



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE 284 OF 2020

(Before Hon. Justice Hellen S. Wasilwa on 13th August, 2020)

MTM.....CLAIMANT

VERSUS

KIE LIMITED.....1STRESPONDENT

MANAGING DIRECTOR, K I E LIMITED.....1STRESPONDENT

RULING

1. Pending for determination before me are two Applications.

2. The first Application is the Notice of Motion Application dated 6th July, 2020, filed by the Claimant/Applicant. The same is filed under certificate of urgency and is brought under Articles 1, 2, 3, 75, 159 and 236 of the Constitution of Kenya, 2010, Section 3, 12 (3) (i) and 20 of the Employment and Labour Relations Court Act and Rule 17 and 28 of the ELRC Procedure and Practice Rules, 2016 and all enabling provisions of the law. Seeking orders that:-

1. This Application be certified as urgent, heard ex-parte and its service be dispensed with in the first instance owing to its urgency (Spent).

2. This Honourable Court be pleased to issue Temporary Injunction to stay the disciplinary proceedings commenced by the Respondents against the Applicant pending the hearing and determination of this Application inter-partes.

3. This Honourable Court be pleased to issue Temporary Injunction to stay the disciplinary proceedings commenced by the Respondents against the Applicant pending the hearing and determination of this suit.

4. Costs of this suit be provided for.

3. The Application which is premised on the grounds that:-

a) The 2nd Respondent with no authority and in gross violation of Clause 11.2.2 of the 1st Respondent's Human Resource Manual maliciously, unlawfully and irregularly interdicted the Applicant without legal authority and/or jurisdictions as such an authority only vests in the Board of Directors of the 1st Respondent as is the case with officers in Grade KIE 13-15.

b) The 2nd Respondent commenced disciplinary proceedings against the Applicant prior to carrying out investigations contrary to the provisions of Clause 11.4.1 (e) of the HR Manual which violates the Applicant's rights as envisaged under Articles 41 and 47 of the Constitution of Kenya, 2010.

c) The Charges and/or alleged offences leveled against the Applicant are unknown to law as the same are not provided in the HR manual and therefore contrary to the provisions of Clause 11.16.1 of the HR Manual and the Employment Act, 2007.

d) The Charges as leveled against the Applicant are bad in law, irregular and fatally defective and therefore lack feet to stand on.

e) The 2nd Respondent commenced the disciplinary action against the Applicant without any formal complaint being filed against

the Applicant contrary to the mandatory provisions of the Grievance Handling Procedure as set out at Clause 12.2 of the 1st Respondent's Human Resource Manual.

f) The 2nd Respondent initiated the instant disciplinary proceedings against the Applicant following her refusal to have a sexual relationship with him to coerce, intimidate and persecute her for declining to grant him sexual favours.

g) The 2nd Respondent initiated the instant disciplinary proceedings against the Applicant with ill intention since she had further declined to join him in his criminal activities of irregularly forging and/or editing of staff disciplinary minutes, irregular recruitment of staff and corruption.

h) The Disciplinary proceedings are intended to unlawfully and irregularly dismiss the Applicant from her employment with the 1st Respondent.

i) The 2nd Respondent denied the Applicant an opportunity to respond to the allegations contrary to the provisions of Clause 11.14.1 (d) of the 1st Respondent's Human Resource Manual.

j) The decision to send the Applicant on compulsory leave for a period of six (6) months was made contrary to the provisions of the 1st Respondent's Human Resource Manual and her rights as protected under Articles 41, 47 and 50 of the Constitution of Kenya, 2010.

k) The entire disciplinary process against the Applicant is thus irregular, illegal, illegitimate and improper and ought to be halted before the totally destitute during the ravaging corona virus pandemic and the harsh economic situation in the Country.

l) The Applicant avers that the instant disciplinary process is a mere formality and a window dressing exercise that is only aimed at irregularly sending the Applicant on interdiction without proper investigation contrary to the law and the HR manual.

m) It is in the interest of justice that the orders sought herein are granted as prayed.

4. The Application is further supported by the Affidavit of **MTM**, the Claimant hereinsworn on 6th July, 2020, in which she reiterates the averments made in the Notice of Motion Application.

5. In response to the Application the 1st and 2nd Respondent filed a Replying Affidavit deposed by **PARMAIN NARIKAE**, the 2nd Respondent herein on 10th July, 2020, in which he maintained that the Application by the Claimant/Applicant dated 6th July, 2020 is unattainable as the Claimant was dismissed on 3rd July, 2020.

6. He further avers that the Respondent's letter of dismissal to the Claimant was duly served on her and that the Claimant was issued with yet another letter dated 7th July, 2020 requiring her to hand over her office by 10th July, 2020. The affiant maintains that the Claimant failed to disclose this material facts to this Honourable Court prior to the Court issuing her temporary orders of Injunction.

7. The 2nd Respondent avers that the Claimant's tenure with the 1st Respondent was tainted with various disciplinary issues among them an accusation of disclosure of confidential information to unauthorized staff on 14th February, 2014 and parking at the SME parking without authority and was as a result issued with a notice to show cause.

8. He posits that the Claimant was further formally charged in accordance with the 1st Respondent's Human Resource Policies and Procedures with 2 offences and was duly accorded an opportunity to prepare a comprehensive response to all the charges.

9. He further averred that the Claimant was subsequently invited for a disciplinary hearing on 30th June, 2020 vide the Respondent's letter dated 23rd June, 2020, which hearing duly proceeded.

10. The 2nd Respondent avers that the Claimant's employment was subsequently terminated on 3rd July, 2020 following a board resolution, which decision was duly communicated to the Claimant by the board chairman on the same date.

11. The 2nd Respondent further avers that the Claimant was duly served with a letter of dismissal dated 3/7/2020 and that the letter was properly served upon her at her residence in [Particulats Withheld].

12. The 2nd Respondent further denied the allegation of sexual harassment as alleged by the Claimant. He states that the 1st respondent has in force a robust sexual harassment policy in force to deal with issues of sexual harassment and that no formal complaint was lodged by the Claimant on the same.

13. He further maintained that the disciplinary action meted against the Claimant was for a valid reason and that due process was followed. He argued that the claim of bias and malice as advanced by the Claimant is unfounded and lacked basis. He therefore urged this Honourable Court to disregard the Claimant's submissions.

14. The Respondents maintained that the Claimant has failed to demonstrate a prima facie case for grant of the orders sought in the instant Application.

15. The Respondents further maintained that the disciplinary process having been concluded and a verdict reached the instant Application is overtaken by events and therefore urged this Honourable Court to dismiss it with costs to the Respondent.

16. In a brief rejoinder, the Claimant filed a Further Affidavit sworn on 21st July, 2020 in which she maintains that the disciplinary process though not concluded is marred with irregularities and inconsistencies thus urging this Court to protect her by granting her the Orders sought in her Application of 6/7/2020.

17. The Respondents in further response to the Claimant's Further Affidavit filed a Supplementary Affidavit deponed by **PARMAIN NARIKAE** sworn on 24/7/2020 in which he reiterates the averments made in his Replying Affidavit deponed on 10/7/2020.

18. He further maintained that the Claimant was taken through a fair disciplinary hearing and was subsequently terminated on 3/7/2020.

19. The affiant further avers that the board decision was communicated to the Claimant vide the letter dated 3/7/2020 that was served upon her at her residence at Prissy Apartment Door No. D8 by one Mr. Richard Onyango and was thus aware of the decision of the board.

20. The 2nd Application is the Notice of Motion Application dated 10/7/2020 by the Respondents/Applicants. The same is filed under Certificate of Urgency and is brought under Section 12 of the Employment and Labour Relations Court Act and Order 40 Rule 7 of the Civil Procedure Rules seeking the following Orders that:-

1. This Application be certified urgent and heard ex-parte in the first instance owing to the urgency.

2. This Honorable Court be pleased to set aside and/or discharge the ex-parte temporary injunction issued on 6 July 2020.*

3. Costs of this application be provided for.

21. The Application is premised on the grounds that:-

a) The Claimant /Applicant concealed material facts from the court at the time of presenting the application which led to the grant of the ex-parte interim orders.

b) The Claimant failed to disclose and be candid with the Honorable Court that as at the time of filing the claim and the application seeking interim injunction, she had already been dismissed by the Board of the 1st Respondent on 3rd July 2020 and the dismissal duly communicated to her.

c) The Claimant failed to disclose and be candid to this Honorable Court that as at the time of filing the Claim and the Application seeking interim Injunction, she had indeed received a letter from the 1st Respondent requiring her to be present on 3rd July 2020 while the Board of the 1st Respondent deliberated a report of the Human Resource Committee.

d) The Claimant indeed honored the summons and appeared on 3rd July 2020 at the Board's waiting room and was clearly informed in person that the disciplinary proceedings against her had been fully completed and the Board's verdict would be communicated in writing on the same day of 3rd July 2020.

e) The Claimant/Applicant failed to disclose and be candid with this Honorable Court that her disciplinary proceedings was conducted for two consecutive whole days being 30th June 2020 and 1st July 2020 after she requested for more or additional time to present her defence to which the proceedings before the disciplinary Committee had to be adjourned to accord her sufficient time and instead, she misleads the court that the disciplinary proceedings occurred or was only conducted on a single day of 30th June 2020.

f) The Claimant filed the Application seeking for issuance of temporary injunction to stay disciplinary action commenced by the Respondents' while it is clear the disciplinary proceedings sought to be stayed had fully concluded on 3rd July 2020 and there exists no further disciplinary action to be undertaken by the Respondents as against the Claimant herein at all.

g) The Claimant has failed to disclose the fact that she requested for review of interdiction which was duly granted and she was placed on compulsory leave which decision she gladly accepted.

h) It is a cardinal rule of employment jurisprudence that disciplinary proceedings commence by issuance of charges against an employee and is completed by issuance of a verdict on the disciplinary process, which was duly issued and communicated accordingly.

i) There exists no employer-employee relationship between the Claimant and the 1st Respondent as at 3rd July 2020 which ought to be preserved pending the hearing of the application inter-partes.

j) The Orders granted have been overtaken by events namely, the conclusion of the disciplinary proceedings and rendering of the decision by the Board on 3rd July 2020 way before the Claimant filed the present suit.

k) It is in the interest of justice that the ex-parte Orders issued on 6th July, 2020 be discharged.

l) We pray that the Application be allowed as prayed in the interest of justice and fairness.

22. The Application is further supported by the Affidavit of **PARMAIN NARIKAE**, the 2nd Respondent herein sworn on 10th July, 2020 in which he reiterates the averments made on the face of the Motion.
23. In response to the Application, the Claimant swore an Affidavit on 21st July, 2020, in which she avers that she filed the instant suit under Certificate of Urgency on 6/7/2020 and was issued with orders staying the disciplinary proceedings on merit, which orders were duly served upon the Respondents on 7/7/2020.
24. The Claimant denied having withheld any material facts from this Court as alleged by the Respondents in their Application. She maintained that she is yet to be served with any dismissal letter as alleged and that the disciplinary process is yet to be concluded contrary to the Respondents' contention that the process has been finalized.
25. The Affiant further contends that the Respondents' version of events is contradictory, inconsistent and unreliable and thus urged this Court to disregard the same.
26. She maintained that contrary to the Respondents' assertion of dismissal, her employment with the 1st Respondent is still intact by virtue of the interim orders issued on 6/7/2020 and thus the need to grant the orders sought in her Application.
27. She further maintained that the disciplinary proceedings are yet to be concluded as the same is only considered concluded after the hearing and determination of an Appeal, which Appeal is yet to be entertained in accordance with 1st Respondent's Human Resource Policies.
28. In response to the Claimant's Replying Affidavit the Respondents/Applicants filed a Further Affidavit deponed by **PARMAIN NARIKAE** on 24/7/2020, in which he maintains that the reasons behind the Claimant's disciplinary proceedings were serious that warranted her dismissal.
29. He further maintained that the Claimant having been terminated only meant that there exists no employer-employee relationship between the 1st Respondent and the Claimant herein and that lodging an appeal does not revive the employer-employee relationship.
30. He further averred that following the decision to terminate the Claimant's employment she was subsequently removed from the payroll effective 3/7/2020 as evidence in the pay change advice dated 3/7/2020 and that her claim that her employment is still intact is therefore not true in the circumstances.
31. It is on this basis that the Respondents urged this Honourable Court to allow the Notice of Motion Application dated 10/7/2020 with costs and dismiss the Claimant's Application dated 6/7/2020.

Submissions by the Parties

32. In her submissions, the Claimant reiterated the averments made in Motion dated 6/7/2020 and the Affidavits filed in support of the same. She further submitted that the respondents have failed to comply with the mandatory provisions of the 1st Respondent's Human Resource Manual in the manner in which it carried out disciplinary proceedings against her.
33. She further submitted that the Respondents have failed to avail to this Court minutes of the board meeting where it was resolved that her employment be terminated. She contended that in absence of such minutes, the matter ought to be decided in her favour.
34. The Claimant further submitted that she has established a prima facie case for the grant of orders sought in her Application dated 6/7/2020 as the process is yet to be concluded.
35. In conclusion, the Claimant urged this Honourable Court to allow her Application as prayed.

Respondents' Submissions

36. The Respondents on the other hand submitted that the ex-parte orders issued by this Honourable Court on 6/7/2020 ought to be vacated having demonstrated that the disciplinary process had been concluded and the Claimant informed of the decision of the board terminating her employment even before she approached this Court on 6/7/2020.
37. It is on this basis that the Respondents urged this Court to vacate the Orders of 6/7/2020 and allow their Application dated 10/7/2020.

Rejoinder by the Claimant

38. In her brief rejoinder, the Claimant submitted that the disciplinary process was unfair and that this Honourable Court ought to interfere to prevent grave injustice that may befall her as a result of the impugned process. To buttress this argument the Claimant cited and relied on the cases of **Fredrick Saundu Amolo Vs Principal Namanga Mixed Day Secondary School & 2 Others (2014) eKLR**, **Ann Wambui Kamuiru Vs Kenya Airways Limited (2016) eKLR** and **Mulwa Msanifu Kombo Vs Kenya Airways (2013)** where Courts proceeded to interfere with an employer's internal disciplinary procedures where such procedures are marred with irregularities.

39. The Claimant further submitted at the time she filed her Application the disciplinary process was not concluded as pleaded by the Respondents and that the letters dated 3/7/2020 and 7/7/2020 relied on by the Respondents' to support their assertion that the process was concluded long before she approached this Court were in-fact back dated. She further maintained that this Court had already issued injunctive orders by the time the said letters came to her attention.

40. The Claimant further submitted that she has established a prima facie case for grant of the orders sought in her Application dated 6/7/2020 and that all issues were raised to the Court at that point.

41. In conclusion, the Claimant urged this Honourable Court to allow her Application dated 6/7/2020 as prayed and dismiss the Respondents' Application dated 10/7/2020.

42. I have examined the averments and submissions before Court. The issues this Court sets out to determine are as follows:-

1. Whether the disciplinary process was being conducted in a fair and just manner.

2. Whether the Claimant/Applicant's disciplinary process was already completed at the time this Court gave the interim injunctive orders on 6/7/2020.

3. If not, what remedies this Court can grant in the circumstances.

Disciplinary process

43. On the 1st issue the Applicant/Claimant averred that she was subjected to a unfair disciplinary process in that the Respondent violated its own Human Resource Manual and the Applicant cited various Clauses in the Manual that were violated.

44. The Applicant averred that Clause 11.2.2 was violated as she was interdicted unlawfully and irregularly without legal authority and/or jurisdiction to do so.

45. The Applicant avers that Clause 11.2.2 of the Respondent's Human Resource Manual does not give power of disciplining officers in Grade KIE 13-15 to the 2nd Respondent as this power is vested in the Board of Directors of the 1st Respondent.

46. Clause 11.2.7 of the Respondent's Human Resource Manual state that:-

“The discipline of members of staff in Grades KIE 13-15 shall fall under the purview of the Board”.

47. The Applicant avers that she is in Grade 14 and therefore her interdiction by the Managing Director was irregular. The Applicant annexed her letter of interdiction dated 3/4/2020 and it is written by the Respondent's Managing Director and there is no indication that he did so as part of the Respondent's Board resolution and therefore the process was irregular.

48. She also contended that Clause 11.14.1 of the Manual was not followed, in that the disciplinary action was convened without any investigation.

49. Clause 11.14.1 (e) of the Human Resource Manual provide as follows:-

“The following shall be observed while processing disciplinary cases;

(e)Thorough investigations of an alleged offence shall be undertaken before disciplinary action is taken”

50. The Respondents have not indicated that investigations had been undertaken before the disciplinary action was commenced and therefore the disciplinary action was commenced irregularly.

51. Another irregularity complained of by the Applicant is as per Clause 11.16.1(ii) of the Respondent's Human Resource Manual which lists offences liable for disciplinary action and the Applicant avers that she never committed any of the offences listed and therefore the charges levelled against her are fatally defective.

52. This is also contrary to Clause 12.2 of the Human Resource Manual which deals with grievance handling Procedure the Applicant avers that no one had levelled any complaint against her.

53. It is indeed true that the process and procedure employed in disciplining the Applicant was irregular and unprocedural.

Completion of the process

54. The Respondents in responding to this application by the Claimant and orders issued, submitted that the orders were already overtaken by events since the Applicant/Claimant had already been subjected to a disciplinary process and dismissed from employment. They therefore aver that the orders issued had been overtaken by events at the time they were granted.

55. In order to understand whether the Respondent's position is true or not, I refer to the correspondence on the file which show that on 30/4/2020, the Claimant was sent on 6 months interdiction period vide the letter of even date authored by the 2nd Respondent.
56. Reasons for the interdiction are given in the letter in question being unprocedually and unlawfully ordering recovery of part of salary of one staff – Mr. Dalmás Lelei a driver at the head office. On the same day, she was also served with a show cause letter on the same day indicating that she had packed her car at the SME Park without authority thus defying earlier advice from the Managing Director.
57. The Applicant/Respondent responded to the show cause letter vide her letter dated 14/5/2020 denying the allegations relevelled against her. The interdiction was also rescinded to allow her an opportunity to be heard.
58. Vide a letter dated 23/6/2020, the Claimant was invited to a staff disciplinary hearing at KIE to be held on the 30th June 2020 at 8.30 am. The Claimant vide her letter dated 25/6/2020 wrote back requesting for certain documents including board minutes sanctioning her compulsory leave and the minutes rescinding her interdiction and all statements of documents used against her.
59. On 26/6/2020, the Respondent wrote back inclosing statements of certain individuals namely oneDore, memos, statement by Finance Manager and one from the senior Administration officer.
60. Her request for board minutes sanctioning her interdiction as requested were declined. The Respondent also thought there was no legitimate reason to have the minutes as requested.
61. Even during these proceedings, the Respondents have not availed minutes of the board nor those of the disciplinary hearing executed against the Claimant.
62. The Claimant has averred that the disciplinary hearing against her was stage managed to dismiss her and that is why she sought Court's intervention.
63. The Respondent on the other hand aver that the process was completed and on 3/7/2020, they terminated the Claimant's services and served her with a dismissal letter through their messenger.
64. As indicated above, the Respondents have not demonstrated that the disciplinary process has been determined. Minutes of this process have not been exhibited before Court.
65. The Claimant has worked as the Respondent's Human Resource Manager. She has contended that she was in Respondent's premises on 3/7/2020 and does not understand if at all there was a letter to be served upon her why it had to be dropped at her home through a motor bike rider.
66. The 1st Respondent is a government corporation and its mode of communication to its staff and for a reason of dismissal cannot be that casual. The dismissal letter refers to disciplinary proceedings held on 30th June 2020 and 1st July 2020.
67. On 2/7/2020, the Claimant was also invited to a board meeting to be held on 3rd July 2020 at 9 am. It therefore beats logic that though on 3/7/2020 she was in the Respondent's premises yet her dismissal letter had to be given to a rider to deliver to her house.
68. In the circumstances, there is a possibility that by 3/7/2020 there was no such dismissal letter and if it was there the Claimant should have been served with it personally. The claim that the Claimant was served with a dismissal letter on 3/7/2020 is found not plausible.
69. Having considered the above issues on the disciplinary process, I find that the process already in place was instituted by a person without authority and any action flowing from it is thus null and void.
70. The Courts have held over and over again that Courts will not interfere with the internal disciplinary action by the employer against their employees.
71. Courts have held that Courts will interfere with the internal disciplinary action only when the process is flawed. The interference will thus be to put back on truck the disciplinary process but not to do away with it all together.
72. See **Anne Wambui Kamuiru vs Kenya Airways:-** Cause No. 1684/2015), where Court held as follows:-

32. There is a convergence in agreement that an employer who commences disciplinary proceedings must ensure due process, fair hearing and due regard to natural justice. The Courts on their part will not interfere with proper internal disciplinary processes unless the Court is satisfied that the process is marred with irregularities or it is stage managed towards dismissal.

33. The Court will interfere not to stop the process altogether but to put the correct process on course. This position was held in Industrial Cause No. 1789/2013 Rebecca Ann Maina & 2 Others vs. JKUAT where Hon. J. Ndolo made similar findings. See also Cause 324/2012 Aviation & Allied Workers Union vs. Kenya Airways Limited".

And Fredrick Saundu Amolo (suing through the Executive Secretary KUPPET Kajiado County Branch) vs the Principal, Namanga Mixed Day Secondary School & Others;

“25. In conclusion, I find that the Court can only intervene in an employer’s internal disciplinary proceedings until they have run their course, except in exceptional circumstances – that is where grave injustice might result or where justice might not by other means be attained. The hearing of the claimants has not run its course, but the procedure adopted with sanction before according him a fair chance to be heard in the presence of his Union or a fellow employee of his choice not accorded to him. This far the court will interference with the proceedings as by not so doing grave injustice will be occasioned to the Claimant. This is one such exceptional case and thus the Court directs as follows;

a. the interdict of the Claimant was not procedurally fair as outlined above and following the 2nd Respondent meeting held on 29th April 2013 and that is hereby set aside;

b. the Claimant shall receive his full pay unless there are valid reasons to justify the withholding of such pay or part of such pay;

c. Where there are legitimate reasons to allow for the suspension or interdiction of the Claimant, fair procedure shall be applied to conclude the same;

d. Where the process as (c) above is to be undertaken the same should be without harassment, intimidation, or threatening of the Claimant;

e. Costs will be in the cause.

73. This Court is thus able to interfere with the flawed disciplinary process instituted against the Claimant and put it on the right cause.

74. In the circumstances, I find the application by the Claimant has merit. I allow the application and direct that the Claimant should submit to a fresh, legal disciplinary process if the Respondent so wish. Due process should accordingly be followed. The process already in place and all consequences from the flawed process are declared null and void.

75. In the interim, the Claimant will continue serving in her employment until due process is effected against her or unless her employment is terminated for any other lawful cause.

76. Costs in the cause.

Dated and delivered in Chambers via zoom this 13th day of August, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Namada for Petitioner – Present

Guserwa for Respondent with Senior Counsel Muite – Present