



**Waweru v Judicial Service Commission (Cause 376 of 2019)
[2020] KEELRC 20 (KLR) (17 December 2020) (Judgment)**

John Muikiria Waweru v Judicial Service Commission [2020] eKLR

Neutral citation: [2020] KEELRC 20 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 376 OF 2019
ON MAKAU, J
DECEMBER 17, 2020**

BETWEEN

JOHN MUIKIRIA WAWERU CLAIMANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The Claimant filed a Statement of Claim on 12.6.2019 alleging that the Chief Registrar of the Judiciary (the CRJ) in a letter dated 27.2.2019 usurped the disciplinary powers of the Respondent as delegated to the Chief Justice (the CJ) by purporting to suspend him and withhold his salaries. He further alleged that the allegations of desertion which were the basis of his suspension were devoid of any truth and that they were actuated by ill motive and malice to pave way for his summary dismissal.
2. The Claimant seeks the following prayers:
 - a. An order of declaration that the suspension of the claimant or any disciplinary proceedings/ actions taken or about to be taken pursuant to the letter dated 27.2.2019 from the Chief Registrar of the Judiciary are illegal, unlawful, null and void ab initio.
 - b. An order of declaration that the Respondent's actions have violated the claimant's right to property and to fair labour practices protected under Articles 40 and 41 of the Constitution.
 - c. An order directing the Respondent to forthwith release to the Claimant all salaries and benefits withheld by the Respondent from the month of February, 2019.
 - d. An order of permanent injunction restraining the Respondent, whether by itself or its officers or any other persons whatsoever from withholding salary and benefits accruing and due to the



Claimant as the Respondent's employee based on the matters or any ground set out in the letter dated 27.2.2019 from the Chief Registrar of the judiciary.

- e. An order of permanent injunction restraining the Respondent, whether acting by itself, officers, panel or committee from commencing, instituting and continuing any disciplinary proceedings against the Claimant and/or terminating the Claimant's employment or dismissing the Claimant from employment based on the matters or any ground set out in the letter dated 27.2.2019 from the Chief Registrar of the Judiciary.
 - f. An order revoking, lifting and/or setting aside the suspension of the Claimant.
 - g. General damages for breach of the Claimant constitutional rights and for unlawful and illegal actions on the part of the Respondent.
 - h. Exemplary damages.
 - i. Interest on sums awarded under (c), (g) and (h) above at court rates from the date of filing this suit until payment thereof in full.
 - j. Costs of this suit plus interest thereon at court rates from the date of Judgment until payment thereof in full.
3. The Respondent filed a Response to the Statement of Claim on 12.7.2019 denying that the CRJ usurped the powers of the CJ because by virtue of Clause D.7.2.2 the CRJ can issue a Notice to Show Cause. It further averred that the Claimant had a habit of absenting himself from duty and had been warned of habitual absenteeism. It averred that the stoppage of salary on account of desertion of duty is pursuant to section 17 of the Employment Act and while on suspension, the claimant is only entitled to alimentary allowance.
 4. The Claimant filed a Reply to the Response on 22.7.2019 in which he reiterated that the suspension is unlawful and that section 17 of the Employment Act states that an employer must pay an employee's wages in accordance with the contract of service. He denied being served with any verbal or written warnings and having failed to answer calls of the Ag. Director-Finance.
 5. The matter was heard on 16.7.2019, 9.10.2019, 25.11.2019, 16.1.2020 and 24.9.2020 when parties tendered their evidence. On 6.10.2020, Counsel for the parties made their oral submissions.

Claimant's case

6. The Claimant testified as Cw1. He stated that he is the Regional Assistant Director Finance- Nyanza Region; that he joined the judiciary upon receiving an appointment letter dated 13.6.2013; that he is in the third tier and he is answerable to the Deputy Director who reports to the Director Finance; that he rendered stellar performance since 2013 and that he got his confirmation letter based on his performance which confirmed him to Permanent and Pensionable effective 1.8.2013.
7. He testified that his role is basically the supervision over all the court stations in Nyanza Region but he is domiciled in Kisumu and this entails receiving reports from the stations on revenue collected, litigants' deposits and accountability of funds sent to various stations for operations and implementation of audit recommendations, among other roles. He testified that at least once every quarter of the year he is expected to visit each of the 12 stations discharging his supervisory function.
8. He further testified that, in March 2019 he received a letter dated 27.2.2019, authored by the CRJ's office via email although it ought to have been sent through his resident judge in Kisumu. He also testified that the letter informed him that there was a report of him absenting himself from the duty



station despite numerous verbal and written warnings, and he had deserted duty effective 16.1.2019 and his whereabouts as at the date of the letter remained unknown.

9. He denied having received any verbal or warning letter and contended that the allegations lacked basis because from 16.1.2019 to the date of the said letter he was still on duty and had documents to that effect. He contended that on even date he had attended a budget preparation and annual work plan for his region at Green Hills Hotel , Nyeri; that he was invited to the workshop through a Memo by the CRJ dated 19.11.2018; that Nyanza Region was part of the region that was required to send representatives; that the workshop was to start on 13th to 19th January, 2019; that he responded to the invitation giving a schedule of the attendees including him; and that he attended the workshop from the reporting date as evidenced by the attendance sheets where he signed like any other person as No. 76 on 14.1.2019, No. 12 on 15.1.2019, No. 6 on 16.1.2019 and No. 39 in the afternoon, No. 48 on 17.1.2019 and No. 38 on 18.1.2019.
10. He testified that the senior most officer in attendance was the Ag. Director of Finance Ms. Susan Oyatsi who left on 16.1.2019 and proceeded to write the letter dated 17.1.2019 which was served upon him through the Chief Magistrate Kisumu on 29.1.2019 at the station; that the letter alleged that he had continued absenting himself from duty despite numerous verbal and written warnings and that she had handed over the matter to the Human Resource (HR) Department for further action. He contended that, although the letter purported to have attached warning letter, there was no attachment.
11. He told the court that under the HR Manual, confirmation of appointment is only accorded upon satisfactory performance and argued that had he been a poor performer, he would not have been confirmed to his position. He further contended that he wrote a letter dated 11.2.2019 while at Kisumu office seeking funds from the AIE holder who is the Chief Magistrate to enable him conduct an audit review of Siaya Law Court from 12.2.2019 to 15.2.2019 and That the Chief Magistrate approved the request for the funds by endorsing thereon. Thereafter he proceeded to Siaya Law Courts where he even signed the Siaya Law Courts visitors' book on 14.2.2019.
12. He clarified that his job is regional based and as such he cannot be answerable to the Resident Judge Kisumu. He told Court that he returned to Kisumu on 18.2.2019 after leaving Siaya on 15.2.2019. He testified that he wanted to do a further audit review but was informed by the Senior Accountant Kisumu that there were no funds; that in his letter dated 20.2.2019 he informed the CRJ of the stations he intended to visit; that on 25.2.2019, he received an email from the Phillip Kakai, from the Head Quarters, requesting that he composes a team to undertake deposit and revenue reconciliation to which responded via email on 28.2.2019 attaching a list of staff that he considered for the task.
13. He reiterated that the allegation that he was absent from duty was untrue. It was his testimony that this allegation did not consider the issues he had informed the Court. He denied receiving any prior written complaint from the Director on the allegations in the suspension letter. He averred that there is no book at the station where he would sign to indicate that he would leave. He contended that the suspension letter did not specify the dates and stations when the Ag. Director Finance visited during the alleged 5 instances within the 2 years' duration and missed him; and that the letter did not also state which activity the Ag, Director was attending to. According to him, all official visits by Director ought to be notified in advance so as to prepare the person in advance.
14. He testified that the suspension letter required him to reply within 14 days from the date of the letter and he responded to the letter on 11.3.2019.
15. He testified that the CRJ in a letter dated 6.11.20117 declined his request for a transfer which he sought because it during the electioneering season and he had also stayed at the station for 4 years. He



- contended that during that time, he was fearing for his security and he was allowed to stay in Nairobi until the elections ended.
16. He testified that the CRJ knew of the false allegation from the Ag. Director Finance and that the CRJ stated that his request for a transfer would be dealt with after the complaint against him was resolved; that he received a email dated 19.10.2017 from Majanja J. stating that he had been away for some time and was expected to explain his absence within 7 days; that he responded by email on 23.10.2017 explaining that due to the volatile electioneering situation, he had sought permission from the CRJ to work from Nairobi; that the email was forwarded to the Ag. Director Finance on 16.1.2019 by the Judge but the forwarded email did not include his response to the Judge. He testified that the email by the Judge was a concern since he had not seen him (Claimant).
 17. He testified that the suspension letter never stated that the decision to suspend him was from the CJ but it stated that while on suspension, he was not to receive any salary thus he had never received any salary from February 2019. He contended that the suspension letter was dated 27.2.2019 but was effective from 16.1.2019. According to him the decision to retrospectively suspend him was wrong.
 18. He averred that the disciplinary procedure under the HR procedure manual applies to all staff; that paragraph B31 of the HR Manual is for permanent and pensionable staff while paragraph D5 of the HR Manual entails the applicable procedure; D.7.1.1 lays down procedure for dealing with misconduct which involves verbal warnings and escalation of the matter to the head of department.
 19. He reiterated that he was not issued with any warning and was not aware whether the matter was escalated to the head of station at Kisumu; that the HR Manual provides a different procedure for suspension under Regulation D.7.5.2 and that suspension is done when an officer is convicted of a serious criminal offence other than an offence under the traffic act or by-laws.
 20. He contended that he was not convicted of any criminal offence and he is not facing such charges; he maintained that there was no indication that his suspension letter was authored with authority from the CJ. He stated that Regulation 15 of the Part IV of the Judicial Service Act provides for disciplinary powers that have been delegated to the CJ which include interdiction, suspension and administer a severe reprimand.
 21. He stated that he had only received alimentary allowance for 3 months. He told Court that as a result of the suspension, his personal rights have been infringed upon, his career progression affected and continues to suffer because he is not being paid his dues. He prayed that the reliefs set out in his claim.
 22. On cross-examination, he maintained that he had no obligation to report to the Principal Judge Kisumu on day to day basis. He however clarified that he had 2 reporting lines being the presiding Judge in Kisumu and the Director of Finance. According to him, the letter dated 17.1.2018 was for information and it did not require his response as Ms. Oyatsi was informing him that she had reported him to the HR.
 23. He confirmed that there was a letter dated 25.3.2019 from Fred Ochieng. J. to the Director HR that alleged that he had absented himself from work during the period under review. He reiterated that he has not been taken through the disciplinary process and he is still a judicial staff. He stated that he is ready to go through the disciplinary hearing and his reason for coming to Court was because the process or charges against him were illegal. He maintained that before his suspension, his right to hearing has been denied.
 24. On re-examination, he testified that the letter by Fred Ochieng J. was never copied to him and that the Judge was referring to the same matter raised by Majanja J.



Respondent's case

25. Susan Oyatsi, the Respondent's Ag. Director Finance testified as Rw1. She adopted her Witness Statement dated 12.7.2019 as her evidence-in-chief. She stated that she had received complaints from the then presiding Judge in Kisumu about the Claimant's habitual absenteeism from his work station with his whereabouts being unknown to the Presiding Judge or other staff in Kisumu; that on 17.1.2019 she wrote a letter to the Claimant and copied to the Chief Registrar's office indicating that the Claimant had absconded duty despite numerous warnings both verbal and written; that on 31.1.2019 she was requested by the Director of Human Resources to avail all documents touching on the matter to which she responded on 11.2.2019 where she attached the email dated 19.10.2017 from the presiding judge demanding an explanation on the Claimant's absenteeism and that she had personally visited the region more than 5 times within 2 years and never found him. She further stated that the matter was forwarded to the Directorate of Human Resource for further action.
26. On cross-examination, she confirmed that the Claimant was based in Kisumu; that he was to administratively responding to the Principal Judge Kisumu and he functionally reports to her; that any complaint on leave and work not done would be from the Principal Judge in the region but it is also her duty to supervise the office; that the CRJ wrote to the Claimant the letter dated 27.2.2019 which was also copied to her.
27. She testified that she could not recall the dates she visited the Claimant's station and failed to find him ;that after she found the Claimant absent during her visits she only talked to the Presiding Judge ; that she never wrote any warning letter to the Claimant but the Principal Judge had written an email and letter to the Claimant; that she handed the matter to the HR Department to deal with the Claimant, and also wrote the latter dated 17.1.2019 which she copied the CRJ and attached the mail and letter from the Presiding Judge.
28. She confirmed that Majanja J never copied the email dated 19.10.2017 to her. She further confirmed that the email was responded to by the claimant but going by the response she was seeing in court for first time. She also confirmed that the suspension letter was authored by a different person and it referred to her as having visited Kisumu for 2 years and never found him. However, she admitted that she could neither confirm whether the Claimant was not on duty during the period he was said to have deserted work between January and February 2019, nor confirm that her letter dated 17.1.2019 on absconding duty is the one which triggered the issuance of the suspension letter. She maintained that she had been to Kisumu on several occasions but never found the Claimant at the Station.
29. She confirmed that the CRJ's letter dated 6.11.2017 was a response to the Claimant's letter dated 25.10.2017 requesting for a transfer and it mentioned notice to show cause. She further confirmed that the email by Majanja J asking the Claimant to give an explanation was forwarded to her on 16.1.2017 but the Judge did not also forward the Claimant's response dated 23.10.2017. She maintained that she used to visit Kisumu and that the PJ would inform her verbally that the Claimant was frequently absent. However, she admitted that she never wrote to the Claimant of his frequent absenteeism and only verbally talked to him.
30. She confirmed that the Claimant attended the workshop that took place between 14.1.2019 to 18.1.2019. She testified that her letter to the Claimant dated 17.1.2019 was through the Chief Magistrate Kisumu and he responded by the letter dated 20.2.2019 which was received on 22.2.2019 after she had handed over his case to the HR Directorate.
31. On re-examination, she testified that she was not the only one who complained of the Claimant's absenteeism and maintained that Ochieng J, the new Presiding Judge, wrote on 25.3.2019 where



- he stated that he had perused the Claimant's records, consulted fellow staff and confirmed that the Claimant had on numerous occasions absconded duty. She testified that the Claimant ought to have notified the CM and PJ when he was going to be away from the station and that the Claimant only explained his absence after the notice to show cause was issued by the PJ.
32. She testified that her role was to escalate the complaint to the HR and it was upon them to deal with the employee. She maintained that it was the first time she was seeing the Claimant's response to Majanja J's show cause.
 33. Dr. Elizabeth Kalei is the Respondent's Director Human Resource and testified as Rw2. Basically she adopted her Witness Statement dated 12.7.2019 and stated that on 27.2.20291 the CRJ sent a notice to show cause to the Claimant on account of his absence from duty without leave and suspended him from office; that having deserted duty and pursuant to section 17 of the Employment Act his salary was stopped; that Rw1 responded to her request for documents touching on the matter and on 25.3.2019, the Presiding Judge Kisumu confirmed that the Claimant was absent without permission on numerous occasions as pointed out by Majanja J and Rw1, and that the same had been confirmed by the Accounts Department and the Chief Magistrate Kisumu Law Court.
 34. She stated that the Claimant's alimentary allowance had already been paid pending the hearing and determination of the disciplinary case.
 35. On cross-examination, she testified that she dealt with the Claimant's case by carrying out investigations and found that there was desertion of duty; that she got information from Rw1 and the Kisumu Station; and that the Claimant was suspended pursuant to letter dated 27.2.2019.
 36. She confirmed that Rw1 was the Claimant's superior and she initiated the complaint of desertion. She testified that after investigations, they discovered that the desertion was from 16.1.2019 and as a result, the charge was amended and served on the Claimant. She testified that she did not have the amended charge and that the matter is prematurely before Court. She testified that the matter should have been dealt with at the shop level.
 37. She stated that she was in support of the letter dated 3.2.2019 that the Claimant was absent form duty from 16.1.2019 to 27.1.2019. She however testified that the said allegation in the letter would be incorrect if the Claimant was attending a conference. She further contended that if the claimant wrote any official letters during the said period, he must prove that he was writing the letters while in his office at Kisumu. She confirmed that the letter dated 20.2.2019 was written by the Claimant seeking facilitation to travel to various law courts within Nyanza Region and that it was received by the Judiciary on 22.2.2019. She denied that the said documents were brought to her attention when doing her investigation.
 38. She confirmed that under Clause D7.3 of the HR Manual 2014, interdiction and suspension can be done to allow full investigations while Clause D. 7.5.2 provides that the CJ can suspend an officer in case of a conviction for serious criminal offence; or should proceedings have been preferred against the officer, that may lead to a dismissal. She contended that proceedings have been commenced against the claimant but not yet concluded but admitted that under Clause D.7.5.1 only the CJ has power to interdict or suspend. She further admitted that the suspension letter to the claimant was not signed by the CJ but the CRJ. She maintained that they had initiated disciplinary proceedings against the Claimant as at the time they issued suspension letter.
 39. She confirmed that an officer on interdiction is entitled to half basic salary, full house allowance and medical benefits but while on suspension an officer is only entitled to alimentary allowance.



40. On re-examination, she testified that the letters addressed to the Claimant's counsel acknowledged that the matter had been placed before the JSC. She maintained that the matter is premature because it should have waited full investigations to be done and for JSC to deal with the matter and determine whether he absconded duty based on his defence.
41. She testified that judicial offices include magistrates who can make judicial decisions and contended that the judicial staff are the other employees who do not make judicial decisions. She contended that the CRJ can suspend judicial staff because the CRJ is both secretary to the JSC and also in charge of managing staff in the judiciary. She maintained that she received a complaint against the Claimant from PJ Kisumu and Director Finance that the Claimant was absconding duty, and Ochieng J the Presiding Judge also confirmed the complaint. She maintained that there is no evidence that the claimant wrote the letter dated 20.2.2019 to CRJ while on duty in the office. She also contended that the claimant breached protocol by writing to the CRJ directly without going through his supervisor, Director Finance.

Submissions by the Parties

42. Mr. Chege Njoroge, learned counsel for the Claimant argued that three issues arise for determination in this suit, namely, (a) whether the filing of these proceedings amount to usurpation of disciplinary powers of the JSC; (b) whether this Court has any powers in supervising the legality of exercise of JSC power to discipline staff; (c) whether the reliefs sought can be granted by the Court.
43. He submitted that the suit does not usurp powers of the JSC in its disciplinary function and that the disciplinary powers must be exercised under a provision of law as provided under Part IV of the Judicial Service Act (JSA); and that, section 32 of the JSA does not relate to judicial officers but only section 32 (3) provides for procedure under the Third Schedule.
44. He submitted that disciplinary power envisaged under the Third Schedule to the JSA is supposed to be exercised by a committee/panel; that the schedule was enacted by Parliament and it is pursuant to section 32 of the JSA; and that the schedule applies also to discipline of judicial staff. According to him, the term officer under Clause D.7.2.2 of the HR Policy Manual is not limited to judges and magistrates only, but it is generally used to refer to both cadre of employees.
45. Accordingly, the counsel submitted that the Third Schedule is applicable to the Claimant. To buttress this position, he relied on *Bryan Mandila Khaemba v Chief Justice and President of the Supreme Court of Kenya & another* [2019] eKLR where the Court held that the Third Schedule is applicable to both judicial staff and judicial officers as recognized under section 1 of the JSA.
46. He argued that the letter dated 27.2.2019 is illegal and invalid because under the *JSA* the power to suspend an officer is reserved for the CJ by way of delegation. He further argued that paragraph 15 of the Third Schedule to the Act states that the powers vested upon the JSC are delegated to the CJ and that these powers include interdiction, suspension and to administer a severe reprimand on an officer.
47. He submitted that under paragraph 15(2) of the *JSA*, the CJ is to act in accordance with the Schedule and other relevant regulations and that the procedure to be followed is provided under paragraphs 16 to 28 of the Third Schedule. He submitted that this was the gist in the Bryan Khaemba case and that the Court found that there was illegality in that the CJ did not comply with the procedure under procedure under the schedule.
48. He argued that in the instant case, the matters are worse because the power was exercised by the CRJ; the mandatory investigation/preliminary inquiry as required under paragraph 25 of the schedule was not done before the suspension; and that the suspension is a grave action than interdiction since the



claimant was denied half-salary and full allowances under paragraph 16 (2) and D.7.2. of the HR Manual. According to the counsel, only interdiction was necessary because disciplinary proceedings had not been taken against the claimant nor was he convicted of any serious criminal offence. He relied on the case of *Pauline Maisy Omung'ala Chesang v Chief Justice and President of the Supreme Court of Kenya & another* [2020] eKLR where the Court held that the officer ought to have been interdicted and not suspended.

49. It was his submission, that no disciplinary process can stand based on the letter dated 27.2.2019 because the process was polluted ab initio. He maintained that the claimant was not usurping powers of the JSC but he was only asking the Court to stop illegality and unfair process. He submitted that in upholding their case this Court will be following other decisions by judicial officers. He argued that they had shown contravention of the JSA and contract of employment because the HR Manual was violated. Finally, the Counsel argued that this Court has power to call all provisions of JSA to light and urged the Court to grant the reliefs sought.

Respondent's submissions

50. Mr. Malenya, learned Counsel for the Respondent submitted that the Claimant is still in employment of the Judiciary but on suspension and that his disciplinary case was pending before the JSC as indicated in the letter dated 16.5.2019.
51. In response to issue of usurpation of the powers of the JSC, the Counsel argued that indeed, determination of the issues raised herein by the Court would amount to usurping the power of the JSC. He relied on *Joseph Mutura Mberia & another v Council Jomo Kenyatta University of Agriculture and Technology (JKUAT)* [2013] eKLR where Mbaru J addressed the question when a Court can intervene in disciplinary process before completion, that is, only when the process is initiated without any reason and when the conduct alleged has not been explained.
52. Counsel submitted that although the Claimant has alleged that the suspension was made as a punishment, the fact is that it was an administrative measure pending disciplinary hearing. He relied on *Kenyatta University & another v Fred Obare* [2017] eKLR where the Court of Appeal declined to interfere with a disciplinary process where there was a suspension and directed the employee to go back to the employer to hear and determine the disciplinary case.
53. On the issues whether the CRJ can suspend an employee, he submitted that there are two responses, that is, a practical and legal response. He argued that section 2 of the JSA distinguishes between judicial officer and judicial staff. He further argued that under section 8 (1) (e) of the JSA the CRJ has HR functions as the authorised officer in HR matters of the judiciary. Consequently, according to the counsel, employees in the cadre of judicial staff are first dealt with by the CRJ such that the provisions of discipline under paragraphs 15,16 and 25 in the Third Schedule and Part IV of the JSA are reserved for judicial officers only. In his view, the said provisions are not applicable to judicial staff most of who are laymen and as such applying the same to judicial staff would not be practicable as it would overwhelm the CJ.
54. He distinguished the authorities cited by the Claimant from the instant suit and stated that there is an appeal before the Court of Appeal due to conflicting decisions on the issue of whether inquiry is needed before suspension. He further argued that the instant case is different from the authorities cited by the Claimant because they related to magistrates who are judicial officers. In conclusion, he submitted that suspension is not a punishment because after the hearing, the employee can be found innocent and therefore reinstated with full benefits. He urged the Court allows the JSC to deal with the matter because JSC might even acquit the Claimant at the hearing.



55. In rejoinder, Mr. Njoroge stated that suspension without pay is punitive and that there are no two ways about it. He denied that CRJ can exercise disciplinary powers on judicial staff and stated that such power position is not founded on the JSA. He maintained that the CJ is the only one that can interdict an officer or staff and that once delegation is done there cannot be further delegation. He contended that Parliament gave disciplinary power to the JSC and delegation of those powers to the CJ only.
56. With respect to the Kenyatta University case he submitted that there were no violations of the law as in the instant matter. He submitted that in that case the Court ordered reinstatement which is not the case herein.
57. He submitted that the Court in the Joseph Mberia case identified exceptions of instances for intervening in disciplinary process and that the cases cited are not limited or pigeon holed.
58. He submitted that under Clause D.4 of the HR Manual the CRJ may have some disciplinary powers in respect of Grade 9 and below, but clarified that the Claimant herein was in Grade 14 to which grade a disciplinary hearing is to be conducted by a committee of the JSC, after preliminary investigations by the CJ. He concluded by urging the court to find that the Claimant has demonstrated that this Court is the proper arbiter of this case.

Issues for determination and analysis

59. The Issues for determination are;
 - a. Whether this Court has jurisdiction to intervene in disciplinary process before conclusion.
 - b. Whether the instant suit amounts to usurpation of the disciplinary powers of the JSC.
 - c. Whether the Claimant's suspension by the CRJ was unlawful and void ab initio.
 - d. Whether the suspension violated the claimant's right to property and fair labour practices as protected under Article 40 and 41 of the Constitution.
 - e. Whether the Claimant is entitled to the reliefs sought.

Court has jurisdiction to intervene in disciplinary process

60. The jurisprudence emerging from this court is to the effect that, as a general rule, courts should not intervene in disciplinary process at the shop floor before they are concluded. However, there are exceptions to the said general rule. In *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.”



61. Again in *Geoffrey Mworira v Water Resources Management Authority* [2015] eKLR Ongaya J 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.”

62. From the foregoing precedents, it is emerging that the Court has no jurisdiction to interfere with internal disciplinary process unless it is demonstrated that the intended action is illegal and/or the employee’s legal rights under the Constitution, legislation, or the contract of service, are being violated by the manner in which the employer is unfairly or illegally conducting the process. In the instant case, the claimant is alleging that the disciplinary proceedings are tainted with illegality since his suspension was unlawfully done by the CRJ and not the CJ as required under the JSA and the HR Policy Manual, and as a result his constitutional rights to property and fair labour practices have been violated. Consequently, it is my holding that this Court’s jurisdiction has been properly invoked

Is this suit a usurpation of the disciplinary powers of the JSC?

63. The Claimant submitted that the instant suit does not amount to usurpation of the disciplinary powers of the JSC because disciplinary powers must be exercised under a provision of law, which in this case is Part IV of the JSA by a Committee or Panel. The Respondent has argued that the Claimant’s disciplinary case is still pending and intervention of the court should only be under exceptional circumstances. According to her, the issues raised herein amount to usurpation of those powers.

64. I have carefully considered the rival contentions. The Claimant was suspended on 27.2.2019 vide the letter addressed to him by the CRJ, and he had made responses to the CRJ on the disciplinary issue. In the letter dated 10.4.2019, Rw2 informed the Claimant that the matter had been forwarded to the JSC for deliberation and that the decision would be communicated to him immediately. He filed the instant suit on 13.6.2019 seeking that the suspension be lifted.

65. As appreciated by the respondent, the court can on certain cases intervene in internal disciplinary process before completion. However as held by Ndolo J in *Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR,

“... the Court will intervene not stop the process altogether but to put things right.”

66. In this case, the court cannot therefore stop the disciplinary proceedings without a good cause, or determine the merits of the disciplinary case before the JSC, but will only interrogate an interlocutory matter, namely, the validity of the suspension by the CRJ without pay. Consequently, I do not find this suit to be an interference with the disciplinary function of the JSC and as such there is no usurpation of the JSC powers.

Whether the Claimant’s suspension by the CRJ is unlawful and void ab initio.

67. The Claimant argued that the CRJ ‘s letter dated 27.2.2019 is invalid for reason that under the JSA the power to suspend is only reserved upon the CJ. He submitted that the title “officer” under the Third Schedule to the JSA is not limited to judges and magistrates but it is generally used to refer to



both judicial officers and judicial staff. However, the Respondent's case is that the CRJ is the overall in charge of HR of Judicial staff and has the mandate to initiate disciplinary processes against them. It is further respondent's case that it is not practical for the CJ exercise the power to suspend and/or interdict over all the judicial staff including support staff.

68. I have carefully considered the contentions by the two sides regarding the relevant provisions of the law and the HR Policy Manual. Section 2 of the JSA defines a judicial officer and a judicial staff as follows:

“judicial officer” includes a registrar, deputy registrar, magistrate, Kadhi or the presiding officer of any other court or local tribunal as may be established by an Act of Parliament, other than the courts established to hear and determine disputes relating to employment and labour relations and the environment and the use and occupation of, and title to, land;

“judicial staff” means persons employed in the Judiciary but without power to make judicial decisions, and includes the staff of the Commission;”

69. The Claimant is not a judicial officer but a judicial staff by dint of the foregoing section. However, as rightfully submitted by the claimant, the term officer is severally used in the Third Schedule and despite the definition under section 2 of the Act, I agree with claimant that in the Third Schedule and the HR Manual it includes judicial staff. The foregoing is fortified by the fact that the Third Schedule has made definition of the only terms which the legislature thought was necessary to clarify. The foregoing view is fortified by the fact that the said Schedule has made definitions to clarify the terms which the Legislature deemed necessary. Paragraph 15 of Part IV of the Third Schedule of the JSA provides;

“(1) The following disciplinary powers vested in the Commission are delegated to the Chief Justice—

- (a) the power to interdict an officer under paragraph 17;
- (b) the power to suspend an officer under paragraph 18;
- (c) the power to administer a severe reprimand or a reprimand to an officer.

(2) The Chief Justice, when exercising the powers delegated by this Schedule, shall act in accordance with the provisions of this Schedule and in accordance with any other appropriate regulation which may be in force.”

70. Section 8 (1) (a) and (e) of the *Judicial Service Act* provides:

“(1) In addition to the functions conferred by Article 161 of the Constitution, the Chief Registrar shall, in particular—

(a) be responsible for the overall administration and management of the Judiciary;

....

(e) be the authorised officer for the Judiciary, who shall be responsible for the efficient management of the day-to-day operations and administration of human resources in the judicial service;”

71. The status of an Authorized Officer responsible for efficient management of day-to-day operations and administration of human resource points to an HR function which, in my view, must involve a



measure disciplinary powers which can be traced in the HR Policy and Procedures Manual. However, the said provision is a general provision as opposed to the specific provisions both under the Act and the Third Schedule, which give the power to discipline judicial officers and staff to the JSC, and delegated some disciplinary powers to the CJ. Since both the Act and the Third Schedule were passed by the Parliament, they are equal and as such the said specific provision of paragraph 15 of the Third Schedule must take precedent over the general provision under section 8(1)(e) of the Act.

72. Section D of the HR Policy and Procedures Manual provides the procedure to be followed in relation to gross misconduct by a judicial officer/staff. Under Section D the HR Policy and Procedures Manual clause 7.2.2 the disciplinary power given to the CRJ is limited to initiating disciplinary proceedings by serving a Show Cause detailing the nature of the offence, and thereafter forwarding to the JSC the same plus the response by the officer/staff. However, when it comes to the issue of interdiction or suspension, that power is only vested in CJ under Clause 7.5.1 and 7.5.2 of the HR Manual in line with Paragraph 15 of the Third Schedule to the JSA.
73. Section D.7.5.2 of the HR Manual provides:
- i. “Where an officer has been convicted of a serious criminal offence, other than minor offences, such as those under the Traffic Act and by-laws, the Chief Justice may suspend the officer from the exercise of the functions of their office pending consideration of their case.
 - ii. The Chief Justice may suspend from the exercise of the functions of the officer against whom proceedings for dismissal have been taken if, as a result of those proceedings, he considers that the officer ought to be dismissed.
 - iii. While an officer is suspended from the exercise of the functions of their office they shall be granted an alimentary allowance in such amount and on such terms as the Commission may by regulations determine.
 - iv. An officer who is suspended shall be required to comply with such conditions as may by regulations, be prescribed.”
74. I have considered the decisions cited by the Claimant most of which are to the effect that Chief Justice has delegated powers to interdict and suspend judicial officers under the JSA. But it is now clear as the day that under Paragraph 15 of the Third Schedule and Clause 7.5.1 and 7.5.2 of Section D of the HR Policy and Procedures Manual, the power to suspend or interdict both judicial officers and judicial staff is upon the CJ and not the CRJ. Consequently, I find that the suspension of the claimant by the CRJ vide the letter dated 27.2.2019 was and still is unlawful and void ab initio because the CRJ lacked the requisite mandate to suspend the claimant both in law and the claimant’s contract of service as contained in the JSA, Third Schedule to the JSA, the HR Policy and Procedures Manual and the letter of appointment.
75. As parting shot on the issue of the HR function of the CRJ and the CJ, and the reference to judicial officers and judicial staff in the Third Schedule and the HR Manual, I would propose that the JSC should as a matter of urgency, undertake a review with a view to clarify some of the unclear issues. I would for example suggest that the CRJ be given powers as the authorised officer under the JSA to exercise disciplinary powers over the judicial staff while the CJ deals with Judicial officers.

Whether the Claimant is entitled to the reliefs sought

76. Having found herein above that the impugned suspension was done by CRJ without mandate from the law and the claimant’s contract of employment, the court hereby makes a declaration that suspension of the claimant done vide the letter dated 27.2.2019 is unlawful and void ab initio.



77. The claimant contended that his right to fair labour practices was violated by the respondent through the said unlawful suspension. The court has considered the relevant law and the HR Manual and confirmed that indeed the respondent had the power to suspend the claimant to pave the way for investigations on the alleged misconduct. However, the said suspension must be done in compliance with the law and the said HR Manual. In this case, I have already found that the suspension was unlawfully done. The claimant contended that he suffered serious financial stress due to withholding of all his salary and benefits which had implications on his loan obligations. Consequently, for the said reason, the court further makes a declaration that by unlawfully suspending the claimant, his constitutional right to fair labour practices as envisaged under Article 41 of the Constitution were violated. The claimant has however not proved the alleged violation of his right to property.
78. The claimant has also prayed for the release of all his salaries and benefits from February 2019 and in view of the finding that the suspension was unlawful and void ab initio, it is my holding that the Claimant is entitled to all the salaries and benefits withheld on account of the unlawful suspension from February 2019 till the date hereof, and the respondent is directed to forthwith release the same to him.
79. In view of the said constitutional violation, the Court finds that the claimant is entitled to compensatory damages. However, the person who violated his rights has not been enjoined to this suit and as such I will not award any damages against the JSC. Likewise, the claim for exemplary damages is declined for lack of legal basis. In any case it is my view that the claimant will be adequately compensated by the withheld salaries and benefits.
80. In view of the foregoing declarations and directions, I revoke, lift and/or set aside the said unlawful suspension, and also grant the prayer of permanent injunction restraining the Respondent from withholding the salary and benefits of the Claimant on account of the said unlawful suspension done vide the letter dated 27.2.2019 by the CRJ.
81. The claimant prayed for permanent injunction to restrain the Respondent, its officers, panel or committee from instituting disciplinary proceedings against him or terminating him based on the letter dated 27.2.2019. However, that prayer is declined because as already observed above, under Section D of the HR Policy and Procedures Manual clause 7.2.2, the CRJ has the power to initiate disciplinary proceedings by serving a judicial staff with a Show Cause and thereafter forward the same plus the response by the officer to the JSC.
82. The claimant confirmed that he responded to the charges made against him and thereafter the CRJ notified him that the matter was forwarded to the JSC for consideration. It follows that there is lawful disciplinary case against the claimant pending before the JSC, and this court will not muzzle the JSC from exercising its lawful mandate under the Constitution, the JSA, Third Schedule to the JSA, and the HR Policy and Procedures Manual. Holding otherwise would amount to interference with the said mandate of the JSC, which I indicated herein above that this court cannot do. In fact, this judgment does not bar the employer from suspending the claimant pending his disciplinary provided that the same is done within the law and the stipulations of his contract of service.

Conclusion and disposition

83. I have found that the CRJ has no power under the JSA, Third Schedule to the JSA and the HR Policy and Procedures Manual to suspend the claimant and proceeded to declare the suspension of the claimant vide the letter by the CRJ dated 27.2.2019 unlawful and void ab initio. However, I found the disciplinary proceeding initiated against the claimant by the CRJ vide the said letter to be lawful and declined to restrain the respondent from pursuing the same. I have further found that by the said



unlawful suspension the claimant's right to fair labour practices has been violated. Consequently, I enter judgment in favour of the claimant in the following terms: -

- (a) Declaration that suspension of the claimant done vide the letter dated 27.2.2019 is unlawful and void ab initio.
- (b) Declaration that the claimant's right to fair labour practices has been violated through the said unlawful suspension.
- (c) The suspension of the claimant done vide the CRJ's letter dated 27.2.2019 is revoked, lifted and/or set aside.
- (d) Direction that all the salaries and benefits withheld from the claimant from February 2019 on account of the said unlawful suspension be released to him forthwith.
- (e) An order of permanent injunction restraining the Respondent, whether by itself or its officers or any other persons whatsoever from withholding salary and benefits accruing and due to the Claimant as the Respondent's employee based on the unlawful suspension done vide the letter dated 27.2.2019 from the Chief Registrar of the judiciary.
- (f) The Claimant is awarded costs and interest.

DATED AND DELIVERED AT NAIROBI THIS 17TH DECEMBER, 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 Rule 28(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

