



**REPUBLIC OF KENYA**

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

**CAUSE 822 OF 2019**

(Before Hon. Lady Justice Hellen S. Wasilwa on 21<sup>st</sup> May, 2020)

**ROSEMARY WAITHERERO MBURU.....CLAIMANT**

**VERSUS**

**KENYA AIRWAYS LIMITED.....RESPONDENT**

**RULING**

1. Before this Court, is the Claimant's Notice of Motion Application dated 9/12/2019 seeking the following orders:-

*a. Spent.*

*b. This Honourable Court be pleased to issue interim orders of injunction directed at the Respondent restraining them, their servants or agents from convening any Board meeting or constituting any panel and/or committee for the purpose of taking any disciplinary action against the Claimant or continuing with any disciplinary proceeding in progress pending the hearing inter partes and determination of this Application.*

*c. This Honourable Court be pleased to issue interim orders of injunction directed at the Respondent restraining them, their servants or agents from constituting a panel/committee or purporting to discipline the Claimant, to discipline the Claimant, of (sic) stay of any of the proceedings or decisions arrived therefrom and the same be declared null and void and of no legal consequence pending hearing and determination of this suit.*

*d. This Honourable Court be pleased to issue interim orders of injunction restraining the Respondent's Board, their servants, employees and/or agents from in any way harassing and/or victimizing the Claimant pending the hearing inter partes and determination of this Application.*

*e. This Honourable Court be pleased to issue interim orders of injunction restraining the Respondent's Board, their servants, employees and/or agents from in any way harassing and/or victimizing the Claimant pending the hearing and determination of this suit.*

*f. That costs of this application be awarded to the Claimant.*

*g. Any other order that this Honourable Court may deem fit to grant.*

2. The Application is supported by the grounds set out therein and the supporting affidavit of Rosemary Waittherero Mburu sworn on 9/12/2019.

3. The Respondent has opposed the Application vide its Grounds of Opposition and the Replying Affidavit of Grace Wamiti sworn on 18/12/2019.

**The Applicant's Case**

4. The Applicant avers that on 18/6/2019, the acting head of supply chain issued her with the suspension letter of 18/6/2019, following a security lapse at Respondent Company. However, no charges were preferred against her and she was allowed to go back to work.

5. She avers that on 28/10/2019 and 3 months after reporting back to work, she was requested to show cause by the acting head of supply chain and responded vide her letter of 30/10/2019.

6. The Applicant avers that there was no communication by management on the issue until November 2019 when the acting head of supply chain declared all positions in the department vacant, via email. Several positions were reserved hindering them from applying for the same. She avers that the restructure was being done in their department alone.

7. Consequently, the Applicant and her fellow colleagues in the department, sought an injunction in Nairobi ELRC 816 of 2019. She avers that on 6/12/2019, interim orders restraining the Respondents from continuing with the restructure which was granted and were valid until 19/12/2019.

8. It is averred that on 9/12/2019, the Claimant received a letter from her immediate supervisor, informing her that she had a panel hearing the following morning at 11:00am. She responded to the letter via email, requesting for more time to prepare and to be furnished with the documents that would be relied on. However, the date was not changed.

9. It is her position that the Respondent's HR Manual outlines the time frame for concluding disciplinary matters. Under, paragraph 16.18, minor offences should be concluded within 7 days while major offences should be concluded within 14 days, from the date the invitation letter was issued. She deposes that she does not know the category of her offence. This notwithstanding, the stipulated time period has lapsed.

10. The Claimant avers that she has been victimized, intimidated and is under constant threat of dismissal on unlawful grounds. She further avers that the disciplinary process is a sham meant to rubberstamp the actions of the acting head of supply chain, who has been extremely hostile and frustrates her work.

11. She urges that if the Court fails to intervene, she risks losing her source of income.

### **The Respondent's Case**

12. The Respondent contends that the Applicant has not established a *prima facie* case to justify the grant of the orders sought and further contends that she will not suffer any irreparable injury if the orders sought are not granted.

13. On the other hand, the Respondent would be deprived of the right to administer the Applicant's contract of employment and the right to manage its business. As such, the balance of convenience tilts in the Respondent's favour and against granting the injunctive orders sought.

14. In her affidavit, Grace Wamiti avers that the averments made in paragraphs 13, 14, 15, 16 and 24 are *sub judice* as they relate to issues pending for determination in **ELRC Cause 816 of 2019; Rose Kosgei and Rosemary Waitherero Mburu vs. Kenya Airway PLC** where the Applicant has sought the injunctive orders regarding her department's restructure. Further, the averments prejudice the Respondent.

15. It is averred that the Respondent has the right to subject its employees to disciplinary processes where they are suspected to have breached their contract.

16. The Respondent avers that pursuant to a whistleblowing tip of 9/6/2019, investigations were carried out regarding the theft and sale of the Respondent's tyres and batteries which were found in the commercial stores that the Applicant was responsible for. As a result, the Applicant was suspended to pave way for proper investigations.

17. The Applicant's suspension was lifted on 12/7/2019 and she reported back to work on 15/7/2019. It is averred that the Applicant was informed that lifting the suspension did not bar any disciplinary action against her on the same issues.

18. The Respondent avers that when investigations were concluded, it was found that the Applicant had breached her responsibilities under the contract. As such, she was issued with a notice to show cause on 28/10/2019. She issued an elaborate response vide her letter of 30/12/2019, regarding every allegation raised.

19. The response was found to be unsatisfactory, hence, she was invited to a disciplinary hearing scheduled for 10/12/2019. However, she requested for more time to source for more documents and the meeting was postponed to 11/12/2019 at 2:00 pm. It is averred that the Applicant confirmed that she would have the necessary documents required for the hearing.

20. It is contended that the Applicant's averment that she was unaware of the gravity of her offence is untrue as the allegations against her were explained to her in the meeting of 10/12/2019 where she acknowledged that she understood them.

21. The Respondent further contends that the averment that the Applicant is being targeted is untrue as she has been invited to the disciplinary hearing to vindicate herself.

22. The Respondent avers that it has complied with all legal and internal processes regarding investigation and discipline of its employees. As such, the Court should refrain from issuing the injunctive orders which might have the effect of prejudging the Respondent's disciplinary process and decision.

### **The Applicant's Rejoinder**

23. The Applicant filed her Further Affidavit sworn on 15/1/2020, in response the Respondent's Replying Affidavit and Grounds of Opposition.

24. She contends that the averments in paragraphs 13, 14, 15, 16 and 24 of her supporting affidavit are not *sub judice* as the same were used to illustrate the Respondent's victimization towards her.

25. She admits the contents of paragraph 13 of the Replying Affidavit but contends that the said duties were to be done under the Respondent's guidelines and which she adhered to. She also contends that she and her department made recommendations to improve security which were never considered.

26. She is of the position that the Respondent ought to have applied mitigation measures to curb the theft instead of laying the blame on her. It is her case that the security team followed up on the theft incident and identified the culprits.

27. The Applicant avers that she received the letter of 18/10/2019, on 5/7/2019. However, the delay in dispatching her letter was not explained to her. She further avers that paragraph 28 of the Replying Affidavit is not entirely true as she never got all the documents she requested for.

28. In response to paragraph 30, the Applicant contends that this matter was filed before the adjournment of the disciplinary hearing to 11/12/2019.

29. The application was disposed of by way of written submissions where both parties filed their written submissions.

### **The Applicant's Submissions**

30. In her submissions filed on 6/2/2020, the Applicant submits that the timing and the circumstances surrounding her disciplinary hearing illustrates her victimization. For instance, the time frames set out in the HR manual were not adhered to. It is submitted that allowing the disciplinary process to continue, will only validate the management's already made decision.

31. She relies on the case of **Valerie Rugene vs. Public Service Commission & 2 Other [2016] eKLR** where the Court found the disciplinary action taken against the Petitioner to be unlawful because of the victimization she endured.

32. The Applicant submits that the issues raised in the Application are different from the issues raised in ELRC 816 of 2019 and contends that the matter is not *sub judice*. In her understanding, for a matter to be *sub judice*, there must be matters in different courts with the same subject matter such that the outcome in one matter will affect the other.

33. She relies on the case of **Michael Mwawai Mjomba vs. Central Electrical International Limited [2019] eKLR** where the Court dismissed the Preliminary Objection on the ground that the two cases were different.

34. She invites this Court to consider the case of **Juliet Wamiri vs. ASK & 7 Others [2019] eKLR** where the orders sought are similar to the ones sought in this case and where the court granted an order for stay of suspension of the Claimant therein.

### **The Respondent's Submissions**

35. In its submissions filed on 18/2/2020, the Respondent submits that the Applicant has not met the threshold set out in **Giella vs. Cassman Brown Company Limited [1973] EA 358**, to warrant the granting of the injunctive orders sought.

36. It is submitted that for the orders issued, the Applicant must show how the disciplinary process flawed as was held in the case of **Wycliffe Gisebe Nyakina vs. Council of the Institute of Human Resource Management & 3 Others [2018] eKLR**. The Respondent submits that the Applicant has failed to demonstrate this.

37. It is the Respondent's submissions that the Applicant is not likely to suffer any irreparable harm and contends that speculation of loss or harm does not count as proof of irreparable harm. It contends that there must be more than unfounded fear on the part of the Claimant, as held in the case of **Nguruman Limited vs. Jan Bonde Nielson & 2 Others [2014] eKLR**.

38. The Respondent submits that the Application is an abuse of the court process as the Applicant is seeking stop a process that she had voluntarily agreed to participate in. It is submitted that the application is premature as the Applicant has not exhausted all the relevant avenues.

39. The Respondent finally submits that the balance of convenience tilts in its favour, as the Applicant is less likely to suffer irreparable harm if the orders sought are not granted.

40. I have examined all the averments of the Parties. From the evidence before me the Applicant had on 18/6/2019 been subjected to a disciplinary process and was placed on suspension. The charges were however lifted and she was allowed to go back to work.

41. On 28/10/2019, after 3 months from the time of reporting back to work she was again issued with a notice to show cause.

42. In the intervening period, the Respondent had also intended to declare the Claimant and others redundant and they proceeded to secure injunctive orders in ELRC 816 of 2019 on 6/12/2019.

43. What is evident herein then is that there are 2 parallel processes that could lead to the removal of the Claimant – one being disciplinary in nature and the other a restructuring process. Evidently, such 2 processes would be prejudicial to the Applicant who is being double

jeopardised.

44. The prudent thing would be for the Respondents to pursue one process and not both. Since this Court already ceased with ELRC 816/2019 where injunctive orders stopping restructuring have already been issued, I will not delve into that issue.

45. However, concerning the suspension of the Claimant on 9/6/2019, investigations were conducted and the suspension was lifted on 15/7/2019. However, the letter lifting the suspension was on “without prejudice” basis that more disciplinary action could be taken out from the results of the suspension.

46. Indeed then the Respondents are justified to subject the Applicant to a disciplinary process if they think that there are reasons or circumstances warranting the same.

47. The only reason for which this Court may interfere with the disciplinary process if at all is if there is evidence that it is flawed.

48. The Applicant has not in any way explained why the process is flawed for this Court to intervene.

49. Courts are reluctant to interfere with an employer’s internal disciplinary process unless it is evidently flawed and in breach of the law and such interference will only be limited to putting the process to the right course.

50. In the case of the Applicant, I find no reason to interfere with the disciplinary process and I therefore find the application without merit. I dismiss this application accordingly.

51. Courts in the cause.

**Dated and delivered in Chambers via zoom this 21<sup>st</sup> day of May, 2020.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Ndungu holding brief Omondi for Respondent – Present

Mwatsama for Applicants – Present