



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION 68 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 5th February, 2019)

GODWIN BARASA BARECHI.....PETITIONER/APPLICANT

VERSUS

KENYA TRADE NETWORKS AGENCY.....RESPONDENT

RULING

1. The Application before Court is the Petitioner/Applicant's Application dated 18th July 2019. The Application was filed by the Applicant/Petitioner herein under Certificate of Urgency through a Notice of Motion seeking the following orders:-

1. THAT for reasons appearing in the Certificate of Urgency and to be recorded, the instant Application be certified as urgent and the same be heard ex-parte in the first instance.

2. THAT pending the hearing and determination of this application and the instant petition a Conservatory and/or Injunction Order do issue prohibiting and restraining the Respondent by itself, agents, servants or employees from entertaining, investigating, hearing, determining and/or conducting purported internal disciplinary process relating to alleged loss of 21 laptops pending the determination of MILIMANI MCCR.905 OF 2017 REPUBLIC VS GODWIN BARAZA & ANOTHER.

3. THAT pending the hearing and determination of this application and the instant petition a Conservatory and/or Injunction Order do issue prohibiting and restraining the Respondent by itself, agents, servants or employees from terminating the Petitioner/ Applicant's employment contract pending the determination of MILIMANI MCCR.905 OF 2017 REPUBLIC VS GODWIN BARAZA & ANOTHER.

4. THAT a declaration do issue that the petitioner's right to fair trial and Administration of Justice has been violated and will continue to be violated unless and until the final determination of the instant petition.

5. THAT a declaration do issue that the Petitioner/Applicant is entitled to half basic salary, house allowance and medical cover pending the hearing and determination of Milimani MCCR.905 of 2017 REPUBLIC VS GODWIN BARAZA & ANOTHER.

6. An order compelling the Respondent to pay the Petitioner half basic salary, house allowance and medical cover pending the hearing and determination of MILIMANI MCCR.905 OF 2017 REPUBLIC VS GODWIN BARAZA & ANOTHER.

7. THAT an order do issue compelling the Respondent to pay the Petitioner/Applicant all the outstanding half basic salary arrears for a period of fifteen (15) months amounting to Kshs.1,305,000/-.

8. THAT this Honorable Court do give directions on the hearing of the substantive Petition.

9. THAT costs of this Application be provided for.

10. Any other order that this Honorable Court deem fit and just.

2. The Application was supported by the affidavit of the Applicant herein Godwin Barasa Barechi sworn on 17/7/2018 and on the following grounds:-

1. *“The Petitioners have a very strong Petition with a high chance of success as demonstrated by the following:-*

i. On 17th May 2017 the Respondent did suspend the Petitioner/Applicant for alleged theft of twenty one (21) Laptops and subsequently proceeded to press on him charges of Stealing By Servant Contrary To Section 268 (1) AS READ WITH SECTION 281 of the PENAL CODE (Milimani MCCR.905 of 2017 REPUBLIC VS GODWIN BARAZA & ANOTHER) which matter is pending in the Chief Magistrate's Court.

ii. On 21st May 2018, during the pendency of the criminal case, the Respondent purported to illegally run an internal disciplinary process/ a parallel quasi-judicial process and has purported to have concluded investigation and has remanded the decision thereof to a later date.

iii. The Respondent's actions flies on the face of the Petitioner/Applicant's Constitutional Right to Fair Trial and administrative of justice and amounts to double jeopardy.

iv. The Respondent's action is sub judice to the criminal matter pending in Court.

v. The Respondent is purporting to take disciplinary action against the Petitioner parallel to the ongoing criminal process with the sole intention to exert illegal pressure on the Petitioner to abandon a claim of his benefits illegally held by the Respondent.

vi. The Respondent's purported move to initiate internal disciplinary proceedings against the Petitioner immediately after being served with a demand letter to pay the Petitioner half basic salary and outstanding arrears thereof is not only mischievous but also malicious and one done in bad faith to deny the Petitioner his entitlement as provided under law.

2. The Petitioners' case is that the actions of the Respondent herein are an infringement of the Petitioner's Constitutional rights and therefore it is in the interests of Justice that this application be heard expeditiously to stop further violations of the Petitioners' Constitutional rights.

3. The Petitioner will suffer irreparable harm if the Conservatory/Injunction/Declaratory Orders are not granted for the reasons that his administrative rights stand to be violated from the verdict of the parallel disciplinary procedure being conducted by the Respondent.

3. In the affidavit in support of the Application, the Applicant has deponed that the Respondent received 35 laptops from IFC on 16.11.2016. That on 18.5.2017 he received a show cause letter from the Respondent following allegation of missing of 21 out of the 35 laptops received by the Respondent which show cause letter he responded vide a letter dated 25th May 2017.

4. On 17th May 2017 he received a suspension letter from the Respondent for one month pending investigations relating to the loss of 21 laptops. He was subsequently on 18.5.2017 charged before the CM's Milimani Criminal Case No. MCCR 905 of 2017 with the offence of stealing by servant.

5. On 19th June 2017 he was indefinitely suspended by the Respondent and has since been paid only house allowance contrary to the law which entitles him to half basic salary together with medical cover.

6. He avers that since then, he has made a demand for payment of his ½ salary which Respondent have declined to pay and have instead proceeded to institute parallel investigations into this case and summoned him for disciplinary processes which he avers are an infringement of his constitutional rights hence this application.

7. The Respondents opposed this application. They filed a Replying Affidavit sworn by Benard Milewa, the Respondent's Company Secretary and Legal Affairs Manager on 17.9.2018.

8. The deponent in his affidavit stated that the laptops were delivered to the Respondent and they were stored in the Agency's CCTV room. They aver that the Petitioner was assigned the role of receiving the laptops on behalf of the Agency and had custody of them pending delivery of software that was identified to have been missing in the laptops.

9. On 11.5.2017, one ICT member of staff discovered that 21 laptops out of 35 were missing from the Agency's Server Room where they had been stored.

10. The Respondent also deponed that the Chief Executive Officer of the Respondent in line with the Respondent's Internal Policies appointed an Investigation Committee to look into the loss of the laptops. The theft was also reported to Capital Hill Police Station and the matter was investigated.

11. The Petitioner was subsequently charged in Court with the offence of stealing by servant and the case is still pending in Court.

12. The Respondent further instituted disciplinary proceedings against the Petitioner and other employees after considering the investigation report prepared by the Committee.

13. The Petitioner and others were served with show case letters for negligence and insubordination and the Petitioner responded by letter dated 25/5/2017.

14. The Respondents aver that the disciplinary process was conducted in accordance with 11.14.1(d) and (e) of the Human Resource Policy and Procedure Manual.
15. The Respondents submit that the criminal case and the disciplinary process are two different processes and that the Courts should not stop an employer from undertaking a disciplinary exercise merely because there is a criminal case arising from the same facts.
16. They aver that the Petitioner refused to attend the internal hearing and instead decided to challenge the process in Court.
17. It is the Respondent's position that the application in Court is not warranted and should therefore be dismissed.
18. The parties agreed to dispose of this application by way of written submissions.
19. I have considered the submissions and averments before me. The issue for determination before me is whether this Court can interfere with internal disciplinary issues of an employer and whether the Petitioner/Applicant is entitled to orders sought in the Interim including payment of ½ salary and other allowances in arrears.
20. The Applicant seeks Injunctive reliefs and so should show that he has a prima facie case as established in **Giella vs Cassman Brown and Company Limited (1973) EA 388.**
21. The Applicants seeks stoppage of a disciplinary process but this Court has stated over and over again that an employer is entitled to institute independent disciplinary proceedings against the employee independent of criminal proceedings as the two processes are independent of one another.
22. The submission that the internal disciplinary process is an illegality and harassment for the Petitioner/Applicant is therefore far from the truth.
23. This Court would only interfere with an internal disciplinary process if it's illegal and manifestly flawed and the interference would be limited to bringing back on truck a proper disciplinary process.
24. This was the holding in **Industrial Court Cause No. 1200 of 2012 Professor Gitile Naituli vs University Council Multimedia University College and Another** where Hon J. Rika opined as follows:-

“The Employment Act does not intend that Court take away managerial prerogatives from employers. To give the interim order would have the effect of stifling the management prerogative in staff administration. It would mean the employer does not have any more say in the contract of employment it has authored. This would be contrary to the intention of the Employment Act, which seeks to merely protect the weaker of the bargaining partners, not deprive the employer the power to run its business altogether”.

25. The Petitioner/Applicant has not submitted that the disciplinary process is flawed in any way. He only contends that it is oppressive to him as he is already facing a criminal charge. This reason cannot influence the Court to stop an employers' right to institute their own internal disciplinary process.
26. On the issue of remedies sought, the Respondent's Human Resource Manual states as follows at Clause 11.22.2:-
- “Where an office is suspended from the exercise of the functions of his public office, he shall be entitled to only allowances and medical benefits but not basic salary”.***
27. That being the position, the Respondents are indeed guilty of disregarding their own manual and they are paying the Applicant only house allowance. This is contrary to their Human Resource Manual, which provide for payment of all allowances and medical benefits.
28. It is for this reason that I order that the Respondent should proceed with their disciplinary process but should henceforth reinstate the Applicant's medical benefits and payment of all allowances and arrears of all unpaid allowances immediately.
29. Costs of this application in the cause.

Dated and delivered in open Court this 5th day of February, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Makori holding brief Kashindi for Respondent – Present

Kiriba holding brief Nyarango for Petitioner