



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION NO. E003 OF 2021

WILKISTER AWINO OJIENDA.....PETITIONER

VERSUS

THE DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

RULING

1. The Petitioner through her Amended Notice of Motion Application dated 12th March 2021 seeks for the following orders:

i. Spent

ii. Spent

iii. *THAT pending the hearing and determination of this application inter partes and or till further orders of this Court, a conservatory order be and is hereby issued suspending the Petitioner's interdiction taken vide the Respondent's Letter dated 9th December 2020 as amended, vide the letter dated 14th December 2020 by stopping any further deduction and or withholding of the Petitioner's pay and re-instating the Petitioner's full pay and benefit forthwith, directing the Respondent to cause the payment to the Petitioner of her withheld salaries, her posting without discrimination and accord her due career advancement.*

iv. *THAT pending the hearing and determination of this Petition and or till further orders of this Court, a conservatory order be and is hereby issued lifting the Petitioner's Interdiction taken vide the Respondent's Letter dated 9th December 2020 as amended vide the letter dated 14th December 2020.*

v. *THAT costs of the application be to the petitioner.*

vi. *THAT this Court shall deem just.*

2. The Application is premised on the grounds that the disciplinary action and interdiction commenced against the Petitioner by the Respondent and or his delegate lapsed on or about the 9th of March 2021 after three months of its commencement as under Clause 11.17.5.5 of the ODPP Human Resource Manual, without any investigations or action being taken. That continuation of both the disciplinary action and interdiction is arbitrary, unreasonable, irrational, illegal and unconstitutional and should be immediately remedied by this Court. That the Petitioner's interdiction is premised upon her official action of prosecuting a court case (**Ngong CM Misc. Criminal Application No. E023 of 2020**) in good faith and from which she is by statute immune from personal liability. That the said interdiction was further given without notice or a hearing and in reliance of a different officer's and/or wrong personal file number and consequently stopped half of the Petitioner's salary. That there also has been no case instituted to justify the Petitioner's interdiction thus rendering the interdiction erroneous on its face. That the Petitioner's right to fair procedure before the Authorised Officer is not guaranteed because the whole action has been contrary to the administrative law maxim, '*Delagatus Non Potest Delegare*' (a delegate cannot delegate), and that her Appeal has been deliberately ignored. Further, that the Interdiction letter dated 9th December 2020, the subsequent correspondences and another letter backdated 14th December 2020, purportedly from the Respondent are incompetent and otherwise invalid for being authored by the Secretary of Public Prosecutions, a Non-Authorised Officer. That since the authorised officer exercises delegated powers of the Public Service Commission as regards employment matters in his Office, he lacked the capacity to delegate that power to interdict/hear/consider the Petitioner's Appeal as he had purported to do. That the Petitioner was already replaced arbitrarily without investigations and in violation of her rights to natural justice thus negating the need for her interdiction and that alternatively, investigation was concluded on 23rd December 2020 when interdiction of her colleague accused of similar charges was lifted.

3. Further, that the interdiction has resulted in the violation of the Petitioner's right, including the right to the secure protection and benefit of the law, and has resulted in the loss of her reputation amongst her peers, loss of gainful and fulfilling employment and a lapse into financial

ruin. That this Court ought to intervene for interim relief to lift the interdiction and have her pay including the withheld pay reinstated.

4. The Respondent filed a Replying Affidavit sworn by the Head of Human Resource Management Division within the Respondent's Office, Monica Mburugu. She avers that intelligence reports and other complaints regarding the conduct of the Petitioner/Applicant as a Prosecution Counsel made the Respondent transfer her forthwith to the headquarters and investigations commenced immediately and that the Petitioner/Applicant was then interdicted on 9th December 2020. That the Petitioner's interdiction is premised on her professional misconduct in Misc Criminal Application No. E023 of 2020 that led to adverse orders being issued against the Republic in a public interest matter, and her actions which are against the code of conduct and ethics for public prosecutors. She further avers that the issue of the Petitioner's personal file number was a minor typographical error that does not invalidate the contents of the interdiction letter since her particulars such as names and address are written correctly. She urges this Court to ignore the said error as the same is not fundamental and no prejudice has been occasioned to the Petitioner. She avers that interdiction is a disciplinary procedure pending investigations and is no way conclusive of the case against the Petitioner as alleged and that the Petitioner's Appeal forms part of the yet to be concluded investigations. That the Respondent has been unable to finalize its investigations within the three months stipulated in the Manual because of the extensive investigations, gathering of exhibits and evidence from various investigative agencies such as the forensic analysis unit, and recording of witness statements from members of the criminal justice system and the Court Users Committee. That the same has further been occasioned by the COVID-19 pandemic which the country is currently and heavily grappling with and she avers that the delay in completing the investigations is not inordinate considering the forgoing unique circumstances. That Clause 11.17.5.1 of the ODPP HR Manual provides that:

'Interdiction is a procedure applied on serious disciplinary cases that require investigations involving any breach of the rules and regulations in order to allow establishment of fact(s) of the case.'

5. Further, that Section K3 (4) of the HR Manual for the Public Service of May, 2016 provides that discipline cases should be dealt with promptly and finalized within a period of six months and that the said being a latter manual, the said provision overrides the ODPP Manual. She further avers that Section K6 (2) of the HR Manual for the Public Service May, 2016 provides that an officer who is interdicted shall be eligible for half of their basic salary with full house allowance and medical benefits. That the Respondent has not withheld any such benefits from the Petitioner as evidenced by her attached payslips and that her admission of having received all the aforementioned benefits renders her application for conservatory orders misplaced and unsubstantiated. She avers that the authority to sign the interdiction letter was delegated and done on behalf of the Director of Public Prosecutions. That the other colleague jointly interdicted with the Petitioner was found not to have handled the said miscellaneous criminal application and the Respondent had thus no reasons to keep her on interdiction. Further, that the decision to interdict is justified in serious cases of misconduct and disciplinary cases and that no determination of the case against the Petitioner/Applicant can be made without according her a fair hearing and a chance to defend herself. That the Petitioner can thereafter further appeal in accordance with Clause 11.20.1 of the ODPP HR Manual. She avers that reinstatement of an employee is a substantive remedy and not a temporary relief and that the law does not contemplate that reinstatement issues as a provisional measure as was reiterated in the case of **Professor Gitile Naituli v University Council Multimedia University College & Another [2013] eKLR**. That the Petitioner has also failed to meet the threshold for grant of conservatory orders in her Application and that the case of **Martin Nyaga Wambora v Speaker of The County Assembly of Embu & 3 Others [2014] eKLR** set out 4 principles for grant of conservatory orders i.e. demonstrating a *prima facie* case with a likelihood of success or the likelihood to suffer any prejudice if conservatory orders are not granted; whether the matter will be rendered nugatory if conservatory orders are not granted; public interest must be considered before grant of a conservatory order (see **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others [2014] eKLR**); and whether grant of conservatory orders will result into a delay in early determination of the dispute. She avers that the interim orders sought by the Petitioner will undermine the Respondent's authority in dealing with disciplinary cases and set a bad precedent amongst staff within the Respondent Office and further erode the values and principles of public service. That conservatory orders being granted at this stage will undermine the Respondent's efforts to have the matter that is scheduled to be heard within a reasonable time delayed further. She asserts that the Application is misconceived, frivolous and vexatious as the Petitioner has not demonstrated how the Respondent acted irrationally, unreasonably, ultra vires and or contrary to the Rule of Law and the Constitution. She thus urges this Court to disallow the Application and dismiss the same with costs to the Respondent and further allow the investigations and hearing, if any, of the case against the Petitioner to proceed to its logical conclusion.

6. The Petitioner/Applicant's advocate stated that they filed their Preliminary Objection and Further Affidavit in opposition of the Replying Affidavit sworn by Ms. Monica Mburugu on 9th April 2021 and prayed that the same be deemed properly on record as part of their Application. He argues that the Petitioner is being taken through a disciplinary process which is conceded in the Replying Affidavit as fishing for proceeds of loss. That the Interdiction and disciplinary processes should have been undertaken as per the ODPP HR Manual Clause 10.15.5 and that the process is time lapsed and should thus not continue. He further submits that the personal file number used to withhold the Petitioner's pay is illegal while the date of conduct as alleged is not specified in the Interdiction letter. That all these disciplinary processes seek to stop the career advancement of the Petitioner as she has been deployed in the same job group for the past 7 years and that the entire process is unlawful and violated the rights of the Petitioner. That the Petitioner should be granted prayers 3 and 4 to stop the entire process, reinstate the Petitioner's pay and arrears paid. He submits that they rely on the Submissions and Authorities filed. Counsel for the Petitioner/Applicant further submits that the person who is supposed to respond is the Attorney General as the representative of the Central Government in legal proceedings, subsequent to the provisions of the Office of Attorney General Act 2012. That the Respondent has violated and further failed to protect the Rule of law and the rights of the Petitioner and that the Reply is filed in personal capacity. He refers to the case of **Microsoft Corporation v Mitsumi Computer Garage [2001] eKLR** urging that the affidavit be struck out and that they further rely on the case of **Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 Others [2014] eKLR**. He further submits that the Petitioner should have been interdicted for just reason and that she was not standing in the way of any investigation. That by 7th December 2020 no investigation was underway and that there is no evidence to show she conspired with the Magistrate whose decision she was not in a position to interfere with. He submits that the DCI is in control of the police file and she had no control of the said file and that the complaints are thus a witch hunt. He urges the Court to allow them have orders as prayed. The Respondent's Advocate stated that they rely on their Replying Affidavit by Miss Monica Mburugu sworn on 10th April 2021 and seek to have the same deemed as part of the record. That the said deponent is Senior Assistant Director HR Management on behalf of the Respondent and in charge of all disciplinary matters in the Respondent's office and is thus competent to swear on the deposition therein. She further submits that they oppose the Motion filed and read to the Court the correct personal file number of the Petitioner as 2011003930 and submitted that the error of one digit should not invalidate the interdiction. That the Petitioner not only acknowledged the interdiction letter and its contents but is the only senior prosecution official bearing the names Wilkister Awino Ojienda. That the Petitioner will be given all

the evidence and grounds in support of the case in the procedure at the ODPP, be given the opportunity to be heard before the Board and also have an option to appeal its decision. That it is not conclusive that the case will go to the Board as it may result in resolution before conclusion of investigations and that that issuance of conservatory orders will prejudice the matter. She further submits that discipline aspects are personal and handled on a case to case basis and that the Petitioner has therefore no basis to argue on the lifting of her colleague's interdiction. That on the issue of the Magistrate mentioned in the Petition, the Respondent's mandate does not extend to investigating judicial officers and which mandate falls under the JSC. On reinstatement, she submits that the Order will take away the prerogative of the Respondent to commence and conclude the disciplinary process. Further, that the Petitioner has not met the threshold for grant of the conservatory orders as she has failed to establish a *prima facie* case. That the ODPP Manual permits disciplinary cases for gross misconduct and which allows them to investigate and determine the issues at play and that the Court should weigh public interest test against private interest. That there is further no specificity of the orders alleged to be violated and urged the dismissal of the application with costs.

7. The Petitioner/Applicant's advocate stated in a rejoinder that since the Respondent rely on the ODPP HR Manual and which was also specified in the letter of interdiction, the Respondent's reliance now on PSC HR Policy is baseless and an afterthought. He referred to section 69(3) and submitted that the process has offended the natural rights of the Petitioner who needed to be heard before her interdiction and given the chance to defend herself. That the Respondent however commenced investigations after interdiction and therefore the entire process is flawed. That the power of immunity under section 15 of the ODPP Act, 2013 are not challenged and that the threshold has been met by the Petitioner and that the only issue on public interest is the Respondent has a duty to protect the officers under it. Further, that the Petitioner has demonstrated distinctly a violation of her rights.

8. The Petitioner/Applicant seeks to stop the Respondent from exercising its managerial prerogatives. Courts are loath to interfere with managerial prerogatives noting that in the case of **Alfred Nyungu Kimungui v Bomas of Kenya [2013] eKLR** my brother Rika J. held as follows:-

“The Employment Act does not intend that Courts take away managerial prerogatives from employers. To give the interim order would have the effect of stifling the management prerogative in staff administration. It would mean the employer does not have any more say in the contract of employment it has authored. This would be contrary to the intention of the Employment Act, which seeks to merely protect the weaker of the bargaining partners, not deprive the employer the power to run its business altogether.”

14. The Industrial Court should be cautious in exercising its jurisdiction, so as not to appear to take over and exercise managerial prerogatives at workplaces. Grant of interim orders that have the effect of limiting genuine exercise by management of its rights at the workplace, should be avoided. Termination of employment, and initiation of disciplinary processes at the workplace, are presumed to be management prerogatives. The Court should be slow in intervening, particularly at interlocutory stages, otherwise the Court would be deemed to be directing the employers in regulation of their employees.

In the instant case the Petitioner has a disciplinary process underway and it is important the Petitioner is accorded the right to hearing before the relevant organs of the Respondent and it is only when that hearing takes place that the jurisdiction of this Court can be properly provoked. The motion is devoid of merit and is dismissed albeit with no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this 21st day of April 2021

Nzioki wa Makau

JUDGE