



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION NO. E084 OF 2021

JAMES AMBUSO OMONDI.....PETITIONER/APPLICANT

VERSUS

DR. ALICE MERCY WAHOME.....1ST RESPONDENT

KENYA UNIVERSITIES AND COLLEGES

CENTRAL PLACEMENT SERVICES (KUCCPS).....2ND RESPONDENT

RULING

1. The Petitioner/Applicant filed a Notice of Motion application dated 7th June 2021 seeking to be heard for orders that pending hearing and determination of the application *inter partes* and of the Petition, a conservatory order does issue staying the Respondents' decision of 25th May 2021 to suspend the Petitioner from employment indefinitely and without pay. Further, that pending hearing and determination of the Petition, a conservatory order does issue:

- a. Suspending the Respondents' decision to suspend the Petitioner indefinitely and without pay;
- b. Directing the Respondents to pay the Petitioner his lawful dues as they fall due; and
- c. Prohibiting the Respondents from re-advertising the Petitioner's position or otherwise interfering with his employment contract in the pendency of this litigation.

2. The Petitioner/Applicant also seeks that each party bears its own costs to preserve the employment relationship between the parties. The Application is premised on the grounds that the Respondents unconstitutionally, unlawfully, and unfairly suspended the Petitioner from service and directed the Petitioner to stay away from the office until advised. The Petitioner asserts that the disciplinary action against the Petitioner violates the guarantees of procedural fairness in the 2nd Respondent's HR Policies and Procedures Manual since the 1st Respondent unilaterally suspended the Petitioner as complainant, prosecutor, and judge. The Petitioner sees the indefinite suspension without pay as a threat of unfair termination and a violation of his fundamental rights and freedoms under Articles 10, 27, 28, 41, 47, and 50 of the Constitution, the Employment Act, the Fair Administrative Action Act and KUCCPS' Human Resource Policies and Procedures Manual. The Petitioner/Applicant asserts that he is apprehensive that going by the conduct of the 1st Respondent and the inhuman treatment she is subjecting him to, the Respondents may be planning to breach the contract of employment, unless restrained by this Court. The Applicant avers in his Supporting Affidavit that he is currently employed by the 2nd Respondent as Director-Corporate Services earning a gross monthly salary of Kshs. 450,239/- plus other employment benefits and allowances and that sometime in December 2020, the 2nd Respondent advertised to the public his position among others to which he submitted an application with all required supporting documents vide a letter dated 6th January 2021. The Petitioner asserts that the board members conducted a shortlisting exercise and after being invited and attending two interviews, he was given an offer letter dated 16th April 2021 requesting him to report immediately. The Petitioner asserts that after salary negotiations, he took up the appointment on Monday 26th April 2021. He further avers that on 11th May 2021 at around 2.30pm, the CEO who is the 1st Respondent herein, summoned him to her office where the KUCCPS Board Chairman was present and he was orally questioned about letters written to him by his former employer, Water Resources Management Authority (WaRMA); some investigations the EACC was conducting on him; and the existence of an active criminal case and a labour dispute between WaRMA and him. The Petitioner asserts that after the interrogation, the 1st Respondent verbally suspended him from work for 5 days until 17th May 2021 and that he submitted the requested write up to the 1st Respondent on the said 17th May, who again verbally suspended him from work for 9 days until 25th May 2021 at 2.00pm. The Petitioner averred that when he reported back to work as scheduled, the 1st Respondent was engaged and that on 26th May 2021 she issued him with the suspension letter dated 25th May 2021 which he contends is unconstitutional, unlawful, and unfair because it is indefinite and without pay and also made without a fair hearing. The Applicant avers that he stands to suffer irreparably as his

career will be crippled if the Respondents go ahead to breach the employment agreement.

3. The Respondents filed a Replying Affidavit dated 21st June 2021 sworn by the 1st Respondent who deposed that it is not contested that the Petitioner herein is an employee of the 2nd Respondent, which relationship commenced on 26th April 2021 when he reported to work. She avers that it is her paramount mandate as the CEO of the 2nd Respondent and Secretary to the Board of Directors to participate in the interviews and recruitment of persons to fill vacant positions within the institution and was therefore present in the two interviews of the Petitioner herein. She confirms that the Petitioner's integrity and moral society standing was questioned when he appeared before the interviewing panel and that his answers to the questions were an unequivocal no. The 1st Respondent further reveals that while the Petitioner ranked third in the interview score sheet of the interviewing panel, the best ranked candidate had an unfavourable reference and the second best ranked candidate declined the job offer. That it is for this reason the Petitioner was invited for a second interview to discuss his remuneration package, duties, responsibilities and employment history before being issued with an appointment letter. The 1st Respondent avers that barely two weeks after the Petitioner had reported to work, the 2nd Respondent received results from its background check on the Petitioner which revealed he had grossly concealed material information about having active criminal cases in court and which information if revealed, would have substantially altered the decision to appoint the Petitioner. That however, the Petitioner denied existence of any such cases when they sought clarification from him but finally conceded and apologised when the relevant cases were highlighted to him later the same day. She asserts that the Petitioner was then by consensus given up to 17th May 2021 to furnish his interdiction/termination letter from the said former employer together with all other documents pertaining to any concluded and/or on-going court cases involving him and that the Petitioner was then lawfully suspended from service pending disciplinary proceedings. She asserts that when the Petitioner was invited to appear before the Human Resource Board Committee to shed more light on the issues, he failed to attend the said sitting. The 1st Respondent further avers that it is glaringly ascertainable that the Petitioner in his usual nature concealed material information from this Honourable Court with the hope of obtaining interlocutory relief, by alleging in the pleadings that he had been suspended indefinitely while all the while concealing that he had been invited to the first preliminary investigation hearing which he snubbed. The 1st Respondent asserts that the Human Resource Board Committee convened a meeting on 11th June 2021 to investigate the new information and concluded that during the recruitment interview, the Petitioner had intentionally concealed important information on adverse matters touching on his integrity and that this position was further affirmed by the EACC in their letter dated 9th June 2021 which also threatened investigations and actions against the 2nd Respondent's officials involved in the Petitioner's appointment. She further confirms that the Petitioner has since been issued with a show cause letter requiring his appearance for a disciplinary hearing before the full Placement Service Board on 6th July 2021 at 8.00am.

4. She avers that the Director Corporate Service is an integral position of the 2nd Respondent since the holder of the office oversees all the major departments of the 2nd Respondent and reports directly to the CEO of the institution and which is the reason why the said Director has to be of questionable character. She asserts that the said Director is further responsible over the 2nd Respondent's finances and that therefore, the body with the jurisdiction to handle disciplinary action against the Petitioner is the Placement Service Board. She asserted that an order lifting the Petitioner/Applicant's suspension will consequently cancel the lawful disciplinary proceedings against the Petitioner and which would not be in the interest of justice. She further avers that where an officer has been suspended from service, they are entitled to full house allowance, medical benefits but no basic salary and confirms that the Petitioner/Applicant's medical insurance is still active. She asserts that the Petitioner/Applicant has refused, denied and/or neglected to give back possession of the 2nd Respondent's official assets despite communication on the same severally and that as per policy, as long as he remains in possession of the said assets which are worth hundreds of thousands of shillings, he cannot be paid what is due and owing. She prays that the Application dated 7th June 2021 be dismissed as the Applicant has intentionally concealed material information from this Honourable Court while failing to establish justifiable grounds to warrant granting of the said order.

5. In response, the Petitioner/Applicant in his Further Affidavit dated 29th June 2021 denies concealing any information about any pending cases and annexed documents including an EACC self-declaration form where he had indicated he had previous litigation. He further avers that no law allows an employee to be suspended indefinitely with no pay and that the law is that a public officer who is charged is suspended on half pay. The Petitioner asserts that the EACC letter dated 9th June 2021 was written two weeks after he had been suspended and was therefore not the justification for his indefinite suspension without pay and further, that he is being punished for exercising his rights against his former employer and the indefinite suspension derogates from the right to presumption of innocence. He asserts that he was invited for a hearing while serving the indefinite suspension and after he had already filed the suit herein and that his response to the same requesting for sufficient notice and additional information has never been responded to date.

6. Mr. Ochiel for the Petitioner/Applicant argued that the suspension has negatively impacted the Petitioner's right to life by denying him a right to livelihood and submitted that courts have held indefinite suspension to be unlawful. The Applicant argued that the Respondents threaten to render the Petition nugatory and that the Petitioner has been denied of his request for information and has only learnt of the matters from the pleadings. He pointed out the letter by the EACC and questioned whether it is not a requirement that the rules of natural justice are to be followed. He urged the Court to interrogate if a public institution can indefinitely suspend an employee and submitted that the reasons advanced are not proper.

7. Mr. Walukwe for the Respondents argued that the Petitioner/Applicant is seeking an order suspending his being disciplined. He submitted that the suspension is not without pay nor is it indefinite and that the Petitioner had been invited to appear before the HR Committee for investigations and even responded to the Board request. He argued that the word "indefinite" is not the word to be implored in the circumstances and that the Petitioner is guilty of concealing the reason why he was suspended, which is concealing before the interviewing panel that he has pending cases. He further submitted that the Petitioner's suspension was carried out in compliance with Clause 11.5 of the HR Policy and Procedures Manual and that the authority to suspend even before the disciplinary proceedings are undertaken is provided for. He argued that the Claimant is allowed to full house allowance and medical benefits but no basic salary per Clause 11.5 (2) and that under Clause 11.5 (4), if an employee is acquitted all withheld salary is to be restored immediately. He argued that the HR Procedures Manual has been followed and that the only reason the one month's house allowance is withheld is because he has refused to hand in the MacBook Pro Laptop, iPad and the chargers. He stated that the Respondents have not said they will not pay but that the Petitioner has to follow procedures and that the Petitioner is not above these procedures. He referred to the case of **Josephat Mutura Mberia & Another v Council of Jomo Kenyatta University of Agriculture and Technology (JKUAT) [2013] eKLR**, where it was held that determination of unfair or wrongful suspension can only be after the disciplinary process is undertaken and a claimant cannot say they cannot be suspended or disciplined. The

Petitioner argued that the Respondents contend they have a right to discipline and it is against public policy for a Court to interfere with the discipline of an employee and that the same is more so untenable if the employee was only in office for 10 days. He further referred to the case of **Barclays Bank of Kenya Ltd v Banking, Insurance & Finance Union (Kenya) [2019] eKLR** where the Court of Appeal looked at the principles of **Giella v. Cassman** in making a determination. He submitted that Section 49(1)(c) of the Employment Act provides for a raft of remedies for breach of Section 41 and that the second limb is available to the claimant. He urged the Court to allow the disciplinary process to be carried out given the EACC letter and that they can then deal with the issue whether the outcome is unfair or has not followed the law. He further prayed that the Motion be dismissed. In response, the Applicant' counsel urged the Court to expunge para 28 and 29 of the Reply Affidavit alleging that the Respondents have sought hand over of equipment as no evidence has been availed and even the person requesting has not been disclosed. The Petitioner argued that the same has been made up for these proceedings and are therefore baseless. He referred to the case of **Donald Avude v Kenya Wildlife Service [2015] eKLR** where the Court held that indefinite suspension without pay amounts to unlawful termination. That no statute authorises indefinite suspension and the happenings are thus an illegality, which this Court ought to so find and not to sanitize it. He prays that the same be interrogated and prays for interim order of status quo to permit Court to have the matter resolved on merit.

8. The Petitioner is facing disciplinary proceedings/action which he impugns as being illegal, null and void for the reason the Respondents have embarked on a flawed process. What the Petitioner seeks from the Court is in the nature of injunctive relief and the principles for grant of interim relief have a bearing on the dispute. These principles were set out in the case of **East Africa Industries Ltd v Trufoods Ltd. [1972] EA 420** and reiterated in the case of **Giella v. Cassman Brown & Co. Ltd. [1973] E.A 358**. In the case of **East Africa Industries Ltd v Trufoods Ltd**, Spry, V-P stated:

“A plaintiff has to show a prima facie case with a probability of success and if the court is in doubt it will decide the application on the balance of convenience. An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.”

In **Giella v. Cassman Brown** (*supra*) the three-part test enunciated in this decision is that:

- a) An Applicant must show a *prima facie* case with a probability of success;
- b) An interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages;
- c) If the Court is in doubt of the two above principles, it will decide an application on the balance of convenience.

9. The Petitioner herein has set out the events preceding the suspension he now challenges and the ongoing disciplinary process at the Respondent. He had been the 2nd Respondent's employee for 10 days when the Respondents suspended him from work. He perhaps has a *prima facie* case in as far as the suspension goes as he asserts he was suspended by a letter that suggests the suspension was for an indefinite period and without pay. This satisfies the *prima facie* limb of the test. On the second limb, the Court held that an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. The Petitioner having been suspended within the first fortnight of his employ, the Court is convinced that the injury he has suffered is not irreparable as it can be adequately compensated by an award of damages. Under Section 49(1) of the Employment Act, the Petitioner has a raft of remedies available to him and indeed he can receive up to the maximum 12 months salary compensation for the injury he has suffered should he demonstrate such injury and the entitlement to this award of damages. Granted that he has failed to cross the threshold for the grant of the interim relief he seeks, the motion is therefore denied. The costs of the said application are to abide the outcome of the Petition herein.

10. The Respondents at the time of the hearing of this matter indicated that the Petitioner holds the MacBook Pro laptop, iPad and chargers belonging to the 2nd Respondent which the Petitioner acknowledged having custody of. The Respondents assert the Petitioner has declined to return them and that it why it has withheld the pay the Petitioner is entitled to. The Petitioner on his part asserts that the Court should expunge the paragraphs referring to the electronic gadgets and the demand for them. The Petitioner asserts that he has not received any request for the return of the items. Granted that the items belong to the Respondent and there is no valid reason why the Petitioner should continue holding on to them, the Petitioner is hereby ordered to return the MacBook Pro laptop and the iPad plus their chargers within the next 24 hours. The Respondents must release the funds they have withheld from the Petitioner within 24 hours following the return of the electronic gadgets subject of this finding. The Petition will be mentioned on 13th July 2021 for directions on its hearing and disposal.

It is so ordered.

Dated and delivered at Nairobi this 7th day of July 2021

Nzioki wa Makau

JUDGE