



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION 7 OF 2019**

**(Before Hon. Justice Hellen S. Wasilwa on 20<sup>th</sup> January, 2020)**

**ERASTUS SIFUNJO KISAKA.....PETITIONER/APPLICANT**

**VERSUS**

**UNIVERSITY OF NAIROBI.....RESPONDENT**

**RULING**

1. The Petitioner/Applicant, Erastus Sifunjo Kisaka filed a Notice of Motion application dated 10<sup>th</sup> January 2019 against the Respondent, University of Nairobi.
2. He seeks to be heard for orders that pending hearing and determination of the Application and Petition herein, the decision by the Respondent to suspend him from duty be set aside and that the Respondent be further restrained either by itself, employees, servants and/or agents from terminating his employment contract or otherwise interfering with his normal employment.
3. The Application is based on the grounds that the Petitioner has been an employee of the Respondent for over 21 years and is currently employed by the Respondent as a Lecturer in the Department of Finance and Accounting, School of Business, College of Humanities and Social Sciences effective 18/07/2014.
4. That he has exhibited impeccable professionalism, competence and integrity in executing his duties but on 25/09/2018, the Respondent issued him with a Letter of Suspension from duty with half pay on grounds that he was suspected of being involved in unethical conduct. That he replied to the suspension letter setting out reasons why disciplinary action should not be taken against him as the allegations were unfounded.
5. That the Respondent has never invited him to present his case/defence before a Disciplinary Committee and that the Respondent has further neglected and or refused to furnish him with any evidence forming the basis of the allegations made against him.
6. That he is required to report to work three days a week despite being paid half salary and without commuter allowance. That he has on several occasions written to the Respondent to lift the suspension or convene a disciplinary hearing but the Respondent has ignored the same and that he continues to suffer indefinite suspension from duty.
7. That his continued suspension on half pay violates his constitutional right to fair administrative action and fair labour practices and that this Application also seeks compelling orders to have him reinstated as lecturer of the Respondent.
8. The Applicant also filed a Supporting Affidavit averring that it was alleged he had attempted to extort money from a student in order to release his examination results for Financial Econometrics Course (Course Unit DFI 611).
9. He avers that the Respondent has failed to follow its own internal disciplinary rules being **The University of Nairobi Code of Conduct and Ethics and The Procedure for Staff Disciplinary, 2016** which require that a person be given a chance to defend themselves at a disciplinary hearing.
10. He contends that it is in the interest of justice that the decision to suspend him be set aside and that if the orders sought are not granted, he stands to suffer irreparable harm which cannot be compensated. He annexes documents marked ***ESK 01*** to ***ESK 05*** in support of his case.
11. The Respondent filed a Replying Affidavit dated 5<sup>th</sup> March 2019 sworn by its Ag Deputy Vice Chancellor (Administration & Finance) and Professor of Management Science, Prof. Isaac Mbeche who avers that the Applicant was employed effectively from 18/07/2013.

12. That the Respondent's Chairman Department of Finance & Accounting received a complaint statement against the Petitioner/ Applicant dated 26/07/2018 from a student of the Respondent, Mr. Charles Mugwanja.

13. That the complaint was accompanied with attachments of SMS detailing the Applicant's intention to extort money from the said student and that investigations conducted by the Respondent's Director Security & Safety Services made a report with the findings that:-

*a. The Petitioner engaged in communication with the student concerning student's missing marks both by mobile phone conversations, text messages and one on one.*

*b. In their conversations, the Petitioner attempted to extort money from the student in the pretext of sorting the student out of purported examination cheating.*

*c. There was indeed mishandling of the student's marks on the marks' sheet by the Petitioner including recording of a wrong Registration No. D63/5531/2017 instead of D63/5131/2017.*

14. He avers that following the report, the Respondent communicated to the Petitioner of its decision to suspend him from duty pending disciplinary action and contends that the Petition is premature, ill-advised and made in bad faith as the Respondent was in the process of convening a disciplinary committee before the Petitioner proceeded to Court.

15. That the suspension of the Petitioner was lawful and procedural and that their Counsel on record has advised him that the Petition does not establish a prima facie case with a likelihood of success.

16. Further, that the Petition does not disclose any arguable constitutional issues to warrant issuance of interim conservatory orders nor the final and conclusive order for reinstatement. He annexes documents marked **IMB 1** to **IMB 5** in support of the Respondent's case.

#### **Petitioner/Applicant's Submissions**

17. The Applicant submits that the Constitution of Kenya provides under **Article 27(1)** that every person is equal before the law and has a right to equal protection and equal benefit of the law while **Article 27(2)** provides that equality include the full and equal enjoyment of all rights and fundamental freedoms.

18. That **Article 28** provides that every person has inherent dignity and the right to have that dignity respected and protected and which right he is entitled to being a lecturer of many years and of good moral standing.

19. That **Article 35** provides for access to information required for the exercise or protection of any right or fundamental freedom while **Article 35(2)** states that every person has the right to correction or deletion of untrue or misleading information that affects the person.

20. He further submits that the Respondent has infringed on his right to fair administrative action under **Article 47 of the Constitution and Section 4 part 1 of the Fair Administrative Action Act, 2015** by failing to accord him a fair hearing and that it threatens to terminate his employment without any justifiable cause or reason. He cites the case of **Severine Luyali –v- Ministry of Foreign Affairs & International Trade & 3 others [2014] eKLR** where the Court held that:-

*“...administrative action is therefore part of the wider exercise of public power that when analysed or reviewed must find reasoning to any challenge of invalidity of administrative action and find basis in lawfulness, fair procedure and reasonableness.” That it was his legitimate expectation he would be given an opportunity to present his case and defend himself before a disciplinary committee but the same was not done and that he is yet to know his fate.*

21. That **Article 50 of the Constitution** provides that every person has the right to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

22. That the case herein relates to parties well covered and protected under the ambit of **Article 41** and that fair labour relations go round to ensure that whatever action is taken by an employer against an employee, due process is given regard.

23. That in the case of **Bella Vista Restaurant Mombasa Limited –v- KRA [2016] eKLR** the Court held that conservatory orders in constitutional litigation must be considered in the light of the purpose of the constitution to uphold and enforce the Bill of Rights.

24. The Applicant further refers to the case of **Peter Kariuki & 16 others –v- Kenya Agricultural Research Institute [2013] eKLR** where the Court held that fair labour practices include provisions for basic fair treatment of employees, procedures for collective representation as work and policies that enhance family life.

25. Further, that **Article 23(3) of the Constitution** provides that in any proceedings brought for the enforcement of the bill of rights, a Court may grant appropriate relief including a declaration of rights, an injunction and conservatory orders. He relies on the case of **Diana Kethi Kilonzo –v- Independent Electoral and Boundaries Commission and 10 others [2013] eKLR** where it was held that where a party is aggrieved, the Court will step in and provide appropriate relief as required by Article 23(3) of the Constitution.

26. It is submitted by the Applicant that the law on interim injunctions is well settled with the grounds for the grant of interim injunctions being enunciated in **Giella v Casman Brown [1973] EA 358**. That the said case set out the three conditions to be satisfied as follows:-

a) *An applicant must demonstrate a prima facie case with a probability of success;*

b) *An injunction will not be granted unless the Applicant might otherwise suffer irreparable injury which would not be compensated by an award of damages; and*

c) *When the court is in doubt, it will decide the application on the balance of convenience”.*

27. He submits he has demonstrated a case which exhibits a right infringed by the Respondent and which calls for a rebuttal or explanation from it, within the meaning made in **Mrao Limited v First American Bank of Kenya Limited & 2 others [2003] KLR 125** and **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** and by extension the first limb for the grant of an interlocutory injunction as enunciated in **Giella v Casman Brown**.

28. Secondly, the Applicant submits that he stands to suffer irreparable damage which cannot be compensated if orders sought in the application herein are granted and that the Court of Appeal defined *irreparable loss* in **Corn Products Kenya Limited v Corn Products Kenya Limited & another [2014] eKLR** as the injustice that would be caused to the defendant if the Applicant were granted an injunction and later failed at the trial and does not outweigh the injustice that will be caused to the plaintiff if the injunction were to be refused but he succeeded at the end of the trial.

29. Thirdly, that if this Court is in doubt then the balance of convenience tilts towards the granting of an injunction until all the issues before this Court are resolved and that the Respondent does not stand to lose in any way if an injunction is granted. That it is clear he has satisfied the prerequisites for the grant of interlocutory injunction as enunciated in the *Giella case* and that the Application herein should be granted in the terms prayed for.

### **Respondent's Submissions**

30. The Respondent submits that in this context, administrative suspension is not a disciplinary sanction and should not be applied as if it is a punishment and that the Petitioner's application is without merit as the Respondent has not terminated the Petitioner from his employment.

31. That administrative disciplinary process and the rules of natural justice require that each party be given a fair hearing, which includes the Respondent being allowed to interrogate the Petitioner with the intention of getting to know the truth as regards the allegations. It cites the case of **Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** where Ndolo J held that the Court should not take over and exercise managerial prerogative at the working place unless the process was marred with irregularities and that court could not stop the process but only put things right.

32. He also relies on the case of **Kenya Plantation & Agricultural Workers Union –v- Finlays Horticulture Kenya Ltd [2015] eKLR** where Radido J held that:

*“31. But it is not clear within our statutory framework whether the right to a hearing is a prerequisite before suspension.*

*33...the Court must be alive to the reality that the employment relationship requires personal contact between employer and employee innumerable times and this of necessity requires mutual trust and confidence. In other words, specific performance must be granted with abundant caution.*

*41...it is clear that the Court has the jurisdiction to intervene in a disciplinary process, but such intervention must be in very exceptional cases where compelling reasons have been given to justify the Court's intervention. The compelling reasons would include the fact that grave injustice would be occasioned to the employee and that the employee had no alternative means of attaining justice or remedies.”*

33. It invites the Court to be persuaded by the case of *Rebecca Ann* above and find that the Petitioner is being clever by running to Court to stop a disciplinary process that is part of the due process enshrined in **Clause 23 of his Terms of Service and Code of Conduct and Ethics for Public Universities**.

34. That the Petitioner has not demonstrated the prejudice and/or injustice it would suffer if the Respondent proceeded with the disciplinary process.

35. It submits that as the Court engages in the delicate balance of convenience, for fairness, the orders sought should not be granted as it will be the one who will be prejudiced if they were to issue. It cites the case of **Alfred Nyungu Kimungui –v- Bomas of Kenya [2013] eKLR** where the court held that:-

*“...The fairness of procedure shall become known after recording of the full evidence. The intervention sought by the Claimant would result in an unjust limitation of the managerial prerogative. The Claimant, if successful, can have full restoration, while this cannot be said of the Respondent, if its decision to terminate is upheld by the Court at the end of the proceedings.”*

36. The Respondent further relies on the case of **Dorothy Njoki Ndung'u –v- Machakos University College & another [2017] eKLR** where Mbaru J while directing the claimant to submit herself to the internal disciplinary mechanisms of the Respondent unconditionally, held that:-

*“35. Based on the documents submitted at this stage, I find grey areas that can only be established in evidence. However, on the*

*same to stay the disciplinary proceedings commenced in view of the work lapses against the Claimant would be to deny the Respondent from addressing the any case of misconduct by the Claimant based on the evidence only available at the shop floor, the work place...*

*36. As such, to stay such a process and or stay the suspension, would be to remove the Respondent from engaging in a fair process where facts with regard to the reasons as to why the Claimant had to be absent from work would be established. At the hearing, the Claimant would have the best forum to give her side of defence and submit all relevant documents in response. To leave such matters to the Court to arbitrate where the Claimant in her own affidavit has not met the prerequisites for the grant of the orders sought would be to deny her a chance to address any concerns that emerge from the internal hearing.*

*38. There are certain facts that can only be confirmed and or ascertained from the shop floor. Therefore when an employee is invited to a disciplinary hearing upon a suspension, this does not amount to termination of employment. This is simply to give both parties a chance to be heard and ensure that each party has his/her case in defence heard..."*

37. It is the Respondent's submission that at the end of the investigations, the Petitioner will be accorded a hearing as per provisions of the manual and the Employment Act 2007 and that the suspension would be released if he was not found culpable.

38. That the Petitioner being opposed to any investigations or disciplinary measures should form the basis for this Court not to grant the orders sought. It prays that this Honourable Court dismisses the application herein with costs to the Respondent.

39. I have examined the averments of both Parties and submissions filed herein. The Applicant's contention is that he was placed on suspension on 25/9/2018.

40. He filed this application on 14.1.2019 almost 3 months after the said suspension and as at the moment he has not been subjected to any disciplinary hearing despite there being no orders barring disciplinary process from progressing or placing an employee on suspension for a long period of time without any disciplinary process being carried out is indeed punitive and a breach of Article 41 of the Constitution on fair labour practices.

41. It is however noteworthy that this Court should not unduly interfere with an employer's internal disciplinary process unless the process is flawed and the interference will be limited to putting the process back on track.

42. This Court has on various occasions addressed the issue of internal disciplinary processes and has stated as follows:-

**"See Kenya Plantation and Agricultural Workers Union vs Finlays Horticulture Kenya Limited (2015) Eklr, Radido J stated as follows:-**

- *"It was not clear whether the right to a hearing is a prerequisite before suspension within our statutory framework.*
- *The Court must be alive to the reality that the employment relationship requires personal contact between employer and employee innumerable times and this of necessity requires mutual trust and confidence. In other words, specific performance must be granted with abundant caution.*
- *That the Court has the jurisdiction to intervene in a disciplinary process, but such intervention must be in very exceptional cases where compelling reasons have been given to justify the Court's intervention. The compelling reasons would include the fact that grave injustice would be occasioned to the employee and that the employee had no alternative means of attaining justice or remedies".*

43. And in **Rebecca Maina & 2 Others vs Jomo Kenyatta University of Agriculture and Technology (2014) eKLR** Ndolo J stated as follows:-

- *"The Court should not take over and exercise managerial prerogative at the working place unless the process was marred with irregularities, but Court could not to stop the process, but only put things right".*

44. I have already intimated that the Respondent's action of placing the Applicant on a suspension without progressing to a disciplinary hearing is an unfair labour practice which should not be condoned.

45. The Court should not however take away the employer's prerogative of proceeding with their own internal disciplinary processes.

46. However, the delay in presenting the disciplinary process against the Applicant has taken an exceedingly long time.

47. In the circumstances, for the sake of putting the process on track, I direct that the Respondent should proceed with the stalled disciplinary process against the applicant within 3 months with effect from the date of this judgement. In default, the suspension would stand waived.

48. In the meantime, the Respondents are restrained from terminating the services of the Applicant unless the disciplinary process is conducted fairly and justly or until the hearing and determination of this Petition whichever comes earlier.

49. Costs in the cause.

**Dated and delivered in open Court this 20<sup>th</sup> day of January, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kalume holding brief Owino for Petitioner

Ali holding brief Kipkorir for Respondent