order of court was granted against the respondents, (b) that the respondents were aware of the order and its terms, (c) that the respondents were in fact in breach of the order and, if so, (d) that their failure to comply with the order was wilful.

And in the case of **Fakie NO v CCII Systems (Pty) Ltd, 2006 (4) SA 326 (SCA)** held that;

But once the applicant has proved the order, service or notice, and noncompliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt. ...

In this regard, there must be intentional, reckless, careless and total disregard of the order issued. The act of defiance even where a party is aware of the existence of the court order but opts to engage in flagrant disobedience as held in the case of **Teachers Service Commission v Kenya National Union of Teachers and Two Others, (2013) e KLR** that;

[A court order] It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.

In this case, it is common cause that the claimant filed a Memorandum of Claim on 6th July, 2020 and the issue in dispute was registered as *the matter of unlawful, irregular and unfair disciplinary action* and the remedies sought in summary were that the same be declared null and void, the same be quashed, the respondent be permanently restrained from initiating any disciplinary process premised on similar charges against the claimant, the claimant be allowed to resume her duties, award of general damages and costs.

Together with the Memorandum of Claim the claimant filed her Notice of Motion seeking interim orders similar to what was in the main claim.

Upon hearing the parties, the court on 13th August, 2020 delivered ruling and directed as follows;

(a) The claimant is directed to submit to a fresh, legal disciplinary process if the respondent so wish.

(b) The process already in place and all consequences from the flawed process are declared null and void.

(c) In the interim, the claimant will continue serving in her employment until the due process is effected against her or unless her employment is terminated for any other lawful cause.

On the claims made, the court rendered itself with final orders. The claimant was allowed to resume her duties and the respondent given liberty to commence *fresh, legal disciplinary process if the respondent so wish.*

With employment secured as such point, the claimant was effectively returned to the shop floor as of 13th August, 2020 save the respondent applied for stay of execution and issued with interim orders which were pending until discharged on 23rd October, 2020.

Parties were returned back to the shop floor.

The respondent was at liberty to initiate disciplinary process as the employer. Such undertaking was court granted. The claimant cannot be found to state that the commencement of disciplinary process once back at the shop floor was contempt of court. To take such view would be to negate the very orders the claimant is currently enjoying in her employment save to assert that no disciplinary process should be undertaken against her.

The employer retains the prerogative to discipline its employees. Such must be done within the applicable law and particularly section 41 of the Employment Act, 2007 which requires notice and attendance to give a defence and as regulated under the applicable internal disciplinary policy/ HR manual.

On the facts presented before this court, the court finds no matter of contempt of court.

On alleged deactivation of the medical cover, the claimant attached annexure page 33, a letter from *Jubilee Health Insurance Limited* dated 19th November, 2020 confirming that;

... we confirm that the member and her dependants were activated on 04.11.2020 and a debit note raised as attached.

This then confirms the respondents case that upon the court ruling on the application seeking stay of execution on 23rd October, 2020 the issue of termination of employment resolved, the due benefits of medical facility was restored.

The alleged dishonoured cheque is without evidence. a dishonoured cheque is a serious offence which ought to have been addressed based on the applicable regulations. This is not the case here. A return of the issued cheque as attached at appendix 'MTM-11' is not on its own, evidence of a dishonoured cheque/payment.

On the payment of ksh.113,860 the claimant asserts that this was in part payment of her salary and the respondent asserts that this was an advance payment of the allowances the claimant is entitled to during the suspension. Such matter then cannot be addressed through affidavits. A hearing will resolve the nature of payment, the amount(s) and what is due in employment.

The cause of action addressed by the court instantly vide ruling delivered on 13th August, 2020 and stay orders having been declined on 22nd October, 2020 any matter arising therefrom with regard to non-payment of salary and allowances is a new cause of action and cannot be addressed in the current proceedings. To do so would negate the right to a fair hearing and deny the respondents the right to a defence based on a new claim(s).

On the second issue for determination as to whether the second disciplinary process should be stopped, on the findings above, there being no contempt of court, the respondent allowed to initiate fresh disciplinary process against the claimant, the claimant cannot turn around and be found to state that while her employment subsists no case with regard to alleged misconduct should be undertaken against her by the respondent. To the contrary, such fresh disciplinary process is court sanctioned. The claimant should willingly submit to the same and where not culpable she will return to her duties and where culpable, appropriate sanction to issue in accordance with the internal policy or the applicable law.

The claimant has since been issued with a show cause notice and replied. It is also apparent to the court that there are several invitations to attend hearing and for one reason or the other the claimant has not obliged.

The rationale for suspension is to remove the claimant from the shop floor to allow the disciplinary process to conclude. The claimant remains in the employment of the respondent and should oblige lawful instructions and directions and where there are unreasonable bottlenecks set by the claimant, nothing stops the respondent from application of section 44 of the Employment Act, 2007.

In **Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust [2017] eKLR** the court held that where an employee squanders the opportunity granted for a fair hearing, the employer is justified to terminate employment for gross misconduct as envisaged under section 44 of the Employment Act, 2007. The court held;

Where the employee has the right to a hearing, the employer has the right to terminate the employee upon following due process. Where an employee squanders the chance to be heard the employer cannot be found to have acted unfairly where great effort was taken and is demonstrated to have been applied to have the employee heard but such employee remained adamant and made irrational demands to avoid a hearing.

The claimant remains at the directions of the respondent and upon summon to attend at the workplace/shop floor, she should willingly attend. Absence from work without the sanction of the employer even where the employee enjoys medical leave should be with approval of the employer.

Where the employee continues to be absent from work due to illness, the motions of section 30 and 34 of the Employment Act, 2007 and applicable internal policy with regard to approval for leave of absence from work apply. an employee who absents herself from work due to illness is hence regulated.

In **Jennifer Osodo versus Teachers Service Commission [2013] eKLR** where the court held as follows;

...an employee facing disciplinary action cannot be allowed to hold their employer to ransom by taking the position that they will only attend disciplinary proceedings at their convenience. I have examined the facts and circumstances of this case and I am satisfied that the respondent afforded adequate opportunity to the claimant to defend herself but she threw away the opportunity. She stretched her luck to the wire prompting the respondent to dismiss her for desertion of duty. I find both the respondent's action and the attendant procedure justifiable. The claimant's claim for unfair termination of employment therefore fails.

In this case, taking the cause of action registered herein and being unrelated to the issues now addressed by the claimant, both applications are found in abuse of court process. The claimant cannot hold the respondent to ransom and cling on the positive parts of the orders granted on 13th August, 2020. Failure to attend as directed by the employer is tantamount to breach of the employment contract. The respondent is at liberty to proceed as found appropriate.

Accordingly, applications dated 24th November, 2020 and the other dated 20th January, 2021 are found without merit and hereby dismissed. The claimant shall abide lawful directions issued by the employer. Where there is disobedience of directions issued the respondent shall be at liberty to deal with subsisting employment as deemed necessary. Costs awarded to the respondents.

DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF APRIL, 2021.

M. MBARU

JUDGE

In the presence of:

Court Assistant: Okodoi

.....and