



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. E412 OF 2021

WYCLIFFE WASIKE SIMIYU.....CLAIMANT

VERSUS

THE DIRECTOR GENERAL NATIONAL

TRANSPORT AND SAFETY AUTHORITY.....RESPONDENT

RULING

1. By the notice of motion dated 20th May, 2021, the applicant prays for an order in the following terms:-

1. Spent

2. Spent

3. Spent

4. Pending the substantive hearing of this cause, this honourable Court be pleased to suspend the implementation of the decision contained in the Respondent's letter dated 19th May, 2021 interdicting the Claimant/Applicant from duty.

2. The application is premised on grounds explicit on the face of the application and found in the supporting affidavit of the applicant which may be summarized that the applicant holds the position of Deputy Director, Finance of the respondent. On 23rd January, 2020, the respondent wrote a letter to the applicant requesting him to proceed on 45 days annual leave from 27th January, 2020.

3. That by a letter dated 19th March, 2021, the respondent wrote another letter placing the applicant on compulsory leave for 30 days to enable investigators to carry out with a matter regarding complaints made by Hazina Sacco on irregular third party remittance which may have caused the respondent financial losses.

4. The action was said to be pursuant to Public Service Commission (PSC) Regulations, 2020, Clause 62(1).

5. By a letter dated 14th April, 2021, before the applicant completed the 30 days compulsory leave, the respondent wrote the applicant another letter extending the compulsory leave for a further 30 days from 19/4/2021 to 19/5/2021.

6. By a letter dated 19/5/2021, the applicant was interdicted from duty on account of gross misconduct and /or negligence of duty. The applicant has been away from work from 23rd January, 2021 to 19th May, 2021, a period of four months and has now been interdicted for an indefinite period.

7. The interdiction was in terms of Section 11.16.1 of the National Transport and Safety Authority Human Resource Management Policy Procedure Manual and on ½ salary with full house and medical allowance. He is not to leave his duty station during the period.

8. The letter did not request the applicant to show cause as required under Clause 11.12.2 of the National Transport and Safety Authority Human Resource Management Policies and Procedure Manual.

9. Furthermore, the letters dated 19/3/2021 and 14/4/2021 indicate that the applicant is not being investigated by persons in the employment of National Transport and Safety Authority in violation of Clause 11.9. and 11.3 of the Manual which provides for a Disciplinary Committee

to handle disciplinary matters and that the Director General is mandated to constitute an investigation committee if in the opinion of the Disciplinary Committee, there is need for investigations before the disciplinary hearing is conducted.

10. The applicant posits that the interdiction is unfair, unlawful and falls short of the step by step provisions of National Transport and Safety Authority Human Resource Management Policies and Procedure Manual. That the Board of National Transport and Safety Authority usurped the disciplinary powers vested in the Disciplinary Committee and prematurely interdicted the applicant to his loss and detriment. That no disciplinary Committee has been constituted to-date. Furthermore, the sending of the applicant on compulsory leave was unlawful as under Clause 62(1) of Public Service Commission Regulations, 2020 an employee cannot be sent on compulsory leave for a period beyond 30 days.

11. That the interim relief be granted pending the hearing and determination of the suit.

Replying Affidavit

12. The respondent filed a replying affidavit sworn to by **George Njao**, the Director General of the respondent who deposes that the respondent on 9/3/2021 received a letter from Hazina Sacco Society Limited demanding for a total of Kshs.6,005, 683.41 together with interest from the respondent being unpaid remittances by employees of the respondent.

13. The Board became aware that there was a previous letter dated 6th February, 2019, on the same matter in respect of which no action was taken by the respective heads of departments of the respondent.

14. The deponent directed the Deputy Director of Investigations and Intelligence to investigate the matter which smacked of potential fraud and collusion by members of staff.

15. The deponent further, involved the Directorate of Criminal Investigations (DCI) the respondent being a public institution.

16. That clause 10.40 of the National Transport and Safety Authority Human Resource Management Policies and Procedure Manual permits the deponent to carry out investigations and refer such investigations to any authority or body it deems fit in terms of Clause 10.41.1.

17. That the fraud under investigations relate to the respondent's payroll system where the deductions, were made.

18. That statutory deductions and third party remittances are prepared by the Human Resource Department and submitted to the Finance Department for review, verification and remittance. That the Finance department had failed to act on the matter since the letter dated 6th February, 2021 was received from the Sacco.

19. That the Board of Directors of the respondent made a resolution that Deputy Directors from the Finance department, Human Resource and Administration Department and Internal Audit Department be investigated for gross negligence and/or omission to investigate this crucial complaint that involved loss of public fund.

20. Furthermore, and in terms of the resolution, an interdiction was issued to all the three heads of the departments including the applicant by a letter dated 19th March, 2021.

21. That the respondent is undertaking investigations both internally and through Public agencies and is about to conclude the investigations for purposes of the disciplinary process to commence and the issuance of the requisite notices to the applicants and others.

22. That Clause 11.7.1(d) guides this process that:-

“The decisions must be based upon logical proof or evidential material.”

23. It is in accordance with this principle that the respondent interdicted the applicant and others before charging them.

24. That it is in the interest of justice that the respondent be allowed to proceed with the disciplinary process to its conclusion.

25. That the applicant has been receiving the half salary and allowances per clause 11.116 .2 of the National Transport and Safety Authority Human Resource Manual.

26. That the application is premature and it be dismissed accordingly.

27. The parties filed written submissions and the issue for determination is whether the applicant has met the criteria for grant of temporary injunction pending the hearing of the suit.

28. In the matter of **Nguruman Limited –vs- Jan Bonde Nielsen & 2 Others CA No. 77 of 2012 (2014) eKLR**, the Court of Appeal in Ouko, Kiage, M'noti JJA, considered the case of **Gielle –vs- Cassman Brown –Limited [1973] E.A. 358 and Mrao Limited –vs- First American Bank of Kenya Limited & 2 Others (2003) KLR. 125** and restated the criteria for grant of interim injunctions that an applicant must demonstrate *prima facie* case with a probability of success; whether irreparable injury would result if the injunction was not granted and whether the balance of convenience from the evidence before Court was in favour of grant of the injunction.

29. The Court cited Mrao case thus:-

“What I have to determine here is whether on the material presented, this Court properly directing itself can conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter.”

30. In the present case, it is apparent that the respondent is faced with serious allegations by a third party, with regard to matters that ought to have been done by its staff including the applicant. The respondent has embarked on investigations of its staff, and has decided to interdict the applicant and two other senior managers pending the conduct of investigations that may result in possible disciplinary action against the applicant and his colleagues.

31. The applicant alleges that whereas the respondent has a right of initiating investigations against the applicant, the respondent is strictly bound by the provisions of National Transport Safety Authority Human Resource Management Policies and Procedures but has deviated from its own procedures to the loss and detriment of the applicant.

32. The Court is also guided by the decision of the East African Court of Justice in **Mary Ariviza and Okoth Mondoh –vs- Attorney General of Kenya and Secretary General of East Africa Community – Application No. 3 of 2010, E.ACJ [2005-2011]** 4

where the Court held:-

“At this stage we must of course refrain from making any determination on the merits of the application or any defence to it. A decision on the merits or demerits of the case must await the substantive consideration of the facts and applicable law after full hearing of the Reference.”

33. Upon a careful consideration of the facts before me, the Court is satisfied that the applicant has made a *prima facie* case with probability of success and that since he has been placed on suspension before a disciplinary committee has been constituted; and the investigations were not commenced by a duly constituted investigations committee, the applicant is likely to suffer irreparable harm by being subjected to a process not instituted in terms of the National Transport and Safety Authority Human Resources Management Policies and Procedure Manual. Furthermore, the applicant has already been placed out of work for a period longer than the 30 days permitted by the Public Service Commission regulations aforesaid.

34. Accordingly, the application is granted and the following orders made:-

(i) Pending the substantive hearing of this cause, the decision to interdict the applicant from duty contained in the Respondent’s letter dated 19th May, 2021 is suspended.

35 (ii) ***Costs in the cause.***

Dated and delivered at Nairobi (virtually) this 16th day of December, 2021.

Mathews N. Nduma

Judge

Appearances

Bryan Khaemba for the Applicant

Judith Opili for respondent

Ekale –Court Assistant