



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.E064 OF 2020

CHRISPUS ILELI KUNUVA.....PETITIONER

VERSUS

COUNTY GOVERNMENT OF KITUI.....1ST RESPONDENT

KITUI COUNTY PUBLIC SERVICE BOARD..... 2ND RESPONDENT

RULING

The petitioner filed application and Notice of Motion dated 12th October, 2020 under the provisions of Article 23 of the Constitution, section 3(1) and (2) of the *Industrial Court Act, 2011* [Employment and Labour Relations Court Act, 2011] and Rule 16 of the *Industrial Court Rules, 2010* [Employment and Labour Relations Court (Procedure) Rules, 2016] and section 4, 6, 7 and 8 of Fair Administrative Action Act and seeking for orders that;

1. Spent.

2. Pending the hearing and determination of this application and or suit a conservatory order do issue restraining the respondent whether by themselves their agents and or servants from recruiting and or employing any person in the position of Chief of Staff or removing the name of the Petitioner from the payroll or denying him any allowance benefits or privilege, which he enjoys by virtue of his employment.

3. Pending the hearing and determination of this application and or suit a conservatory order does issue to stay decision contained in or implementation or execution of the letter dated 7th October, 2020 addressed to the petitioner by the County Secretary, Kitui County Government.

4. Pending the hearing and determination of this application and or suit the petitioner be reinstated to employment at the Kitui County government on the same terms and conditions of employment.

5. Costs of the application be provided for.

The application is supported by the petitioner's application and on the grounds that in violation of the law the respondents have determined the petitioner's employment based on malice and by applying the date of suspension in a retrospective manner. Such action amounts to unlawful termination of employment which is to render the petitioner unemployment and has occasioned him irreparable loss. The petitioner was denied a fair hearing in violation of the right to fair administrative action and contrary to the rules of natural justice.

The respondents purported to suspend the petitioner retrospectively from 1st July, 2020 without pay. No investigations had been conducted contrary to the Employment Act and the human resource manual. The suspension was indefinite and amounts to dismissal.

In his affidavit in support of the application, the petitioner avers that on 17th October, 2017 he was employed by the respondents as chief of staff for a contract term of 4 years 10 months at a monthly salary of Ksh.200, 000.

Following the outbreak of COVID-19 pandemic, by an internal memo dated 16th March, 2020 all employees were advised to stay home and to work from home where possible. For reasons known to the County Governor, from April, 2020 she stopped assigning the petitioner duties and the last assignment was on 4th April, 2020 which was to supervise installation of water tanks at strategic places in Kitui town.

The petitioner also avers that despite the Ministry of Health protocols for COVID-19 he would report to the office as and when it was necessary but was not assigned duties.

On 17th June, 2020 the County Secretary told the petitioner for the sake of his health, security and wellbeing he should move out of his office to a newly constructed office block and on 19th June, 2020 he vacated office and relocated to the new block as directed.

Between June and July, 2020 the County Governor was busy with various attempts by the County Assembly to impeach her and was therefore not reporting to the office and hence the petitioner was not allocated any duties. On 16th July, 2020 his official motor vehicle was withdrawn without formal communication. He continued to report to work using private means.

On 21st August, 2020 all staff were sent home for 2 weeks due to suspected case of COVID-19. Such reduced the petitioner's duties.

In September, 2020 all staff of the County went on strike to protest unpaid salaries which had been due since July, 2020. The petitioner continued to report to the office.

On 5th October, 2020 there was a high level meeting of all chief officers, county executive officers, the deputy governor and the governor but the petitioner was not invited. On 7th October, 2020 he was issued with letter of suspension and which unprocedural and unfair for the reasons that the suspension was to operate retrospectively from 1st July, 2020 and the import of which was to deny him salary due; this was contrary to the law and policy; there was no hearing and notice to show cause and the suspension was indefinite.

The actions of the respondents is contrary to article 10, 25, 27, 41, 47, 48 of the constitution and the orders sought should be allowed with costs.

In reply, the 1st respondent filed the Replying Affidavit of Joshua K Chepchieng the County Secretary and who avers that he has authority to respond herein. That the application and petition is full of false averments lacks material non-disclosure and should not be entertained by the court.

There is no termination of employment and the petitioner has not been removed from the payroll and is on suspension. Due procedure and rules will be followed in accordance with the labour laws and practice.

The petitioner cannot seek for an order of reinstatement into employment while on suspension.

Mr Chepchieng also avers that the petitioner was appointed by the County governor as chief of staff with duties to oversee the smooth running of the Governor's office, **organise itinerary of the Governor, coordinate activities and supervise the Governor's personal staff among other duties.**

The decision to suspend the petitioner came after extensive consultations brought about by the petitioner's laziness, incompetence, gross misconduct and absenteeism and then he deserted duty from May, 2020. Investigations into the conduct of the petitioner is underway and the 1st respondent is weary that is he remains in office he will interfere with on-going investigations.

The petitioner deserted duty and has not been reporting to work without giving good cause. He has only been making technical appearances and was issued with warning on 11th June, 2020. He has been on the media inciting residents of Kitui and stating that he did not apply for his job with the respondents and can do without it.

The 1st respondent does not have a County Public Service board at the moment as the tenure of its members ended in July, 2019 and all matters concerning the board are dealt with by the County government of Kitui.

There is no violation of the law by the respondents as alleged. The petitioner has not clarified as to which of his rights have been violated. The respondents as the employer have rights and shall be filing for a cross-petition for the salaries the petitioner is earning since May, 2020 without working. The petitioner is hiding behind the COVID -18 to be absent from work since the Ministry of Health directives related to employee above the age of 58 and he is below such age. As chief officer in charge of the office of the Governor, the petitioner duties are essential and he was required to report to work but has remained absent.

The fact that the Governor for Kitui was not in office from September does not mean that the petitioner was to be absent from duty and the application by the petitioner should be dismissed with costs.

The petitioner filed his Supplementary Affidavit and avers that the 1st respondent response is full of falsehoods a he was never issued with any warning letter dated 11th June, 2020 and there is no factual basis that he absconded duty from May, 2020 as alleged. The alleged warning letter has several anomalies since it does not refer to his correct personal file number, it is not copied to the human resource management, **the letter was not served on him and the signatures compared with the letter of suspension are different and it is not authentic.**

The petitioner also avers that even where the mandate of the 2nd respondent ended under section 59 of the County Government Act the 2nd respondent has mandate to exercise disciplinary control over and remove persons holding or acting office such as the petitioner. Such functions cannot be delegated as power to discipline employees is with the 2nd respondent. Before a suspension, the human resource policy requires a show cause notice and the employee be given a hearing which was not done in his case. The petitioner is properly before this court.

Both parties addressed the application by way of written submissions.

On the application, the affidavits and written submissions the court has analysed and the issues which emerge for determination can be summarised as follows;

Whether conservatory orders should be issued against the respondents from recruiting, employing any person in the position of the petitioner and or removing him from the payroll;

Whether conservatory orders should issue staying the decision vide letter dated 7th October, 2020 with regard to suspension; and

Whether the petitioner should be reinstated to his employment at Kitui County Government.

By letter dated 7th October, 2020 the 1st respondent through the County Secretary and Head of Public Service Dr. Joshua K. Chepcheng wrote to the petitioner that;

RE: SUSPENSION FROM DUTY

It has been brought to my attention by the Officer of the Governor, Kitui County that you have been away from duty without permission since the month of May. I am further notified that you have been in your place of work since July this year, without leave, reasonable or lawful cause. ...

... The Governor has directed that you be suspended from exercising the duties of your office with effect from 1st July, 2020 until advised otherwise. While on suspension, you will not be entitled to any salary but you will be paid full house allowance, medical allowance or where applicable medical insurance premium will be remitted.

In employment and labour relations, the employer has the prerogative to deal with discipline of its employee(s) by application of the internal mechanisms, disciplinary measures or human resource management policies. Such prerogative can only be interfered with by the court where there is apparent illegality or apparent violation of the constitution or the law as held in the case of **Mulwa Msanifu Kombo versus Kenya Airways Ltd** and in **Prof. Francis M Njeru versus Jomo Kenyatta University of Agriculture & Technology [2013] eKLR**.

Also, the employer has the prerogative to suspend an employee as an administrative action to allow for investigations. Once an employee is placed on suspension it should therefore be seen as an administrative action imposed on an employee with stated reasons.

In the case of **Elizabeth Cherono Kurgat versus Kenya Literature Bureau [2014] eKLR** the court in addressing the issue of sending an employee on suspension held as follows;

... the Claimant was suspended on being suspected to have committed the employment offence. It is not a material departure, that the Respondent termed this action as compulsory leave, instead of suspension or interdiction under the Terms and Conditions of Employment. All are terms that may be used by an Employer on sending an Employee on administrative leave. She understood she was being placed on administrative leave to allow for investigations and the disciplinary process to take place. ...

Inherently, a suspension is meant to pave way for investigations or as required. The employee is removed from the shop floor to be recalled for a hearing and where the investigations do not requires a hearing, the employee is recalled back to work.

The employer who enjoys a prerogative should not abuse it or apply the same to the detriment of the employee.

In the case of **Narry Philemons Onaya-Odeck versus Technical University of Kenya [Formerly, the Kenya Polytechnic University College] [2017] eKLR** the court held that it is the duty of the employer to put in place work place systems to address employment misconduct within a reasonable time. Where the employer is unable to deal as required, the employee has the right to be recalled and informed or addressed as appropriate.

On the issues set out above for determination, the petitioner's position has not been determined as vide letter dated 7th October, 2020 he was sent on suspension. As addressed above, such suspension should be addressed within a reasonable time to avoid anxiety and in **Samson Omwoyo versus Maasai Mara University & Another Cause No.2367 of 2016** the court held as follows;

... the employer has the prerogative to discipline its employees. However, a prolonged suspension of an employee that is not addressed within a reasonable time only results in anxiety and is bound to raise concern. ...

A period of three (3) of suspension was found excessive and unreasonable. See **Victor Sammy Mutiso versus TSC [2016] eKLR**. In any event, an interdiction or a suspension like in this case should only be interim to allow for investigations and should not take long as held in **Peter Gaitho Ng'ang'a versus Board of Management Banita School and another [2015] eKLR**

Interdiction is a preliminary step in the disciplinary process. The petitioner may as well be vindicated by the investigations and that

could be the end of the matter. Any pecuniary loss he may have suffered during the interdiction can be restored as provided for in the regulations.

on whether the court should suspend the letter of suspension, as addressed above, the employer has the prerogative to suspend an employee save such should not be for a protracted period. This is in putting into account that the petitioners salary has been suspended putting him into great hardship as the withdrawal of salary while employment subsists is punishment which should not be visited against any employee as held in the case of **Bryan Mandila Khaemba versus Chief Justice and President of the Supreme Court of Kenya & another [2019] eKLR**. in this regard, it is only fair that the petitioner salary be restored at 50% pending the respondent addressing his suspension.

On whether the petitioner should be reinstated, employment is not terminated. There is no cause for reinstatement.

In conclusion, the court finds the petitioner has moved the court for good cause following the indefinite suspension and hence under the provisions of section 46 of the Employment Act, 2007 the court wishes to bring to the attention of the respondent the provisions of section 46(h) thereof;

46. The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—

...

(h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation;

Accordingly, application dated 12th October, 2020 is hereby allowed in the following terms;

- a) The petitioner shall remain on suspension pending investigation and which should be determined within a reasonable time and not exceeding the next thirty (30) days;**
- b) While the suspension of the petitioner remains in force he shall be paid 50% of his salary and including 50% of the due and unpaid salaries to date;**
- c) Where (a) above is not addressed as directed, the petitioner shall resume duty without further reference to the notice dated 7th October, 2020;**
- d) On the directions above, the court shall hear the petition on priority basis;**
- e) Costs shall follow cause.**

DELIVERED AT NAIROBI THIS 22ND DAY OF DECEMBER, 2020.

M. MBARU

JUDGE