



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 198 OF 2019**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF ARTICLES 2, 27, 28, 47, 48, 50 AND 176 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 12 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT 2011**

**AND**

**IN THE MATTER OF SECTIONS 4, 7, 8, 9, 10 AND 11 OF THE FAIR ADMINISTRATIVE ACTIONS ACT 2015**

**AND**

**IN THE MATTER OF SECTION 60 AND 138 OF THE COUNTY GOVERNMENTS ACT 2012**

**AND**

**IN THE MATTER OF REGULATIONS 35, 36, 38 AND 39 OF THE REVISED PUBLIC**

**SERVICE COMMISSION (LOCAL AUTHORITIES) REGULATIONS 2007**

**AND**

**IN THE MATTER OF RULES 4, 10, 11, 22, 23 AND 24 OF THE CONSTITUTION OF KENYA 2010**

**(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)**

**PRACTICE AND PROCEDURE RULES 2013**

**AND**

**IN THE MATTER OF RULE 7 OF THE EMPLOYMENT AND**

**LABOUR RELATIONS COURT (PROCEDURE) RULES 2016**

**BETWEEN**

**FRANCIS OCHIENG OIRO.....PETITIONER**

**AND**

**NAIROBI CITY COUNTY GOVERNMENT.....RESPONDENT**

**JUDGMENT**

The Petitioner filed this Petition on 28<sup>th</sup> October 2019, seeking redress for the alleged infringements of his rights and freedoms, and sought the following remedies from this Court–

- a. A declaration that the Petitioner is a legitimate employee of the County Government of Nairobi and barring him from accessing his respective office or performing his duties is unlawful and unconstitutional violating Articles 27, 41 and 47 of the Constitution of Kenya 2010.
- b. A declaration that the purported suspension of the petitioner that has since lasted for over 14 years is strange to the law, illegal and unconstitutional.
- c. An order of mandamus directed at the Respondent to reinstate the Petitioner to his employment status as a senior public health officer.
- d. An order of compensation directed at the Respondent to pay the Petitioner his full salaries and allowances from year 2004 to date.
- e. The costs of the Petition.

In response, the Respondent filed the response dated 24<sup>th</sup> July 2020 and the Notice of Preliminary objection challenging the validity of the petition on the following grounds–

- a. That this Court has no jurisdiction to hear, entertain and/or determine the petition herein as it alleges breach of contract of employment governed by the Employment Act and the Employment and Labour Relations Court Act.
- b. That the underlying complaint is the alleged unlawful interdiction and subsequent dismissal of the Petitioner by the Respondent and therefore this Court is bound wholly on the provisions of the Employment Act.
- c. That it is not permissible for the Petitioner to found the cause of action directly on the Constitution without challenging the Employment Act, which was enacted to give effect to the Constitutional rights that the Petitioner is complaining of.
- d. That the alleged unlawful interdiction and termination of a contract of employment is not a constitutional issue thus the petition does not disclose a cause of action anchored on the Constitution.
- e. That the Petition filed herein is incompetent, fatally defective, misplaced and bare of any reasonable cause of action, ground(s) or proof to warrant the grant of the orders sought and the same should be struck out.
- f. That consequently this Petition is an abuse of this Court's process and should be struck out with costs to the Respondent.

### **The Petitioner's Case**

The Petitioner was an employee of the City Council of Nairobi, now Nairobi City County, working for gain as a Senior Public Health Officer and earning a salary of KShs.15,000.00. He was issued with a suspension letter on 26<sup>th</sup> June 2004 on grounds of gross misconduct. However, he was never subjected to any disciplinary proceeding and continued to report to work.

Despite writing to the Respondent on several occasions over the years seeking information on the status of his suspension and his employment status, the same was received but never responded to. In particular, he wrote letters in the years 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2016, 2017, 2018 and 2019.

Following the Petitioner's suspension, the Permanent Secretary, Secretary to the Cabinet and the Head of Public Service wrote a letter to the Attorney General, all Permanent Secretaries, the Controller and Auditor General, the Clerk to the National Assembly, the Private Secretary/Comptroller of State House, the Secretary, Public Service Commission of Kenya, the Registrar, High Court of Kenya, the Director-General, National Security Intelligence Service, the Secretary, Teachers Service Commission of Kenya, the Chairman, Electoral Commission of Kenya and to all Provincial Commissioners; advising them on the implementation of delegated powers and Public Service Commission's decisions.

The Secretary also noted that disciplinary cases took long before referrals to the Public Service Commission. As such, some officers remained on the payroll for a long period without rendering their services to the government. The Secretary called for expeditious finalization of disciplinary processes within three months.

However, the Nairobi City County did not act on the letter despite receiving the same. Further, the Petitioner was never seconded to be an employee of the Nairobi City County following the transition to devolved system of government. The Petitioner was unsalaried for 15 years.

The Petitioner avers that the Respondent discriminated against him contrary to article 27 of the Constitution and sections 5 and 41 of the Employment Act. It is averred that the Respondent's acts or omissions have violated the Petitioner's rights to fair labour practice and right to fair administrative action. Further, that the same amounts to a contravention of Section 10(5) and 13 of the Employment Act.

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

The Respondent admits that the Petitioner was an employee of the defunct Nairobi City Council and that he was indeed suspended for gross misconduct, being that on 11<sup>th</sup> December 2003, he issued Pembe Flour Mills Limited a one-year irregular exemption notice and which put the public's health at risk. Further, he advised the Director of Jet Chemicals Limited to abscond attending court which resulted to him being sentenced to 2 hours' imprisonment on 28<sup>th</sup> May 2004.

It is the Respondent's case that the Petitioner did not appear for a disciplinary hearing after the lapse of 15 days. That the Petitioner ought to have responded to the suspension letter within 15 days. Due to his failure to communicate to the Respondent, the appropriate disciplinary action was taken.

The Respondent contends that the Petitioner was told to cease performing the duties indicated in his appointment letter and avers that a list of the employees who were to be dismissed was forwarded to the Public Service Commission on 30<sup>th</sup> July 2005, with the Petitioner's name being amongst them.

It is averred that the Petitioner's dismissal was communicated to him vide the letter of 25<sup>th</sup> July 2017, which had been effected from 28<sup>th</sup> May 2004.

It is the Respondent's case that the alleged contraventions as outlined in the Petition are irrelevant and inapplicable to this. That the Petitioner has misinterpreted the said provisions to suit his own purposes. Further, the Respondent contends that the alleged unlawful interdiction and termination of the employment contract is not a constitutional issue and does not disclose a cause of action anchored in the Constitution. The Respondent therefore urges this Court to dismiss the Petition with costs.

The Petition was disposed of by way of written submissions with both parties filing their submissions.

### **The Petitioner's Submissions**

The Petitioner submits that his rights under the Constitution of Kenya 2010 were violated by the Respondent by failing to pay his salary and giving him responsibilities as a health officer of the country. The Petitioner submits that the Respondent had the responsibility to pay him the outstanding salaries and arrears for the 14 years that he was unpaid, by dint of section 134 of the County Governments Act. He further submitted that with devolution, he had legitimately expected that he would be seconded to the Nairobi City County Government by the defunct Nairobi City Council as his colleagues had been.

To support this position, he relied on the case of **Republic v Town Clerk of Webuye County Council & Another; HCCC 448 2006** as cited in the case of **Gateway Insurance Company Limited v Jimmy Kiamba, Treasurer Nairobi County Government & 2 Others [2015] eKLR**.

It is the Petitioner's submissions that the Respondent violated his right under article 41 by suspended him and later allocating him work without payment or lifting his suspension. According to him, this was a variation of his contract and amounted to constructive dismissal.

He relied on the case of **Hoggs v Dover College [1990] ICR 39** and **Alram Extrusions v Yates & Others [1996] IRLR 327** as cited in **Kenya County Government Workers Union v Wajir County Government & Another [2020] eKLR** where it was held that where a contract is fundamentally varied and the employee continues to serve the employer, they are entitled to bring an action for breach of the previous contract.

The Petitioner therefore submits that the Respondent's actions amounted to a violation of articles 27, 28, 41, 43 and 47 of the Constitution hence he is entitled to the prayers sought, have proved the violation of these rights. The Petitioner also submits that he is entitled to costs of the Petition owing to the Respondent's act of varying his contract of employment.

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

The Respondent submits that where an Act of Parliament has enacted legislation to give effect to constitutional rights, it is ordinarily impermissible for a litigant to found a cause of action on the Constitution without alleging that the statute in question is deficient in the remedies it provides as was held in the cases of **Sumayya Athmani Hassan v Paul Masinde Simidi & Another [2019] eKLR**, **Barbara De Klerk v Cape Union Mart International (PTY) Limited Case No. C 620/2011[2012] ZALCCT 22** and the Supreme Court case of **Communication Commission of Kenya & Others v Royal Media Services Limited & 5 Others [2014] eKLR**.

The Respondent therefore submits that this Court lacks the jurisdiction to entertain the Petition as it alleges breach of an employment contract governed by the Employment Act. Further, it is submitted that the petition fails the substantive test as set out in the cases of **Anarita Karimi Njeru v Republic [1979] eKLR** **Trusted Society of Human Rights Alliance v Attorney General & 2 Others [2012] eKLR** because the Petitioner failed to prove the purported discrimination. The Respondent relied on the case of **Mohammed Abduba Dida v Attorney General & 2 Others [2012] eKLR** which reiterated the holdings in the two cases.

The Respondent submitted that the petition ought to be dismissed for the petitioner's failure to outline with precision how his rights under Articles 27, 41 and 47 had been infringed upon.

It is the Respondent's submissions that the Petitioner's allegations that his rights under section 4 and 6 of the Fair Administrative Actions Act have been infringed upon due to the Respondent's failure to give reasons for the administrative actions taken against him, is unfounded and unripe for consideration herein. The Respondent contends that the Petitioner's suspension letter outlined the reasons for his suspension and that the letter of 25<sup>th</sup> July 2017 informed the Petitioner of his right to a review or internal appeal against the administrative decision.

The Respondent submits that the Petitioner is not entitled to the injunctive orders sought as he has not come to equity with clean hands. In particular, he did not present his case before the Respondent and opted to file this petition. The Respondent relied on the case of **Kyangaro v Kenya Commercial Bank Limited & Another [2004] 1 KLR 126** as cited in **Patrick Waweru Mwangi & Another v Housing Finance Co. of Kenya Limited [2013] eKLR** has been relied upon.

### **Analysis and Determination**

I have carefully considered the pleadings filed, the evidence adduced together with the parties' submissions and the following are the issues for determination before this Court–

- a. Whether the preliminary objection has merit and has met the legal threshold.
- b. Whether the Petitioner's constitutional rights have been infringed upon.
- c. Whether the Petitioner is entitled to the reliefs sought.

### **Preliminary Objection**

The threshold to be met by a preliminary objection was set out in the case of **Mukisa Biscuits Manufacturing Co. Limited v West End Distributors Limited [1969] EA 696**.

*"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."*

This was followed up by the judgment of Sir Charles Newbold in the same case–

*"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."*

The Respondent's preliminary objection fails the test as set out in the **Mukisa Biscuit Case [SUPRA]** since this is not an issue that can be determined by mere interpretation of the law as the facts have to be appreciated and accordingly applied to the relevant laws. Further, I note that the holding in the case of **Sumayya Athmani Hassan v Paul Masinde Simidi & Another [Supra]** as relied upon by the Respondent was made at judgment stage and not at a preliminary stage, after the Court had appreciated all the material before it.

In any event there is no law requiring a Petitioner to rely on the Constitution as well as the Employment Act. The case of **Sumayya Athmani Hassan v Paul Masinde Simidi & Another** can be distinguished from this case. The specific remedies sought were general damages, terminal benefits and issuance of certificate of service. In determining the petition, the ELRC relied wholly on the provisions of Employment Act. However, in this case, apart from alleging the violation of his rights under article 41 and 50 which are also enshrined in the Employment Act, the Petitioner alleges discrimination, a breach of his economic rights and right to fair administrative action which are not contained in the Employment Act. As such, the preliminary objection lacks merit.

### **Breach of Constitutional Rights**

The Petitioner's evidence that he had been subjected to suspension for a period of 14 years was never controverted by the Respondent or explained. The Petitioner narrated that he sought clarity from the Respondent, on the status of his suspension and employment over the years but there was never a response. Subjecting the Petitioner to prolonged suspension without taking a disciplinary action against him was in breach of Article 47(1) of the Constitution and Section 4(3) of the Fair Administrative Action Act.

Further, the same amounted to an unfair labour practice as the Petitioner was left with no salary to fend for himself for those many years. The Court in **Donald Mumo Moses v Mid-Wave Freighters Limited [2014] eKLR** observed that keeping employee on suspension for so long was an unfair labour practice.

The Respondent adduced evidence to show that the Petitioner's employment was terminated on 25<sup>th</sup> July 2017. The letter indicates that it was sent by registered post but there was no receipt to show that the same was ever sent. As indicated, the Claimant sought clarification and as late as 27<sup>th</sup> September 2019, the Petitioner had written to the county government seeking clarification on the status of his employment. The Respondent did not adduce any evidence to show that the same was ever responded to. This was a breach of the Petitioner's right to fair administrative action as it is clear that a decision to terminate his employment had been made without informing him, despite the numerous opportunities that presented themselves after 25<sup>th</sup> July 2017.

The Petitioner's right to a fair hearing was violated. No evidence was adduced to show that the Petitioner was heard or that the matter had been investigated. Further, the letter indicated that the Petitioner had the right to appeal within 42 days from the date of the letter. Since he never received the letter, he was denied the chance to appeal the decision. The Respondent attached an incomplete document as proof that the Petitioner had indeed appealed.

Further I note there are inconsistencies in the Petitioner's termination letter. The termination letter is dated 25th July 2017 while the unidentified document states that the Petitioner appealed against dismissal on 14th September 2016. In any event, the document is not sufficient proof as it is incomplete making it difficult to ascertain what and whom it relates to.

The Respondent violated the Petitioner's right under Article 27(1) of the Constitution, by seconding other employees of the defunct Nairobi City Council to the Nairobi City County Government and leaving the Petitioner out, yet he was an employee of Nairobi City Council having not been dismissed at the time of seconding. The same was a requirement under Section 138 of the County Governments Act. The Petitioner was still reporting to his supervisor for the period he had been on suspension. The Respondent did not controvert this assertion or provide a justification for the omission. The Petitioner however did not demonstrate how the Respondent's actions violated his rights under Article 43 and nor did he prove a violation of the same.

### **Remedies**

The Petitioner has sought a declaration that he is a legitimate employee of the County Government of Nairobi and barring him from accessing his respective office or performing his duties is unlawful and unconstitutional violating Articles 27, 41 and 47 of the Constitution of Kenya 2010. This prayer will be addressed together with the order of mandamus seeking to reinstate the Petitioner to his employment status as senior public officer.

The Respondent adduced a letter showing that the Petitioner's employment had been terminated by dint of the letter dated 25<sup>th</sup> July 2017. As such, the Petitioner ceased to be an employee of the Respondent by virtue of that letter. Further, despite finding that the termination was unfair and violated the Petitioner's rights, he cannot be reinstated back to employment as Section 12(3)(vii) of the Employment and Labour Relations Court Act only allows this Court to issue an order for reinstatement within three years of dismissal. Three years have passed since the issuance of the letter and therefore the Petitioner cannot be reinstated.

The claim for compensation of full salaries and allowances from 2004 to date is declined as the Petitioner was suspended on nil pay as per the terms of his employment. However, the Petitioner is entitled to compensation for violation of his rights under Articles 27, 41, 47 and 50 of the Constitution. Article 23 of the Constitution grants this Court the power to grant an order for compensation where an individual alleges a violation of their rights. **I thus award the Petitioner compensation by way of general damages in the sum of Kshs.1 million (Kshs.1,000,000.00).**

The Respondent shall bear the costs of this Petition.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF NOVEMBER 2020**

**MAUREEN ONYANGO**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**