



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 137 OF 2018

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27, 41 AND 47 OF THE CONSTITUTION

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF THE EXPORT PROCESSING ZONES ACT, CAP 517 LAWS OF KENYA

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

THOMAS OMBASA SOIGWA.....1<sup>st</sup> PETITIONER

BENTER ACHIENG OMOLLO.....2<sup>nd</sup> PETITIONER

VERSUS

EXPORT PROCESSING ZONES

AUTHORITY.....1<sup>st</sup> RESPONDENT

GEORGE MAKATETO.....2<sup>nd</sup> RESPONDENT

PAUL GICHERU.....3<sup>rd</sup> RESPONDENT

RULING

1. Before Court is an application by the Respondents dated 21 January 2019 seeking orders

(a) ...

(b) **THAT** this Honourable Court certify that the Petition herein raises a substantial point of law and it be placed before the Honourable Chief Justice pursuant to section 21(2) of the Employment and Labour Relations Court Act, 2011 for appointment of a three bench judges to hear and determine the same.

(c) **THAT** the Honourable Court do give such further or other directions as it may deem just and appropriate;

(d) **THAT** the costs of and incidental to this application be in the cause.

2. The Respondents filed *skeletal submissions* and list of authorities in respect of the application on 21 January 2019, 29 January 2019 and 5 February 2019.

3. The Petitioners, in opposition to the application filed a replying affidavit sworn by Musa Juma and list of authorities on 29 January 2019, and *skeletal submissions* on 5 February 2019.

4. The parties addressed the Court on 7 February 2019.

#### **Respondents' contentions**

5. The Respondents presented one key ground in support of the application and this was that there was uncertainty in the state of law in regard to the question whether the prerequisite of /doctrine of natural justice (requirement of a hearing) was a requirement before placing a public officer on *administrative compulsory leave* to facilitate investigations.

6. To demonstrate that there was uncertainty in law, the Respondents drew the attention of the Court to its decision in the case of *Ezra Chiloba v Wafula Wanyonyi Chebukati & 7 Ors* (2018) where the Court held that an employer needed contractual authority to send an employee on compulsory leave and which was endorsed by Makau J in *Okiya Omtatah Okoiti v Joseph Kinyua & 2 Ors* (2018) eKLR.

7. The Respondents also cited the position taken by this Court in *John Mwaniki v Joshua Irungu & Ar* (2017) eKLR that

Under the common law, suspension of an employee without either a contractual or statutory basis has been held to be unlawful and in breach of contract.....in my view, because there is no contractual foundation to sending the Claimant herein on compulsory leave, the principles applicable to suspension under the common law would apply to sending a public official on compulsory leave...

8. As a contrast to demonstrate the uncertainty, the Respondents cited the decision of Onyango PJ in *Thomas Kerongo & 2 Ors v James Omariba Nyaoga & 3 Ors* (2017) eKLR where she took the position *that because there was no law prohibiting an employer from sending an employee on compulsory leave, it was not illegal or unlawful.*

9. Further reference was made to a passage in *Humphrey Makhoha Nyongesa & Ar v Communications Authority of Kenya & 2 Ors* (2018) eKLR by Onyango PJ that

I find the action taken against the Interested Party by the 1<sup>st</sup> Respondent a matter of private contract governed by the employment law and terms and conditions of employment in the employment contract. I further find that in sending the Interested Party on compulsory leave, the 1<sup>st</sup> Respondent was not exercising administrative authority and therefore the action does not fall within the purview of Article 47 of the Constitution and the Fair Administrative Actions Act.

10. Still on the uncertainty, reference was made to a holding by Rika J in *John Ogutu Ragama v Bandari Sacco Ltd* (2017) eKLR that

Compulsory leave is administrative leave, imposed on the employee pending investigation of employment offences and disciplinary action.

11. The Respondents also cited the decision by Ongaya J in *Elizabeth Cherono Kurgat v Kenya Literature Bureau* (2014) eKLR where the Judge stated that

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.

12. Apart from decisions the of this Court, the Respondents relied on the decision of the High Court in *Justice Amraphael Mbogoli Msagha v Chief Justice of the Republic of Kenya & 7 Ors* (2006) eKLR where the High Court cited a passage in *Lewis v Heffer & Ors* (1978) 3 All ER 345 citing *John v Rees* that

Suspension is merely expulsion *protanto*. Each is penal and each deprives the member concerned of the enjoyment of the rights of membership of offices. Accordingly in my judgement the rules of natural justice prima facie apply to any such process of suspension in the same way that they apply to expulsion.

Those words apply no doubt to suspensions which are inflicted by way of punishment as for instance a member of the Bar is suspended from practice for six months or when a Solicitor is suspended from practice. But they did not apply to suspensions which are made as a holding operation pending inquiries.

Very often irregularities are disclosed in a government department or in a business house and a man may be suspended on full pay pending inquiries. Suspicion may rest on him and he is, suspended until he is cleared of it. No one so far as I know, has ever questioned such a suspension on the ground that it would not be done unless he is given notice of the charge and opportunity of defending himself and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the Department or the office is being affected by rumours and suspicion, the others will not trust the man. In order to get back the proper work he be suspended. At that stage the rules of natural justice do not apply.

13. In opposing the application, the Petitioners countered that the legal question on *administrative compulsory leave* was a simple issue of contract which did not raise any substantial question of law warranting the empanelling of a 3 judge-bench.

14. As to what constitutes a substantial question of the law, the Petitioners cited *County Government of Meru v Ethics and Anti-Corruption Commission* (2014) eKLR and *National Land Commission v Afrison Export Import Ltd & 9 Ors* (2018) eKLR.

15. The Petitioners in the same breath submitted that based on the doctrine of judicial hierarchy, the decision of a 3 Judge bench of the same Court had equal force with the decision of a single judge.

16. The Court has considered the contentions by the parties.

17. It is correct that judges of this Court appear to have taken divergent positions on the issue of *lawfulness of compulsory leave*.

18. However, as urged by the Petitioners, a decision of a 3 Judge bench of the Court would only be of persuasive value and would not resolve any perceived uncertainty in the law.

19. The Court agrees.

20. The proper course would be for parties to await a determination of an appropriate case at this level of the judicial hierarchy and then if not satisfied to move to the next level.

21. The Court is also of the view that the question posed by the Respondents turn at the first instance on application and interpretation of individual contracts of employment, and if applicable, specific statutory provisions before implicating the general law on employment and its interplay with the Constitution.

22. The Court finds no merit in the application dated 21 January 2019 and orders it dismissed.

23. Costs in the cause.

**Delivered, dated and signed in Nairobi on this 15<sup>th</sup> day of March 2019.**

**Radido Stephen**

**Judge**

**Appearances**

For Petitioners                      Musa Juma & Co. Advocates

For Respondents                    Wekesa & Simiyu Advocates

Court Assistant                    Lindsey