



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. E466 OF 2020

FREDRICK WANYONYI SIMIYU.....CLAIMANT

VERSUS

THE ACTING CHIEF EXECUTIVE OFFICER,

KENYA MEDICAL SUPPLIES AUTHORITY.....1ST RESPONDENT

THE BOARD OF DIRECTORS, KENYA MEDICAL SUPPLIES AUTHORITY...2ND RESPONDENT

RULING

1. The application dated 30/8/2020 was filed by the Claimant/Applicant praying for an order in the following terms:-

1. Spent

2. Spent

3. Spent

4. Pending the substantive hearing and determination of this cause, this Honourable Court be pleased to suspend the implementation of the decision contained in the Respondents' Letter dated 25th August, 2020 interdicting the Claimant/Applicant.

5. Pending the substantive hearing and determination of this cause, this Honorable Court be pleased to issue a temporary injunction restraining the Respondent from proceeding with any further disciplinary proceedings against the Claimant/Applicant based on the reasons contained in the letter of 25th August, 2020.

2. The application is premised on grounds 1 to 28 set out on the face of the

Notice of Motion the nub of which is that the Claimant/Applicant was served with a letter of interdiction on 25/8/2020 by the Respondent citing the claimant's failure to properly advise the management and the Board in regard to award of contracts and divulging information to unauthorized persons by leaking of Kenya Medical Supplies Authority's (KEMSA's) reports, documents and communications with regard to COVID-19 and misappropriation of funds vide dubious procurement.

3. That this attracted world attention including World Health Organization likening it to murder and the President has ordered Ethics and Anticorruption Commission (EACC) and Director of Criminal Investigation (DCI) to conduct immediate investigations.

4. That the Global fund and United States Agency for International Development (USAID) have threatened to withdraw funds that were meant to support HIV/AIDS and Tuberculosis programs for the next 3 years.

5. That going by the gravity of the alleged misappropriation of COVID-19 funds, even if it was true that it was the claimant who was the whistle-blower of the issue at hand, which is vehemently denied, that cannot be a basis of instituting disciplinary action against him including the decision by the 1ST respondent to interdict him from his position.

6. That on 17/4/2020, Solicitor General gave Kenya Medical Supplies Authority (KEMSA) an elaborate advisory on procurement procedures to follow in making COVID-19 purchases and therefore it was spurious to blame the claimant for failure to advise the 1st respondent on the same matter.
7. That the interdiction is unfair, unlawful and unconstitutional as it is an end in itself, and makes no reference to a pending disciplinary hearing. That same is indefinite and the claimant has not been asked to make any representation which amounts to being condemned unheard.
8. That the interdiction violates Kenya Medical Supplies Authority (KEMSA) Human Resource and Administration Policies and Procedures Manual which lays down the step by step disciplinary process to be followed in case of an alleged misconduct.
9. That the 1st respondent ought to have served the claimant with a Show Cause Letter before interdicting him. That the claimant's right to fair Administrative process has been threatened and or violated.
10. The career of the claimant has been placed in jeopardy by the illegal actions of the 1st respondent.
11. That the Court do exercise its discretion to set aside the respondent's decision pending the hearing and determination of the suit.
12. The respondent filed a replying affidavit deposed to by **Mr. Edward Njoroge**, the 1st respondent and dated 15th September, 2020 in which he states that the interdiction of the applicant was in terms of Kenya Medical Supplies Authority (KEMSA) Human Resource and Administration Policies Procedure Manual at paragraph 21.17 which provides:-

“An officer may be interdicted to allow investigations to be conducted in a case where proceedings may lead to his dismissal. The Chief Executive Officer or an officer authorized by him may order the interdiction of an employee where it is considered that the employee having committed a serious offence is in serious breach of discipline and must cease to exercise the duties of his/her position. During the period of interdiction, proceedings shall be instituted to establish the facts of the case. The interdictions shall not exceed 3 months, except in cases that involve police investigations.”

13. The 1st respondent deposes that the interdiction is lawful and was done to allow investigations to take place but was not in itself punishment. That provided the interdiction does not exceed 3 months, it is lawful and procedural and the period should also permit a disciplinary panel to be established by Kenya Medical Supplies Authority (KEMSA) in terms of the Kenya Medical Supplies Authority (KEMSA) Human Resource manual aforesaid should it be necessary.
14. That the applicant will be presented an opportunity to answer to charges that may arise against him and therefore, the applicant's allegation that he has been denied fair administrative process and opportunity to be heard is presumptive and premature.
15. That the Court should be slow to interfere with the disciplinary mandate of an employer and should only interfere upon conclusion of the process and a decision made which is not the case in this matter. The respondent prays that the application be dismissed with costs.

Determination

16. The parties filed their respective submissions and list of authorities. The Court has carefully considered the depositions by the parties and their respective submissions and has delineated the issue for determination to be whether the Applicant has satisfied the requirements for grant of an interlocutory injunction pending the hearing and determination of the suit.
17. The requirements were well set out in the case **of Giella –vs- Cassman Brown and Company Limited [1973] E.A. 358** - that firstly, the applicant must establish a *prima facie* case with a probability of success; secondly, the applicant must show that he /she is likely to suffer irreparable harm that cannot be compensated by damages if the suit is successful and in case of doubt, the Court to rely on balance of convenience.
18. Without getting into the merits of the suit the Court has determined that the letter of interdiction dated 25/8/2020 was issued to the applicant following a sitting of a special full board of the respondent on the same date in which the Board resolved to interdict the applicant for the two reasons stated in the letter to wit:-
 - (i) Failure to properly advise the management and the Board in regard to award of contracts.
 - (ii) Divulging information to unauthorized persons through leakage of the Authority's reports, documents and communications.”
19. It is explicit from the letter that the board did not indicate what steps if at all it intended to take against the applicant during the period of interdiction.
20. The letter itself did not indicate for what period the applicant had been interdicted. The interdiction is therefore indefinite and open ended. The interdiction was said to take place immediately.
21. The suit was filed on 31st August, 2020. The 1st respondent did not indicate in the replying affidavit dated 15/9/2020, nor in the submissions filed on 4/2/2021 what further steps if at all have been taken against the applicant since he was interdicted on 25th August, 2020.

22. It is opportune to note that by the time the submissions were filed by the 1st respondent on 4/2/2021 more than five (5) months had lapsed since the applicant was interdicted.

23. At the exparte stage, Hon. Maureen Onyango issued an interim injunction staying the letter of interdiction dated 25/8/2020 and in the words of the Court at that exparte stage, ***“it does not comply with paragraph 21.17 of the Kenya Medical Supplies Authority (KEMSA) Human Resource Policies and Procedures”***

24. The 1st respondent has not stated in the replying affidavit and or in the written submissions filed on 4/2/2021, more than five (5) months later what lawful investigations have been conducted on the matters alleged against the applicant that would justify his interdiction notwithstanding the injunction issued against the impugned letter of interdiction.

25. A purposive interpretation of the Kenya Medical Supplies Authority (KEMSA) Human Resource Policies and Procedures Manual and in particular Chapter 21 thereof titled ***“21.0 Policy on Discipline”*** clearly shows that with regard to major offences and Gross Misconduct Offences, ***“the formal disciplinary procedure starts with a Show Cause Letter”*** (emphasis mine) in terms of Section 21.12 (c) followed by a Disciplinary process in terms of Section 21.13 which provides: -

“21.13- Disciplinary procedure in instances of major and gross misconduct, the following procedure will be followed: -

(a) The matter shall be reported immediately by the departmental head to Human Resource Administration Manager (HRAM).

(b) Investigations into the alleged misconduct will be instituted and if appropriate a written notice suspending or interdicting the employee from attendance for a specified period while investigations take place will be issued.”

26. It is beyond par adventure that the 1st respondent completely failed to comply with the 2nd respondent’s Human Resource Policies and Procedures Manual and the applicant has demonstrated a *prima facie* case with a probability of success that warrants the Court to confirm the interlocutory injunction already issued by the Court at the exparte stage.

27. It must be remembered that the 1st and 2nd respondents are public officers and institution respectively which are bound by the principals and values enshrined under Articles 10(1) & 20(1) of the Constitution. It follows that the respondents are bound to observe, the provisions of Article 41(1) by respecting the right of every person to fair labour practices; Article 47(1) by respecting the right of every person to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and Article 236 which provides: -

“A public officer shall not be: -

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”

28. The Court need not gain say that the provisions of Employment Act, 2007 with regard to disciplinary process which have been expressly adopted in Chapter 21 of Kenya Medical Supplies Authority (KEMSA) Human Resource Policies and Procedures Manual are mandatory. In this regard, Section 41 of the said Act on disciplinary procedure must be observed before any punitive step is taken against an employee.

29. Accordingly, the application succeeds and the Court confirms the temporary injunction as prayed for in the application by staying the letter of interdiction dated 25th August 2020 pending the hearing and determination of the suit.

30. Costs in the cause.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY, 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 ruling 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

Bryan Khaemba,

Kamau, Kamau, & Co. Advocates for the Claimant/Applicant

Ong'anda & Associates for the respondent

Ekale – Court clerk