REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 95 OF 2020

HUMPHREY NYAGA NJERU.....PETITIONER

VERSUS

SAFARICOM INVESTMENT COOPERATIVE LIMITED.....RESPONDENT

RULING

Introduction

1. The application before the Court is the Petitioner's Notice of Motion dated 24.6.2020. It is brought under Article 23 of the Constitution of Kenya, 2010, Rules 23 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and Rule 6 and 7 of the Employment and Labour Relations Court (Procedure) Rules 2016 and seeks the following Orders:

a) **THAT** this Application be certified as urgent and be heard *ex-parte* in the first instance (Spent)

b) **THAT** pending *inter-partes* hearing and determination of this Application, a temporary Conservatory Order of injunction restraining the Respondent and or anyone claiming under them from proceeding with disciplinary hearing scheduled on 26.6.2020 and or anytime thereafter in the manner set out by the Respondent's letter to the Petitioner dated 19.6.2020 or otherwise based on the charges set out in the letter dated 16.4.2020 by the Respondent to the Petitioner without compliance to the Employment Act, Fair Administrative Action Act and the Constitution and or providing answers to the specific questions set out in the request for particulars and evidence by the Petitioner to the Respondent dated 21.4.2020, 5.6.2020 and 15.6.2020. (Spent)

c) **THAT** there be an early *inter-partes* hearing date to this Application.

d) **THAT** Pending *inter-partes* hearing and determination of this Application, an Order of mandatory injunction is issued directing the Respondent to provide evidence and or answer to the specific request of particulars forming basis of the charges against the Petitioner in the letter dated 16.4.2020 by the Petitioner to the Respondent in terms of the entire Petitioner's request for particulars vide letters dated 21.4.2020, 5.6.2020 and 15.6.2020 to the Respondent within 14 days from the date of this Order and in default thereof, the charges in the letter dated 16.4.2020 by the Petitioner to the Respondent be deemed as abandoned and expunged from the Petitioner's employment record.

e) **THAT** pending *inter-partes* hearing and determination of this Petition, a temporary conservatory order of injunction restraining the Respondent and or anyone claiming under them from proceeding with the disciplinary hearing scheduled on 26.6.2020 and or anytime thereafter in the manner set out by the Respondent's letter to the Petitioner dated 19.6.2020 or otherwise based on the charges set out in the letter dated 16.4.2020 by the Respondent to the Petitioner without compliance with the Employment Act, Fair Administrative Actions Act and the Constitution and or providing answers to the specific questions set out in the Request for Particulars and Evidence by the Petitioner to the Respondent dated 21.4.2020, 5.6.2020 and 15.6.2020.

f) **THAT** the Petition filed herewith be certified urgent and be heard on priority basis.

g) **THAT** the Honourable Court be pleased to grant the Petitioner's costs of the Application herein.

2. The Application is premised on the grounds as set out on the body of the Motion and Affidavits sworn by the applicant on 24.6.2020 and20.7.2020. In brief, the applicant's case is that he was employed by the respondent as her Chief Executive Officer; that on 1.4.2020, while on leave the respondent carried out a hurried, biased and malicious evaluation on his performance and entered a verdict of poor performance and recommended for separation; that by a letter dated 16.4.2020 he was interdicted for misconduct including fraud and abuse of office; that the letter also invited him to defend himself from the said charges but he could not do so without certain particulars and documents which he requested from the respondent vide his letters dated 21.4.2020, 5.6.2020 and 15.6.2020; that the said request was not adequately granted and

instead he was summoned to attend a disciplinary hearing on 26.6.2020 at 2.00pm; that he is apprehensive that if the instant Application is not allowed, the disciplinary hearing will proceed as scheduled in complete violation of his rights as guaranteed under Articles 25 (c), 27(1), (2), (5), 28, 30 (1), 35 (1) (b), 47 and 50 of the Constitution of Kenya, 2010 and in the Respondent's Human Resource Policy Manual; and finally in his view he has made out a prima facie case with probability of success that the respondent is engaging in unfair labour practices in breach of the constitution and the HR policy manual and unless the orders sought are granted the Petition will be rendered nugatory.

3. The Respondent has opposed the application by the Replying Affidavit sworn by **PETER GICHANGI**, the Chairperson of the Board of Directors and Central Management Committee of the Respondent, on 9th July, 2020. In brief, he contended that the Applicant's performance was lawfully evaluated and/or appraised as required under the Respondent's Human Resource Policy Manual and placed on a Rapid Results Initiative (R.R.I) following his dismal performance for purposes of improving his performance; that thereafter the Applicant was interdicted on allegation of misconduct in accordance with the Respondent's Human Resource Policies and Procedures Manual at Clause 15.2.6.1; that the Applicant was accorded an opportunity to make his presentations to the Respondent and was subsequently notified of the disciplinary hearing on 5.6.2020 vide her letter dated 3.6.2020; that the Applicant's request for documents was sufficiently granted but he deliberately failed to attend the disciplinary hearing despite it being rescheduled to 16.6.2020 and 26.6.2020; that the Petitioner has approached this Honourable Court with the sole intention of evading disciplinary proceedings for alleged misconduct; that this Court should allow the disciplinary hearing to proceed as clearly provided in the Respondent's Human Resource Policies and Procedures Manual; that the prerogative to manage the day to day relationship between an employer and employee remains that of the employer and that this Court should not unduly interfere with the same; and finally, no exceptional circumstances shown by the Petitioner to warrant this Court's intervention in the on-going disciplinary proceedings against the Petitioner.

4. The Application was canvassed by way of written submissions.

Submissions by the Parties

5. The Applicant submitted that he has met the legal threshold for the grant of prayers 4 to 7 of the instant Application and therefore urged this Court to grant the same as prayed and relied on **Board of Management of Uhuru Secondary School Vs City County Director of Education & 2 Others (2015) eKLR.**

6. He maintained that he has established a prima facie case for the grant of the Conservatory Orders sought by showing that the process leading to his invitation for a disciplinary hearing is marred with irregularities and inconsistencies that warrants this Honourable Court to interfere with the process to avert the violation of his rights as envisaged in the Constitution of Kenya, 2010. He further submitted that he has established clear, actual and threatened violation of his fundamental rights and freedom thus warranting the grant of the Orders sought.

7. The Applicant further submitted that should the Orders sought not be granted he is likely to suffer irreparable damage that may not be compensated by way of damages. In his view, withholding of the said orders will water down and erode the rule of law as guaranteed in the values, objects and purposes of the specific rights and freedoms in the bill of rights. For emphasis the Petitioner cited and relied on the case of **Joseph Siro Mosioma Vs H.F.C.K & 3 Others Nairobi HCCC No. 265 of 2006 (UR)** where the Court held that a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction.

8. The Applicant maintains that unless restrained by this Court the Respondent shall proceed with an unlawful, biased and premeditated disciplinary process thus rendering the entire Petition nugatory. To emphasize that point, he relied on the case of **Martin Nyaga Wambora Vs Speaker of the County Assembly of Embu & 3 Others (2014) eKLR** and urged the Court to allow the same as prayed.

Respondent's Submissions

9. The Respondent on the other hand submitted that the Applicant has failed to establish a prima facie case to warrant granting of the orders sought in the Application and has further not laid a basis for this Court to interfere with the internal disciplinary processes of the Respondent. To buttress this argument, the Respondent cited and relied on the cases of **Geoffrey Mworia vs Water Resources Management Authority (2015) eKLR** and **Mulwa Msanifu Kombo Vs Kenya Airways (2013) eKLR** where Courts have held that interference in an employer's disciplinary process would only be done in circumstances where an employee establishes that the employer is proceeding in a manner that contravenes the provisions of the Constitution or legislation, or in breach of agreed terms, or in a manner that is expressly unfair and offends the rule of natural justice.

10. The Respondent maintains that the disciplinary process instituted as against the Applicant herein is in conformity with the law as the Applicant was duly accorded an opportunity to make his presentations. The Respondent further maintains that the instant Application is a sham and is only aimed at delaying and evading disciplinary process.

11. In addition, the Respondent contends that the Applicant will not suffer any harm if the disciplinary process proceeds as the Applicant is aware of the charges levelled against him and that he will have a chance to a fair hearing. For emphasis the Respondent relied on the case of **Aviation & Allied Workers Union Vs Kenya Airways Limited [2013] eKLR** where the Court held that where the grievants were aware of the allegations against them as they responded to the show cause letters issue and could not later say that due process was not followed.

12. The Respondent further submitted that should the impugned disciplinary process be found to be unfair the Applicant shall be compensated by an award of damages by dint of Section 49 of the Employment Act and as such he does not stand to suffer irreparable damages if the orders sought in his Application are not granted. To buttress this argument, the Respondent cited and relied on the case of **Joan Wairimu Wanyutu Vs Social Services League, MP Shah Hospital (2019) eKLR** where the Court held that a Claimant cannot claim to suffer irreparable damages where compensation under section 49 of the Employment Act, 2007 can be awarded.

13. Finally, the Respondent submitted that the Applicant has failed to prove that the balance of convenience tilts in his favour for the issuance of the interim conservatory orders as contended by the Applicant. For emphasis the Respondent cited the authority of **Alfred**

Nyungu Kimungui Vs Bomas of Kenya (2013) eKLR where it was held that fairness of procedure can be interrogated at the full hearing of a matter and therefore interfering with the process would be tantamount to unjust limitation of the managerial prerogative of an employer.

14. The Respondent maintained that she has followed due process in instituting the disciplinary process against the Applicant herein and should therefore be allowed to proceed with the same. She therefore prayed that the interim conservatory injunction in force be vacated and the application dismissed with costs.

Issues for determination and analysis

15. After careful consideration of the application, affidavits and the submissions by the parties the main issue for determination is whether the applicant has met the threshold for this Court to grant interlocutory injunction pending trial of the suit herein. In Kenya the threshold for granting interlocutory injunction has not changed since the celebrated decision in **Giella v Cassman brown [1973] EA 358** where the following principles were set out:

a) That the applicant must establish a prima facie case with probability of success.

b) That the applicant must demonstrate that he stands to suffer irreparable harm if the order is withheld.

c) If the court is in doubt, it should determine the application on a balance of convenience.

Prima facie case

16. Prima facie case was defined by the Court of Appeal in **Mrao Limited v First American Bank of Kenya Limited & 2 others [2003] e KLR** as follows: -

> ***"…in civil cases is a case in which on the material presented to the court, a tribunal properly directed itself will conclude that there exists a right which apparently has been infringed by the opposite party as to call for an explanation or rebuttal from the latter."***

17. In view of the foregoing binding precedent, the applicant must prove that his legal rights under the Constitution, legislation, employer's HR Policy and Procedure Manual or the contract of service have been or are about to be infringed by the impugned disciplinary proceeding through the manner in which the employer is unfairly or illegally conducting the process. I gather support from **Mulwa Msanifu Kombo v Kenya Airways [2013] eKLR** Mbaru J held that: -

> ***"… this court would be reluctant to involve itself in a disciplinary process commenced by the employer unless in appropriate cases it is established that the disciplinary process has been commenced or is continuing unfairly. The intervention in disciplinary process by employers will be entertained by the court rarely and in clear cases where the process is likely to result in unfair imposition of a punishment against the employee. The court will intervene … if it is established that the procedure relied on by the employer offends fairness or due process by not upholding the rule of natural justice or, if the procedure is in clear breach of the agreed or legislated or employer's prescribed applicable or policy standards, or if the disciplinary proceedings were to continue it would result into manifest injustice in view of the circumstances of the case."***

18. In **Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR**, Ndolo J held as follows regarding court's intervention in disciplinary process at the shop floor: -

> ***"… the Court will intervene not stop the process altogether but to put things right."***

19. Ongaya J agreed with the foregoing views when in **Geoffrey Mworia v Water Resources Management Authority [2015] eKLR** he expressed himself as follows: -

> ***"The court will sparingly interfere in the employer's entitlement to perform any human resource functions such as … disciplinary control … 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 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."***

20. In this case, the applicant faults his interdiction and subsequent disciplinary proceedings contending that the same has been marred with irregularities, is unfair and in gross violation to his rights as protected under the Constitution, the Employment Act and the Respondent's Human Resources Policies and Procedures Manual. He contends that the charges against him have no nexus to his job description and for that reason he requested for particulars of the charges and documentary evidence supporting the charges but the request was not sufficiently granted to enable to him prepare his defence and instead the employer insisted on proceeding with the hearing. In the applicant's view, the disciplinary proceedings are a sham working to achieve a premeditated and predetermined outcome expressed in the appraisal of 1.4.2020.

21. The respondent has however, maintained that the particulars of the charges have been provided together with the relevant documents to enable the applicant prepare for the disciplinary hearing. She contends that the documents being demanded by the applicant are not relevant to the charges and that the applicant is only evading disciplinary process. In her view the disciplinary process is lawful and in compliance with the law and her HR policy manual and separate from the performance appraisal which was also done lawfully under te HR Policy Manual.

22. I have carefully considered the material presented to me by the two parties including the correspondences between them which sets out the charges and responses by the applicant. The charges were contained in the Letter of interdiction dated 16.4.2020 as follows:

> *a) Fraud*
>
> *Irregular activation and roll over of your Pepea account in contravention of the SIC Pepea product terms and conditions. The terms of the Pepea products were beneficial due to the reduced tenure of deposit at a high interest rate.*
>
> *b) Abuse of Office*
>
> *As the CEO, you allowed junior officers to approve exceptional product terms to your personal benefit at the expense of SIC.*

23. The applicant responded vide his letter dated 21.4.2020 raising issues in the manner in which he was sent on interdiction and further raising concerns on the manner in which the disciplinary process was initiated by the Respondent. Further, on 28.4.2020 he asked for the disciplinary proceedings to be halted until he was furnished with the relevant documentation that formed the basis of the charges against him and subsequent interdiction. The respondent provided none of the requested documents and instead on 3.6.2020 she invited the claimant for a disciplinary hearing on 5.6.2020.

24. On 4.6.2020 the Applicant through his Advocates, wrote to the Respondent requesting to be furnished with documentation that formed the basis of the said charges against him. The respondent replied by the letter dated 10.6.2020 attaching some of the requested documents and the disciplinary hearing was subsequently rescheduled to 16.6.2020. The Applicant was not satisfied and insisted on being furnished with all the documents requested for earlier, plus more information including the list of witnesses. The respondent declined contending that all the relevant documents to the case had been supplied and scheduled the hearing to 26.6.2020. However, the court halted the same pending the determination of the instant motion.

25. Under section 41 of the Employment Act, the employer has the obligation of explain to the employee in a language he understands, the reason for intended termination and thereafter invite him to defend himself in the presence of another employee of his choice. The said provision is set out below: -

> ***"1. Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation."***
>
> ***2.Notwithstanding any other provision on this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance and the person, if any, chosen by the employee within subsection (1) make."***

26. In my view, the charges of fraud and abuse of office against the applicant and the particulars set out in the letter dated 16.4.2020 are clear and not vague. The applicant was the CEO of the respondent and going by the lengthy letters he has written to the respondent in relation to the said charges, the court is without doubt that the applicant understood the charges and the particulars provided. He is therefore capable of defending himself during the intended disciplinary proceedings.

27. As regards the documentary evidence and the particulars of the witnesses to the alleged fraud and abuse of office, I find the same to be justified because they are founded on the right to fair hearing, right to information, the right to fair administrative action and the right to fair labour practices as envisaged in the Bill of Rights in the Constitution. Denial of such right to an employee by his employer would be unfair and justiciable. However, such rights are not absolute and will be enjoyable if the employee's request for information is made with precision and without shifting goal posts. I would think that this case would not have been necessary had the applicant made a simple and clear list of the documents he needed for purposes preparing for his defence.

28. In this case, however, I have to admit that the letters by the applicant to the respondent were not specific on the information he wanted. I find them to be too long and lacking precision on the requested documents. In my view, the applicant seems to be in a fishing expedition casting a wide net without limit. The respondent is justified to opine that the applicant is going around in circles with the sole intention of evading the disciplinary process. In fact, I find the respondent to have acted fairly by accommodating the applicant by rescheduling the hearing and providing him with some documents.

29. Having found that the charges against the applicant and the particulars thereof are clear and that he has not made a clear and precise list of the requested documents for purposes of preparing his defence. I return that the applicant has not proved that any of his rights under the Constitution, legislation, HR Policy Manual or his contract of service has been violated as alleged. I have also considered the provisions of the respondent's Human Resource Policies and Procedures Manual and the Employment Act, 2007 and formed the opinion that the Respondent complied with the same in instituting the impugned disciplinary process. It follows, therefore that the Applicant has not established a prima facie case with probability of success.

Irreparable harm

30. Without prove of a prima facie case the court sees no need of determining whether the applicant stands to suffer irreparable harm if the injunction order is denied. In my view, the only reason why the issue of irreparable harm arises is to guard the established case from becoming nugatory in case the applicant was to suffer an injury which cannot be remedied by an award of damages.

Balance of convenience

31. Again the court only deals with the issue of balance of convenience if it is in doubt. In this case I harbour no doubt on whether or not to grant the injunction sought. consequently, I find the Notice of Motion dated 24.6.2020 to be without merit and proceed to dismiss it. Costs in the cause.

Dated, signed and delivered at Nairobi this 21st day of August 2020.

ONESMUS N, MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE