



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

PETITION NO. E10 OF 2020

IN THE MATTER OF APPLICATION OF ARTICLES 10,27,28,33,41,50,165(2), 176,232 AND 236 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 22,27,28,41 AND 50 OF CNSTITUTION OF EKNYA 2010

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT

AND

IN THE MATTER OF THE ILLEGAL INTERDICTION IMPOSED ON THE PETITIONER

BETWEEN

ANTHONY KARIUKI KAMWARO.....PETITIONER

AND

FRED NTEKEREI, THE CHIEF OF STAFF NAROK COUNTY GOVERNMENT...1ST RESPONDENT

THE COUNTY SECRETARY, NAROK COUNTY GIVERNMENT.....2ND RESPONDENT

NAROK COUNTY PUBLIC SERVICE BOARD.....3RD RESPONDENT

NAROK COUNTY GOVERNMENT.....4TH RESPONDENT

JUDGMENT

1. This Petition was filed together with a Notice of Motion Application dated 17th December,2020 seeking orders interalia to stay the notice to show cause dated 5th August, 2020 and the imminent disciplinary proceedings, to allow him access to his office and reinstate him to the payroll.

2. On 18th January, 2021, this Court stayed the disciplinary process initiated against the Petitioner till the application was heard and determined and on 2nd February, 2021, this Court directed the Application to be canvassed together with the Petition.

3. In the Petition dated 17th December, 2020, the Petitioner sought for the following reliefs; -

- a. That an Order of certiorari be issued to bring to this Honourable Court for purposes of being quashed the decision made by the Respondents through a show cause letter dated 5th August, 2020 to interdict the petitioner who was serving in the office of the Governor Narok County in contravention of Article 47 and 236 of the Constitution 2010, section 59(c) of the

County Government Act No. 17 of 2012 and the Employment and Relations Act.

b. That the Honourable Court be pleased to find and uphold that the decisions, actions and Omissions of the said Show Cause letter and interdiction by the 1st Respondent in interdicting the Petitioner Constitutes conduct that violates Articles 10, 41 and 236 of the Constitution of Kenya.

c. That this Honourable Court be pleased to issue an order by the way of injunction restraining the Respondents, its officers, staff, agents, servants and/or any other persons acting at its behest howsoever, or any of the Respondents from dismissing the Petitioner from employment.

d. That the Petitioner be allowed access to occupy his position in the office and place of work.

e. General damages.

f. That the costs be awarded to the Petitioner.

Background.

4. The Petitioner avers that he was employed by the 4th Respondent on a 5 years contract as a director of communication services and protocol in the office of the Governor Narok County commencing 1st December, 2017 which he worked till 15th October, 2020 when he received a letter dated 5th August, 2020, requiring him to show cause why disciplinary action should not be taken against him for absenting himself from work from 2nd March, 2020 and before he could respond he was interdicted with no pay and barred from accessing his office as from September, 2020. Subsequently, he responded on the 26th October, 2020 giving an explanation to the show cause. Further that he never failed to undertake any assignment given to him by his supervisor and or the Respondents.

5. The Petitioner avers that the chief Officer, Mr. Fred Ntekerei, signed his interdiction letter as opposed to the office of the County public service Board as provided for under section 58 of the County Government Act therefore acted in excess of his authority.

6. It is stated that the Respondent had declined to provide him with particulars of absenteeism alleged despite his request and therefore he is apprehensive that the Respondent might terminate his service without following due procedure.

7. The Petitioner contends that his right under Article 27 was violated upon when the Respondents out of the entire workforce singled him out and interdicted him without any cause. That to interdict him without any pay violated his right to dignity provided for under Article 28 of the Constitution. In addition, his right under Articles 41, 47 and 50 of the Constitution were violated when the Respondent interdicted him without following any process and without affording him an opportunity to be heard.

8. In response to the Petition, the 1st Respondent, Mr. Fred Ntekerei, the Chief staff of the County Government of Narok, on his behalf and behalf of the other Respondents, swore a replying affidavit on the 1st February, 2021 stating that he is the supervisor of the Petitioner. That he issued the show cause letter to the petitioner as empowered under section 4.0, 41 and 4.4 of the public service commission discipline manual, as read together with section D. 20 of the Public Service Human Resource Manual, section K.8 of the Public Services Commission Human Resources Policies and Procedures.

9. He maintains that when the Respondents did not receive any response to the Show Cause by 28th August, 2020, the 1st Respondent informed the Human Resource director to stop the petitioner's salary in accordance with the disciplinary measure provided for under the manual.

10. The Respondent contends that they never interdicted the Petitioner but only issue him with a show cause letter which he responded to and the said response was yet to be scrutinized neither had they commenced any disciplinary proceedings therefore the suit was filed prematurely.

11. It is the Respondents' case that the 1st Respondent did not usurp the powers of the 3rd Respondent by initiating the disciplinary process, rather that Section 4.1 of the Public service discipline manual empowers the employee's supervisor to initiate disciplinary process, then escalate the matter to the Human Resource Management Advisory committee who would in turn make recommendation to the 3rd Respondent to take action.

12. The Respondent stated that the Petitioner in the Response to the show cause only accounted for his absence from 8th March to 14th March 2020, but has not explained his whereabouts from 14th March, 2020 to August, 2020 and the excuse that he was working from home due to Covid restriction is not plausible as no direction were given to any employee to work from home. In addition, that all directors and employees in the different departments worked from station save for those with underlying conditions and those in advanced ages that were excepted and who were given express permission by their supervisors.

13. That Respondents stated that the disciplinary proceedings were based on the petitioner's absenting himself from work for over 6 months, which disciplinary process was stalled by the Court which they opined was done by the Court in a way that controlled the management of the County functions and in effect interfere with the Respondent's managerial prerogative to discipline its employees.

14. During hearing the Petitioner adopted his Affidavits filed on 18.12.2020 and 3.3.2021 together with documents filed on 18.12.2020. He testified that his Petition was filed on the basis of the illegal suspension that stopped his salary.

15. On cross examination by Mr. Kere Advocate, he testified that he was not issued with any suspension or interdiction letter but his salary was stopped and he was barred from accessing his office therefore the Respondent paralyzed the implementation of his duties. Also that he was normally assigned duties by the Governor which he carried out to the letter and would report back to the Governor after completing a task, these duties included the trip to Dubai which the 1st Respondent claimed not to be aware of. He testified that he has never been assigned any duty by the 1st Respondent.

16. The Respondent's witness, Mr. Fred Ntekerei, the Chief Officer of Staff and the 1st Respondent herein testified that he is the supervisor of the Petitioner and he issued him with a notice to Show cause for absenting himself from Work. He testified that the Petitioner throughout the period never gave any brief of the Governor's speech when the governor had made several pronouncements on the COVID-19 Pandemic status. He contended that he waited for the Petitioners response to no avail till he instructed the Human Resource to stop his salary in September, 2020 which elicited the response of 28th October, 2020. However, that the matter had been handed over to the disciplinary committee who were yet to carry out the disciplinary hearing.

17. On cross examination by Misati Advocate, the witness testified that the Petitioner received instructions from the Governor through him. He testified that he tried contacting the Petitioner from March to August through his mobile phone to no avail which informed his decision to issue him with a show cause letter which was dispatched through the county registry and since the same was not responded to he recommended the petitioner salary to be stopped and after his salary was stopped a response was made by the petitioner on 28th October, 2020.

18. On further cross examination he testified that he never received the letter from the petitioner advocates neither did he responded to the letter of 28th October, 2020 but three weeks later he invited the Petitioner to a disciplinary hearing which was scheduled for January, 2021. On the issue where staff worked remotely, he testified that the Respondents' employees worked on rotational basis and the supervisors were informed accordingly.

Submissions.

19. The Petitioner submitted on four issues; whether this petition was filed in breach of specific procedures, whether the Court has jurisdiction to address it, whether the petitioner rights have been violated and whether the Petitioner is entitled to the reliefs sought.

20. On the first issue it was submitted that the Respondent alleged that the petition herein has been filed prematurely without adhering to section 85 of the public service Commission Act and section 77 of the County Government Act which provides for disciplinary action to be carried out by the Commission and Appeal to be preferred to the Public Service Commission, but that the said provisions does not take away this Court's jurisdiction to hear the issue at hand. In this they cited the case of **Samuel Okuro & 7 others v Kisumu County Public Service Board the Government Kisumu County & another [2017] eKLR**, where the Court held that; -

“The other argument of the Respondents that the Petitioners failed to comply with section 77 of the County Governments Act is misplaced as the section refers to appeals against decisions of County Public Service Board and not the decisions of the Governor or the County Secretary both of whom are not members of the County Public Service Board.in any event the section does not oust the jurisdiction of the court.”

21. Accordingly, the petitioner submitted that as much as the court ordinarily need not interfere with the Respondents internal disciplinary control it can only do so when the process is flawed and in this case it was submitted that the Respondents action of stopping his salary infringed on his rights and was against the procedure.

22. On the second issue it was submitted that this Court is clothed with jurisdiction to hear and determine this Petitioner as the same emanate from the actions of the Petitioner employer who interdicted and stopped the petitioner salary without hearing the Petitioner. That when the Respondent failed to subject him to disciplinary hearing before stopping his salary violated his right under Article 27 ,28,33,41 and 50 of the Constitution of Kenya 2010, which violation can only be canvassed in this Court as they emanate from employment relationship. To support their argument, they cited the case of **United states international University(USIU) V the Attorney General and others [2012] eKLR**.

23. On the third issue it was submitted that the disciplinary process was initiated by the 1st Respondent who had no authority to issue the show cause letter which duty was a preserve of the County public service board which the 1st Respondent was not a member. Further that the interdiction without pay or disciplinary hearing violated his rights under the constitution to fair administrative action.

24. It was then submitted that the petitioner had requested for particular of absenteeism alleged by the Respondent to no avail when access to information is a right that is enshrined under Article 35 of the Constitution.

25. The Petitioner then submitted that the Respondents have violated the Petitioner right to access information, right to fair labour practices and right to fair administrative action and have further contravened values and principles enshrined under Article 10 and 236 of the Constitution when they discriminated against him and stopped his salary therefore victimizing him. The petitioner then urged this Court to allow the petition as prayed.

26. The Respondents also submitted on four issues: whether the jurisdiction of this Court has been invoked prematurely, whether the Respondent were entitled to deal with the petitioner in the manner that they did, whether the 1st Respondent acted ultra vires in making a recommendation for the stoppage of the petitioner's salary and what orders should be made as to costs.

27. On the first issue it was submitted that the Petitioner filed this Petition prematurely since the disciplinary process had just began and a hearing was yet to commence. It was argued that the filing of this Petition and the Court stopping of the disciplinary process controlled the

Respondents' managerial prerogative to discipline its employees. In this they cited the case of **Geoffrey Mworira V Water Resources Management Authority [2015] eKLR** where the Court held that; -

“The court will very sparingly interfere in the employer’s entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer’s internal process.”

28. They also cited this Court decision in Thomson **Kerongo & 2 others V James Omariba Nyaoga & 3 others [2017] eKLR** where the Court held that; -

“Due process is an internal disciplinary process to be exercised by an employer. The Court is not expected to enter into the boardrooms of the employers to micro manage their affairs... The court will only interfere where there is breach of the process and even so, only with a view to setting the process right.”

29. Accordingly, it was submitted that the Respondents exercised its powers and subjected the Petitioner to internal disciplinary measures which the Petitioner now seeks to curtail when no wrong on its party had been demonstrated. It was argued that the petitioner moved this Court to undermine the administrative authority of the 3rd and 4th Respondent as the Petitioner seeks to injunct the disciplinary hearing when this Court is not empowered to stop internal disciplinary proceedings. In this they cited the case of **Rosemary Mburu V Kenya Airways Limited [2020] eKLR**.

30. On the second issue it was submitted that the petitioner absenteeism for over 6 months without informing his supervisor informed the 1st respondent's decision of issuing him with a notice to show cause and since no reply was elicited the respondent took further steps and advised the petitioner salary be stopped, which according to the Respondent awoken the Petitioner and he was forced to respond to the show cause on 28th October, 2020. It was argued that the Respondents are empowered under the law and its manual to exercise disciplinary control over its employees therefore the Respondent did not do anything out of the ordinary. It was also submitted that the Respondent did not in any way infringe on the Petitioner's rights under Articles 27, 35, 41 and 47 of the Constitution. It was then submitted that the Respondent was justified to seek for an explanation for the Petitioner's absence from work the way they did.

31. On the third issue it was submitted that the 1st Respondent issued the petitioner the show cause letter in accordance with section 4.0, 41 and 4.4 of the public service commission discipline manual, as read together with section D. 20 of the County Public Service Human Resource Manual, section K.8 of the Public Services Commission Human Resources Policies and Procedures manual for public service 2016. It was then argued that the 1st Respondent acted on delegated authority from the 3rd Respondent and him being one of the authorized officer as per Public Services Commission Human Resources Policies and Procedures manual for public service 2016. It was further argued that the stoppage of salary is an automatic consequence of absenteeism and would not necessarily require anyone to recommend the same.

32. The Respondent then urged this Court to dismiss the Petition and award them costs.

33. I have examined the evidence and submissions of the parties herein. The main issue for determination by this court is whether to stay the disciplinary process initiated against the petitioner herein.

34. The petitioner has contended that the process initiated was flawed because the show cause letter was signed by the chief officer one Fred Nyekerei who had no authority to do so as the authority rests on the 3rd respondent.

35. I have noted from APP NNI dated 1st December 2017, that the petitioner was appointed as Director Communication services and protocol on contract. The letter came from the office of the County Secretary. This letter did not emanate from the County Public Service Board.

36. The contention by the petitioner that the NTSC letter was from a wrong person is therefore not true as the petitioner was never an employee of the County Public Service Board. The NTSC has emanated from the office of the Governor from where he had been employed.

37. It is my finding that the show cause letter issued to the petitioner was issued by the right office.

38. I will therefore not interfere with the Internal Disciplinary process of the respondent unless they are flawed.

39. I will decline to grant orders sought by the petitioner and dismiss the petition accordingly. For avoidance of doubt, the respondent is free to continue and conclude the disciplinary process against the petitioner but follow all due process. There will be no order of costs.

DATED AND DELIVERED IN OPEN COURT THIS 25TH DAY OF NOVEMBER, 2021

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Misati for Petitioner – present

Kerre for Respondent – present

Court Assistant - Fred