



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC NO. 457 OF 2016

KENYA COUNTY GOVERNMENT

WORKERS UNION.....CLAIMANT

VERSUS

COUNTY PUBLIC SERVICE

BOARD OF NAROK..... RESPONDENT

JUDGMENT

1. The claimant, a trade union, sued the Respondent for wrongful dismissal of its member, the grievant, Mr. Levin Kimeu.
2. The claimant states that the grievant was transferred from the defunct Kitui Municipal to Narok in February, 2012 as a planner II in salary scale 8 which is the current grade L. subsequently when municipals were transitioned to the County government, the Grievant was taken up as an employee of the County Government of Narok and retained his position.
3. On 11th March, 2014, he was directed to proceed for his annual leave as he had failed to take up annual leave from the year 2009 which according to the Respondent was against the terms and conditions of service. The grievant obliged and took the leave for 30 days.
4. On 16th April, 2014, while still on leave, the grievant was served with a letter referenced.2004400002426/2014/1 alleging that he had violated the rules of governance in the performance of his duties in that he had made double allocation of plots, misused his office and sabotaged county government plans and development agenda contrary to service. In the said letter the grievant was given 14 days to respond to the said allegations, hand over all government assets and documents and proceed on a compulsory leave for 30 days.
5. On 30th April, 2014 the grievant handed in all the documents and assets in presence of the then Town Administrator, one Godfrey Kwena, as directed and proceeded on his leave as directed by the County secretary.
6. Upon reporting after the compulsory leave he found his office had been allocated to someone else and the Respondent did not allocate him another office or position and duties to continue with his job. Subsequently on 25th November, 2015 the grievant requested the company secretary for an office space which letter did not elicit any response.
7. In January, 2016 the grievant's salary was stopped and his name deleted from the Respondent's payroll without reason given to him, when he had been working for the Respondent and even submitted work plan and budget to the CEC of lands for planning of border towns and Kojong'a market on 25th November, 2015.
8. On 24th March, 2016, the claimant's County secretary wrote a letter to the Respondent inquiring on the circumstances on which the grievant's salary was stopped only to be served with a backdated letter of 12th January, 2016 purporting that the grievant had been absent from work since 22nd May, 2014, which letter was received on 11th April, 2016.
9. On the same day, 11th April, 2016, the grievant was individually served with an interdiction letter dated 31st March, 2016 on the basis of being absent from work since 22nd May, 2014, and that disciplinary action was to be conducted once the Respondent finalizes with his case.
10. After the interdiction the grievant was never summoned for any hearing neither was he recalled. The claimant then acting on instructions of its member wrote a demand letter on the termination of the claimant and demand for payment of his terminal dues. This letter fell on deaf ears.

11. A trade dispute was reported to the labour office on the 21st July, 2016 and a conciliator, by the name M.O Bunde was appointed vide a letter of 10th August, 2016.
12. Meetings were convened by the conciliator on 7th September, 2016, 20th September, 2016 and on 30th September, 2016 which were all snapped by the Respondent. Subsequently the conciliator issued a certificate of conciliation directing the matter be taken up by the Court.
13. The Claimant now seeks for judgment against the Respondent for the unfair dismissal of its member and prayed for the following reliefs;-
 - a) **That this Honourable Court finds that Mr. Levin Kimeu was discriminated upon based on language, ethnic and social origin which is in breach of employment Act, 2007.**
 - b) **That this Honourable Court find that the failure/refusal of the county secretary to allocate Mr. Levin Kimeu an office space was in breach of Article 47(1) of the Constitution of Kenya 2010.**
 - c) **That this Honourable Court finds that the county secretary allegation of double allocation of plots by Mr. Levin Kimeu was not true because the double allocation were done before Kimeu was transferred to Narok.**
 - d) **That this Honourable Court finds that the proper disciplinary process was not followed hence declare that the interdiction letter was null and void.**
 - e) **That this Honourable Court orders that the County Government pays Mr. Levin Kimeu all his salaries withheld unlawfully from January, 2016.**
 - f) **That This Honourable Court Orders for unconditional Reinstatement of Mr. Levin Kimeu back to office without loss of benefits, seniority and service.**
 - g) **That this Honourable Court orders that Levin Kimeu be paid salaries of six months as compensation for loss of earnings during the period of unlawful termination which is within section 5 of the Labour Institution Act, 2007.**
 - h) **That this Honourable Court gives time limit for the Respondent to reinstate Mr. Levin Kimeu and pay him all his emoluments.**
14. The Respondent entered appearance on the 23rd April, 2018 and filed a statement of Response on the 20th July, 2018 contending that the grievant was lawfully interdicted on the basis of being absent from duty without leave from 22nd May, 2014 .
15. The Respondent avers that it informed the grievant of his pending leave days and merely advised him on the need to utilize the same but never at any point coerced the grievant to taking that leave.
16. The Respondent asserts that the grievant's office attendance was erratic and irregular. That his behavior was unbecoming which culminated to various warnings both verbally leading to the warning letter of 27th September, 2012. Further that members of the public made various complaints on double allocation of land and a lot of interference with the system management using live form system which system was accessible to the grievant which the Respondent was forced to lock the grievant from accessing the Local Authority Integrated Financial Management System(LAIFMOS) to safeguard the integrity of the system.
17. Nevertheless, that the grievant attempted to approve development plans in 2013 which work was a preserve of the Town clerk which culminated to another warning on the grievant. Without Justification and defiance of laws the grievant carried out fraudulent subdivisions in 2014 when there was no Town Planning Committee to authorize the said sub-division.
18. The Respondent avers that the grievant did not hand over as directed and the document filed as Appendix D is not proper as the same is not in the Respondent's letter head as is in practice.
19. The Respondent maintains that the grievant was given 30 days leave with another 30 days compulsory leave which essentially would have lapsed on 22nd May, 2014 and not later than 2nd June, 2014. However, the grievant reported back to work on 25th November, 2015 after about a year and half without any justification or explanation thereof.
20. After reporting on 25th November, 2015 the grievant failed to follow up on the alleged issue of space for the reason that he was still on the Respondents payroll without rendering any services to the Respondent. The grievant's salary was stopped from January, 2016 and subsequently the grievant was interdicted from employment commencing on 31st March, 2016 on the basis of absenteeism.
21. The Respondent maintains that the grievant was interdicted on justifiable basis and while the Respondent was sill finalizing investigation that would form part of disciplinary hearing the Grievant rushed to this Court claiming unfair termination when the grievant had not been terminated.
22. The Respondent contends that it followed the law and had not at any point violated the grievant's rights as alleged by the claimant.
23. The Respondent contends that this suit was filed prematurely and urged this Court to dismiss the same with costs.

Hearing

24. The Claimant called one witness, **Levin Kimeu Mulei(CW-1)** whose testimony basically reiterated his claim.

25. On cross examination by **Kere Advocate**, CW-1 testified that he handed over as directed in presence of Mr Kwena however admitted that the handing over form was not signed. He stated that upon expiry of his annual and compulsory leave he reported back to the office on 4th June, 2014 and since his office space had been taken over, he opted on sharing other employees' office as he follows up on allocation of an office. That since there was no response he formally made a request of office space on 25th November, 2015. He also testified that once his salary was stopped and he informed the claimant who inquired on the stoppage of salary only for the Respondent to serve him with an interdiction letter. He testified further that the matter was taken to a conciliator and when asked whether the Respondent was served he testified that they were but could not prove service.

26. On re-examination CW-1 testified that he was took his annual leave and soon after was directed to go for compulsory leave only for his office to be given to someone else and on inquiry, his supervisor did not take action forcing him to write an official letter requesting for an office to work from. In the meantime that he worked in other employees offices. He maintained that his salary was stopped then thereafter he was served with interdiction letter and that no hearing was ever conducted on the alleged misconduct.

27. The Respondent called one witness, Geoffrey Kwena, the Respondent staff administrator as the RW-1, who adopted his witness statement dated 11.7.2016. He testified that he was the town clerk when the grievant was the town planner. That he was the one that advised the grievant to take his annual leave and thereafter put on compulsory leave which was to end on 22nd Mat, 2014 however the Grievant failed to report back to work from that day to 25th November, 2015 and could not account for the absence leading to the stoppage of his salary.

28. On cross examination by Odero Advocate, he maintained that he served the grievant with the letter of 12.1.2016 and on the compulsory leave he affirmed that the leave was conditional on handing over and that the grievant did not hand over. He stated that the grievants salary was stopped on the basis of absenteeism but could not explained why salary was stopped on alleged absenteeism for 2 years. He also admitted that the claimant was not issued with a show cause letter or a letter directing him to any disciplinary hearing. He also stated that there is no formal termination of the claimant services. Further that the Respondent did not attend any hearing with the Union on any disciplinary hearing.

Claimants Submissions.

29. It was submitted for the claimant that the interdiction of the grievant was unfair, irregular and unlawful because the basis for the termination is on alleged absenteeism which the grievant has explained having reported back to work immediately after the compulsory leave only to find his office had been occupied and the request to be allocated another office has never born any fruits. Further that the grievant had on 25th November, 2015 submitted his work plan for boarder town with the budget which was funds were never allocated to him. These actions according to the Claimant demonstrates that the grievant was at work. The Claimant thus submitted that no reason was given for the interdiction and the same ought to be found as unfair. In this they cited the case of **Fredrick Saundu V Pricipal Namanaga Mixed Secondary School & 2 others** and the case of **Judith Mbayah Tsisiga V Teachers Service Commission [2017] eklr.**

30. The claimant argued that the grievant ought to have been subjected to disciplinary hearing before the interdiction and the stoppage of salary. In this they cited the case of **Anne Nyambura Kariithi V Micro and Small Enterprises Authority [2021] eklr.**

31. It was then submitted that the interdiction is unlawful on the basis that it's still ongoing without an end on sight from 31st March, 2016 to now about 6 years contrary to Article 47 of the Constitution that provides for expedient, efficient and reasonable administrative Action. Further that this suit was not filed prematurely but was informed by the lethargy and indifference of the Respondent. The claimant buttressed its argument by citing the case of **Margaret Ayuma Katungu V Attorney General [2018] eklr** and the case of **Omari Bakari and 5 others V County Government of Mombasa and Mombasa County Public Service Board [2018] eklr.**

32. It is the claimant submissions that the Respondent ought to have at the very list pay the grievant half basic salary and his house allowance together with his medical allowance or medical insurance during the period of interdiction as provided for under Clause D.31 of the County Public service Human Resource Manual 2013.

33. Accordingly it was submitted that the grievant was unlawful interdicted without any benefits contrary to the law and the claimant urged this Court to allow the claim as prayed.

Respondent's Submissions.

34. The Respondent maintained that it followed due procedure in interdicting the grievant in that the grievant after being send on compulsory leave that was to end on 22nd may, 2014 stayed absent till 25th November, 2015 when he resurfaced and demanded to be given an office cause the previous office had been taken over by another planner. It was argued that the absenteeism was a basis for disciplinary sanction and action was taken against him under Clause D.20 of the County Public Service Human Resource manual, 2013 as read with section 9(e) of the Public Officers Ethics Act No. 4 of 2013. subsequently his salary was stopped and he was removed from payroll which action was communicated to the grievant in the letter dated 12.1.2016, later on 31st March, 2016 the grievant was legally interdicted for the absenteeism.

35. The Respondent argued that it did not violate the grievant's Constitutional rights as alleged and that the interdiction was merely to last till finalization of investigation and hearing of the grievant which was curtailed when this suit was filed.

36. On the prayers sought, the Respondent submitted that no evidence was adduce in support of prayer (a). prayer (c) was an issue that was

already adjudicated in Narok CMC No. 64 of 2016 and was dismissed further that this Court lacks jurisdiction to determine the same. With regard to the prayers for compensation the Respondent submitted that the grievant was interdicted in accordance with the law as such he should not be granted the reliefs sought.

37. I have examined all the evidence and submissions of the parties herein. The grievant contends that he was forced to go on compulsory leave which he obliged and had been asked to hand over all government assets and documents.

38. The letter directing the grievant to proceed on compulsory leave is dated 16/4/2014 (APP B).

39. APP D is the handing over report the claimant avers he made on 30/4/2014 and is witnessed by one Godfrey Kwena though not signed by the said Godfrey.

40. The grievant has contended that when he resumed from the compulsory leave, he found his office space taken up and he was forced to share space with others in the office.

41. On 25/11/2015 he wrote a letter to County Secretary asking to be allocated office space and this letter was not responded to. The claimant's salary was later stopped from January 2016. On 31/3/2016 he was interdicted.

42. The letter of interdiction did not indicate the period of interdiction and there is no indication that the interdiction was ever lifted as at 14/11/2016, when this case was filed.

43. Section D 31 (1) (e) of the respondent's HR Manual envisages that an authorized officer may in the exercise of these powers and functions, interdict an employee provided that proceedings which may lead to the officer's dismissal are being taken or about to be taken or that criminal proceedings are being instituted against the County Public Officer.

44. In the case of the respondent, no Criminal proceedings were ever instituted against him. There is also no indication that disciplinary proceedings were being undertaken against him.

45. The respondents aver that the claimant had been guilty of abating fraudulent subdivision of land and also approving development plans.

46. This was indeed misconduct and there is no reason why the respondent didn't institute disciplinary proceedings against him if they had the evidence of misconduct.

47. It is my view and finding that the respondent erred in keeping the grievant on interdiction for a long period without instituting disciplinary proceedings against him.

48. The grievant through the claimant even attempted reconciliation but even this did not bear fruits.

49. I therefore find that the claimant was unlawfully and unfairly interdicted by the respondent with effect from 31/3/2016 and I find the interdiction null and void.

50. I therefore lift the interdiction against the grievant and direct the respondents to reinstate him to work with full pay with effect from 31/3/2016 without loss of promotion and benefits with immediate effect and in any case not less than 1/1/22.

51. The respondents will also pay the grievant 6 months salary as damages for the unlawful interdiction.

52. The respondents will pay costs of this suit plus interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED IN OPEN COURT THIS 2ND DAY OF DECEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

IN THE PRESENCE OF:

BAITU HOLDING BRIEF FOR ODERO FOR CLAIMANT – PRESENT

OKUO HOLDING BRIEF KERRE FOR RESPONDENT – PRESENT

COURT ASSISTANT - FRED