



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. E592 OF 2021

NAOMI ACHIENG OKETCH..... 1ST CLAIMANT

KEVIN PASIKARI.....2ND CLAIMANT

JUDITH RAGUMBI..... 3RD CLAIMANT

HELLEN BOSIBORI..... 4TH CLAIMANT

VERSUS

SEEDS OF PEACE AFRICA

INTERNATIONAL (SOPA).....1ST RESPONDENT

DR AMBROSE D. O. OGWENG.....2ND RESPONDENT

RULING

1. Through a memorandum of claim filed herein on the 26th July, 2021, the claimants/applicants have sued the respondents, seeking against them the following reliefs: -

(i) A permanent order staying and suspending the respondent's suspension letters dated 22nd July, 2021 addressed to the claimants together with the notice of restriction of access to SOPA office, dated 22nd July, 2021;

(II) A permanent injunction be issued restricting the respondents from breaching the contract of employment with the claimants, by subjecting the claimants to inhuman, hostile and humiliating work environment.

(III) Costs of the suit be awarded to the claimant.

2. Contemporaneously with the filing of the statement of claim, the claimants filed a notice of motion application wherein they have sought for the following orders: -

(I) That the application herein be certified as urgent and heard ex-parte in the first instance.

(II) That pending the hearing and determination of this application, a temporary order be issued staying the respondents' suspension letters dated 22nd July 2021 addressed to the claimants together with the notice of restriction of access to SOPA office dated 22nd July 2021.

(III) That a temporary injunction be issued restricting the respondents from breaching the contract of employment by subjecting the claimants to inhuman, hostile and humiliating work environment pending the hearing and determination of this claim.

(IV) Costs be awarded to the claimant.

3. The application is premised on the grounds obtaining on the face of the application, and supporting affidavit sworn by the 1st claimant/applicant with the blessings of the other claimants/applicants.

4. Only prayers (iii) (iv) and (vi) of the application are outstanding for court's determination, the rest are spent.

5. Largely the factual contents of the memorandum of claim are reiterated in the grounds on the face of the application and the supporting affidavit. Relevant to the application at hand are the hereinafter summarised averments.
6. The 1st respondent is a non-governmental organisation based in Nairobi, whose core objective is promotion of peaceful co-existence and human dignity. The 2nd respondent is its Founder Chairperson. His roles and functions are stipulated in its constitution.
7. According to the claimants/applicants, they are the only employees and staff of the 1st respondent in its Nairobi office. The 1st claimant/applicant is the executive officer, the 2nd claimant/applicant, the accountant and the 3rd, 4th and 5th claimants/applicants are support staff.
8. Their employer-employee relationship is in nature a fixed term one. The 1st claimant's contract lifespan being for that period 1st May 2019 up to 30th June 2022, those of the 2nd, 3rd and 4th claimants/applicants, 23rd October 2019 up to 23rd October 2022, 1st June 2020 to 31st August 2022 and 23rd October 2020 up to 23rd October 2021, respectively. The 5th claimant is an intern whose internship contract is to run for 3 months (renewable) to December 2021. They exhibited their employment contracts as NA1.
9. The claimants/applicants contend against the 2nd respondent that he has not been working for the best interest of the 1st respondent. He has on several occasions been caught with his hand in the cooking jar. He has pilfered funds belonging to the 1st respondent and diverted the same to his own use. At one stage, as exhibited by the applicant's document marked 'NA 2' this became a subject of criminal investigations by the Director of Criminal Investigations.
10. The claimants contend that it is the incident of 21st July, 2021, that stirred up, the situation that the claimants/applicants have found themselves in. The 2nd respondent demanded for a cheque of Kshs.110,000.00 to be encashed for his personal use. The 1st claimant holding the demand unprocedural, declined to allow the amount to be processed. The claimants have exhibited an email correspondence by the 2nd claimant to the 2nd respondent, email whose contents are largely lamentations on the improper ways in which the 2nd respondent was handling financial matters of the 1st respondent.
11. According to the claimant, it is after this incident that on the 22nd day of July 2021, the 2nd respondent went to their offices, locked them and posted at the doors a notice dated 22nd July, 2021, restraining access to the office premises.
12. The 2nd respondent left behind with the care taker, their suspension letters all dated 22nd July, 2021.
13. The claimants/applicants state that they have at all material times discharged their duties diligently. None of them has a complaint against him/her. The sudden action by the 2nd respondent was therefore unexpected, and is not in accord with the stipulations of the Employment Act 2007.
14. They argue that they have been subjected to inhuman treatment which has caused to be visited on them, immense mental anguish as they have become a subject of ridicule, rumours and speculations.
15. The claimants further contend that the 1st respondent has no fully constituted board, and institutional policy framework, birthing a situation where the 2nd respondent perpetually usurped the functions of the claimants. The 2nd respondent has been full of threats and intimidation to them.
16. They assert that, their rights have been breached, the 2nd respondent continues to make the working environment toxic, for them to continue working in, and as a consequence they need this Court to intervene.
17. The respondents are opposed to the application. They have filed a replying affidavit sworn by the 2nd respondent on the 5th August 2021. They do not make any contestation that the 1st to 4th claimant have at all material times been employees of the 1st respondent. However as regards the 5th claimant, they have taken a position that she has never been their employee, but an intern.
18. The respondents aver that the claimants are contracted by the 1st respondent as employees. The 1st claimant is appointed through the 2nd respondent and delegated to perform functions of the Chief Executive. She reports to the board through the 2nd respondent.
19. According to the respondents the 1st claimant only exercises delegated authority under the direct supervision of the 2nd respondent.
20. The respondents hold that the 1st respondent has a duly constituted board in compliance with the law. They have exhibited minutes of the board, minutes of 28th July 2021 to fortify this averment.
21. That contrary to the allegations made by the claimants the 1st respondent has policies in place, *inter alia* the human resource policy, finance and procurement policy, child protection policy and gender-based violence policy. The steps of the 2nd respondent in discharge of his duties have at all material times been ordered by these policies.
22. The 2nd respondent contends that anchored on the stipulations of the constitution of the 1st respondent and directions of the board, he has the duty and responsibility to act against employees as and when their performance went below that which is expected.

23. The 2nd respondent rejected the allegations against him of financial malpractices. He asserted that no cheques were lost or misplaced.
24. The investigations by the Director of Criminal Investigations was ill engineered by a former employee who wanted to use the criminal investigation process to take over the running of the affairs of the 1st respondent. The letter that was posted to the DCI was by an anonymous person purporting to be a former employee of the 1st respondent.
25. The 2nd respondent states that he however, suspects that the same was done in collusion between the first two claimants and the anonymous author.
26. The 2nd respondent went ahead to state that the letter by the DCI was malicious and was written in bad faith. The content and directions therein were ultra vires, the officer who wrote the same.
27. The 2nd respondent stated that he is a mandatory signatory to the accounts of the 1st respondent. He does not recall signing a cheque of Kshs.500,000.00, all the cheques were cashed either in the name of the 1st claimant or the 3rd claimant. He however, submits having received a cheque of Kshs.110,000.00 which he calls part of his subsistence and upkeep allowances while performing organizational duties on behalf of the 1st respondent.
28. He insisted that the cheque be drawn in his name for accountability and transparency purposes, having dawned on him that there were systematic flaws in the organisation's. Human Resource and Finance processes. There was misappropriation of funds by the 1st claimant.
29. He says that the 1st respondent had valid reasons for suspending the employees temporarily and to close the officers in order to protect the information and documents that are required for internal audit purposes. According to the 2nd respondent, his action to suspend the claimants was sanctioned by the 1st respondent's board, through the minutes of 5th July 2021.
30. They contend that the suspension is an administrative action not a disciplinary one. That no fault has been identified against any of the claimants. The audit will reveal whether there is fault or not, on any or all of them.
31. He contends that if the claimants are not suspended and restricted, the irregularities will damage the reputation of the 1st respondent, will reduce the confidence which the 2nd respondent has worked on for many years to sustain positive, and effective relationship with donors, the government of Kenya and the beneficiaries.
32. The claimants are guilty of non-disclosure of material facts, the respondents contend.

The claimant's submissions

33. The claimants filed written submissions dated 11th August, 2021 in compliance with the directions of this Court regarding disposal of the application. Counsel for the claimant identifies two issues as the issues for determination in the application, namely, whether the claimants/applicants satisfied the conditions for grant of stay of the suspension letters and restrictions of access, and whether the claimants/applicants satisfied the conditions for the grant of temporary injunction.
34. Counsel submits that the process of suspension should be looked at using lens that Lady Justice Onyango provided in Cause No. 998 of 2014 – **Donald Avula Vs. Kenya Forest Services [2015] eKLR**, thus;

***“suspension being a process not provided for by law, must be considered in line with the criteria set in the decision of the Supreme Court of Canada in the case of Cabiakman -vs- Industiral Alliance Life Insurance Co. [2014] 3 S.C.R 195, 2004 SCC 55. The Court in this case distinguished “disciplinary” suspension. For purposes of the case, disciplinary suspension was defined as “punitive measure for a reproachable act made during work, while administrative suspension is a preventive measure which can be taken when the interest of the employee’s business require it, even in absence of an act made by the employee while working.*”**

In the Cabiakman case the Court set the criteria for administrative suspension as follows: sufficient link between the reproached act and the type of employment; the nature of the accusations; the existence of reasonable grounds to believe that maintaining, even temporarily, the employment relationship would be prejudicial to the employer or his reputation; the existence of immediate important inconvenience that cannot be practically countered by alternative measures (for example: assigning the employee to another post); and, the necessity of protecting the public.”

35. The claimants' counsel submits that the respondent did not come out clearly on whether the suspension was administrative or disciplinary. The actions of the respondent are only intended to harass the claimants.
36. It was further submitted for the claimants that the suspension was illegal since the respondent is visiting actions of an anonymous former staff on the claimants. The suspension is anchored on mere suspicion. The suspension letters are ambiguous, they have not brought forth the kind of investigations that are being carried out. For this they do not meet the criteria presented in the **Cabiakman** case.
37. According to counsel, the suspension letters do not cite any disciplinary action against the claimants. The letters and the restriction of access are premature.

38. The claimants' counsel further submitted that the suspension letters grossly infringe their employment contract and the 1st respondent's Human Resource Policy. The 1st respondent's Human Resource Manual at clause 8.3 (see page 99) of the respondent's replying affidavit provides for suspension. It puts the maximum period of suspension at three calendar months, and provides for an entitlement of pay to an extent of ½ of the basic salary during the period of suspension.

39. Counsel submits that the letters are coached in a manner that they do not give specific timelines for the suspension. The suspension is therefore indefinite. This is a state that cannot be countenanced. He cites the case of **Joseph Ndungu versus Mastermind Tobacco (K) Limited[2014]eKLR.**

40. That this Court is clothed with the authority to intervene on a suspension of an employee, counsel for the claimants has put reliance on the holding in the case of **Geoffrey Mworio vs. Water Resources Management Authority and 2 others [2015]eKLR and Petition No.100 of 2019; Bryan Mandela vs. Judicial Service Commission.**

41. It is submitted on behalf of the claimants that this application meets all the conditions necessary for a grant of the temporary injunction that they have sought. That they have established a prima facie case with the probability of success, they have put reliance on the case of **Mrao Limited vs. First American Bank of Kenya Limited and 2 others Civil Appeal No. 39 of 2002.**

42. If an injunction is not granted, they are likely to suffer irreparable loss. It is submitted.

43. On a balance of probability, the claimants have established that the procedure was not followed by the respondent when issuing the suspension and restriction notices.

Submissions by the respondent

44. The respondents filed their written submissions dated 19th August 2021, in support of their position on the applicants' application, and in address to the application and submissions by the latter.

45. The respondents' counsel argues that the claimants' application(s) are a wilful waste of the Court's time and an unnecessary impediment to the investigations that the respondent wanted to conduct. The claimants' suit is premature, speculative and based on abstract matters.

46. The claimants have not met the conditions necessary as set out in the case of **Giella vs. Cassman Brown & B. Limited [1973]1 EA 358** to attract a favourable exercise of this Court's discretion on their application for a temporary injunction relief.

47. Counsel submitted that from an employment context the existing rights that may be protected by means of a mandatory injunction must originate from the employment contract. He argues that an employee must meet the following tests to obtain an injunctive relief: -

(i) The employees must demonstrate a strong case that is likely to succeed at the hearing of the main claim;

(ii) Damages are not an adequate remedy e.g. due to reputational impact, destitution by reasons of loss of income or harm caused as the employee's self-worth and emotional well-being is bound to their role; and

(iii) The balance of convenience when weighed up, the potential harm and interests of the parties favours the granting of an injunction.

48. Counsel stated that in Common Law, an employer has a right to temporarily suspend an employee on full or part pay for as long as is necessary to undertake and conclude an investigation.

49. It is submitted that there existed valid reasons for the suspensions, the subject matter herein. Paragraphs 8,15, 16, and 17 of the replying affidavit supply the reasons.

50. On the claimants' contentions on insufficiency in detail of the suspension letters. The respondents' counsel reiterated that at common law, employers enjoy the right to suspend an employee[s] and further the Human Resource Policy of the 1st respondent did provide for this right. The court is referred to page 99 of the respondents' replying affidavit.

51. The court should take a cautious approach, never to substitute its own "reasonable grounds" for those of the employer, contrary to what the Court of Appeal stated in the case of **CFC Stanibic Bank Ltd vs- Danson Mwashako Mwakuwoma [2015] eKLR.**

52. The action of suspending the claimants flowed from the contract of employment.

53. It is submitted that the orders prayed for in the interlocutory application are the same as those sought in the main suit. This Court is urged not to grant the same for it can easily venture into the space of infringing upon the employer's right to manage and administer its policies. The respondents put reliance on the cases of, **Prof. Gitile Naituli vs- University Council of Multimedia University College & Another,** and **Alfred Nyungu Kimungui vs- Bomas of Kenya.**

54. The respondents have also put reliance on holding in **Aviation and Allied Workers Union vs- Kenya Airways Limited [2012] eKLR thus;**

“ Thus, similarly this court would be reluctant to involve itself in a disciplinary process commenced by the employer unless in an appropriate case. It is established that disciplinary process has been commenced or is continuing unfairly. The intervention in disciplinary process by employers will be entertained by the court rarely and in clear cases where the process is likely to result into unfair imposition of a punishment against the employee. The Court will intervene in an administrative disciplinary procedure if it is established that the procedure relied on by the employer offends fairness or due process by not upholding the rules of natural justice or if the procedure is in clear breach of the agreed or legislated or employer’s prescribed applicable policy or standards or if the disciplinary procedure were continue it would result into manifest injustice in view of the circumstances of the case”

55. The claimants have not justified their quest for the Court’s intervention as they have literally failed to establish any of the circumstances put forth in the holding above. The respondents submit that the balance of convenience does not tilt in favour of the claimants.

56. The respondents in their submissions see the reasons on which the claimants’ application is anchored as being two-fold; that the 1st respondent’s board is not duly constituted, and respondent has misappropriated the 1st respondent’s funds. Then goes on to submit that these reasons as presented by the claimants have been shown to be untrue by the respondents.

57. Counsel submits that this Court does not have jurisdiction to inquire into the same grounds as they do not go to the root of the employment contract and that the Court cannot supervise the handling of the complaint made to the Director of Criminal Investigations. That the claimants have not demonstrated any infringement of the provisions of section 41 and 45 of the Employment Act, 2007.

58. That the claimants are still on full pay and are not financially embarrassed. They rushed to Court. They would have waited for the audit process to be completed first.

59. That the remedies sought by the claimants cannot be granted to them, as on merit they do not deserve them, it is submitted.

Determination

60. The claimants’ application is in two limbs which this Court must at this juncture deal with. There is that which relates to an alleged inhuman, hostile and humiliating work, environment and that which regards the suspension. On the first one the claimants have sought for an injunction, whilst in the second one suspension/stay.

61. The claimants seek: -

“That a temporary injunction be issued restraining the respondent from breaching the contract of employment with the claimants, by subjecting the claimants to inhuman, hostile and humiliating work environment pending the claim.”

From the material placed before Court it is difficult for one to discern the acts complained of that would fall under the category of inhuman, hostile and humiliating. There is lack of detail and or specificity, yet the allegation is very serious. The allegation is omnibus and ambiguous. In the manner the claimants have packaged their material on this, they are inviting the Court to enter the realm of speculation. Unfortunately, I cannot do.

62. The respondent did not make any specific submission on this limb. That notwithstanding, in view of what I have stated above, I come to a conclusion that the claimants have not established a prima facie case on matters relating to the treatment. In Mrao Limited Vs. First American Bank of Kenya Limited & 2 others [2003]eKLR, a prima facie case was stated to be:

“4. A prima facie case in a civil application includes but is not confined to “a genuine and arguable case.” It is a case which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for explanation or rebuttal from the latter.”

63. Mustill J in The Niedersachsen 1983] 2 Lloyd’s Rep 600 at page 605 defined “a good arguable case” thus:

“one which is more than barely capable of serious argument, but not necessarily one which the Judge considers would have a better than 50 per cent chance of success.”

64. In the upshot I decline to award prayer 5 of the notice of motion application dated 26th July 2021.

65. This brings me to prayer 3 of the application relating to suspension. From the onset let me say that in their submission the respondents argued that the applicants’ application is anchored on two grounds, first that the 1st respondent has no duly constituted board and policies and second the alleged dishonest acts of the 2nd respondent. From the material before me I see the anchor of the claimants’ application differently. They are claiming that there were no legitimate business reasons to justify the suspension, and that the same was prompted by bad faith in the sense that it is retaliatory. The suspension of the claimants seems indefinite.

66. The claimants argue that the respondent have not come out clearly on whether the suspension visited upon them was administrative or disciplinary. I do not agree with this line of submission. At paragraph 16 of the replying affidavit, the 2nd respondent deposed:

“that am advised by our advocate on record which advice I verily believe to be correct that the action of suspension is not a

disciplinary action on its own. That suspension is a normal administrative action. None of the claimants was terminated from employment. The offices belong to the 1st respondent who has given the claimants employment opportunity. The first respondent has valid reason for suspending the employees temporarily and to close offices in order to protect the information and documents that are required for internal audit. The suspension letters clearly stated the reason for the suspension and restriction of access to the office.”

67. In rendering myself on the claimants’ application, I will handle the suspensions as administrative suspensions.

68. In ***Cabiakman vs. Industrial Alliance Life Insurance Co.[2004] 35 C. R. 195 scc 55***. The Court made an authoritative distinction between “disciplinary”, suspension and “administrative” suspension. Disciplinary suspension was defined as a punitive measure for a reproachable act made during work while administrative suspension is a preventive measure which can be taken where the interest of the employer’s business requires it, even in the absence of an act made by the employee while working.

69. The respondents both in their replying affidavit and submissions have taken a position that under the 1st respondent’s HR manual/policy, and common law the 1st respondent has the right to suspend its employees. The contents of the submissions by counsel, are in a tone to make one come to an inescapable conclusion that the respondents are suggesting that the “right” is unfettered and can be exercised as a matter of course. I hold they are wrong on this.

70. In ***Potter vs N.B Legal Aid [2015]1 S.C.R.***, a matter in the Supreme Court of Canada, Wagner J. stated;

“75. I will now address the Commission’s main argument that it had no duty to provide Mr. Potter with work. Before doing so however, I would note that the Board did not merely withhold work from porter, it ordered him to stay away from the office and designated a replacement. Moreover, even if the board had an implied authority it is not unfettered but is subject to a basic requirement of business justification. Because no business reasons were given, I find that the suspension was unauthorized.

71. There seems to be a lack of appreciation on the part of the respondents that one cannot wholly and safely anchor his/her case under the “wings” of the common law. There has been a radical shift, employees’ rights under employment contracts have been constitutionalised. The arena of labour relations jurisprudence is now more than before constitutionally and equity spirited.

72. No doubt this court has jurisdiction to grant injunctive relief and stay suspension of employment. In ***Mezey v South West London and St. George’s Mental Health NHS Trust[2007]*** the Court of Appeal demonstrated existence of the power in courts to grant these reliefs. Sedley LJ stated;

“There seems to me to be no reason of principle why the court should be without power, if in all the other circumstances it judges it right to do so, to stay a suspension just as it may stay a dismissal. Each is capable of being a breach of contract, the one no doubt more fundamental than the other, each is capable of not being fully compensable in damages.”

73. The onus is on the employer to demonstrate to court on a civil standard of proof that a reasonably serious and immediate risk to the employer’s legitimate interests exist. In other words, in order for a suspension to be held justified, there must be shown, to be present legitimate business reasons.

74. The respondents submitted that the reasons for the suspensions are at paragraph, 15 , 16, and 17 of the replying affidavit. I have carefully considered the contents of these paragraphs, I am afraid, they do not bring out what one can see as a legitimate business reason[s].

75. In my view, it is not enough to state that it was necessary for the suspensions to be in place, so that documents and information required for an audit is protected. What is this information? what are these documents? Who among the claimants would have, access to, and control of them? Did the respondents take any reasonable steps to ascertain whether the risk on continued employment might be mitigated through such techniques as closer supervision or transfer to other stations? All this crucial information has not been brought out by the respondents.

76. The suspension letters uniformly read;

“RE: Suspension

Serious irregularities have been found in the operations of the organization and the Board has found it necessary to take remedial measures.

The Board hereby suspends you from any further engagement with the office pending completion of investigations.....”

77. It is not difficult to conclude that the letters in their content regarding the reason for suspension are not very clear, the business justification does not come out clearly. The justification has not been explained in the replying affidavit. In most circumstances, an administrative suspension cannot be found to be justified in absence of a basic level of communication with employees. At minimum, acting in good faith in relation to the contractual dealings means being honest, reasonable, candid and forthright. – ***Potter v- N.B legal Aid [2015] 1 S.C.R.*** Candidness and forthrightness cannot be said to be present in a situation like in the instant matter where employees are given a vague reason for their suspension from employment.

78. The suspension clearly seems indefinite, not finite as envisaged in the 1st Respondent’s Human Resource Manual.

79. I have carefully considered the material placed before me by the parties, inclusive of the respective submissions by their counsel, and come to a conclusion that the Claimants have an arguable case against the Respondents and that fairness, and the circumstance of this matter, dictate that the order sought in prayer 3 of their application be granted.

80. In the upshot, the application is allowed in terms of prayer 3. Costs of the application shall be to the claimants.

81. The parties may in the circumstances of the matter take a hearing date for the substantive suit on a priority basis.

82. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF AUGUST 2021.

KEBIRA OCHARO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

OCHARO KEBIRA

JUDGE