



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

ELRC CAUSE NO. 1431 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 13th March, 2019)

DR. JAMES WAFULA WENYAA.....CLAIMANT

VERSUS

THE COUNTY GOVERNMENT OF MACHAKOS.....1ST RESPONDENT

COUNTY PUBLIC SERVICE

BOARD OF MACHAKOS.....2ND RESPONDENT

RULING

1. The Claimant/Applicant, Dr. James Wafula Wenyaa filed a Notice of Motion Application dated 5th October 2018 against the County Government of Machakos and the County Public Service Board of Machakos.

2. He seeks to be heard for orders that this Honourable Court be pleased to issue a mandatory injunction against the Respondents directing them to immediately reinstate him, assign him duties and a work station and pay him his full salary pending the hearing and determination of this Application and of the suit.

3. Further, for this Honourable Court to issue any further orders and directions as it may deem fit in the interest of justice and the cost of the application be in the cause. The Application is based on the grounds that:-

1. The Applicant is a qualified Medical Practitioner.

2. The Applicant was appointed to the Public Service Commission through a letter dated 2nd April 2012 as a Medical Officer Intern Job Group "L" effective 5th February 2010.

3. The Applicant was promoted by the Public Service Commission through a letter dated 2nd April 2012 to the grade of a Medical Officer Job Group "M" effective 1st December 2011.

4. The Applicant was diligent in his duties and was promoted with immediate effect by the Ministry of Medical Services through a letter dated 31st May 2012 to the Medical Officer in charge – Kathiani District Hospital.

5. On or about 18th August 2014, the Applicant was arrested and taken to Kyumbi Police Station and subsequently charged in Criminal Case No. 993 of 2014 on 19/08/2014 before the Principal Magistrate Mavoko Law Courts of stealing by a person employed by the public service contrary to section 280 of the Penal Code.

6. On or about April 2015, the Respondents without any due process, information or reasons communicated to the Applicant, placed the Applicant on half salary and verbally informed him not to come to work.

7. The Applicant reasonably suspects that his placement on half salary without any due process, information or reasons communicated to him was due to the pending Criminal Case No. 993 of 2014, but no written communication was given on this.

8. *The Respondents on or about the 28th of August 2017 on their own motion, moved the trial court and withdrew charges against the Applicant herein under Section 204 of the Criminal Procedure Code.*

9. *The Applicant has on numerous occasions written to the Respondent to be reinstated and salary be paid in full but there has been no action taken by the Respondents who have turned a deaf ear to the Applicant's requests and a blind eye to the Applicant's suffering.*

10. *The Respondents have now on the 18th of September 2018 communicated their decision to completely stop the salary of the Applicant following a staff audit yet the Respondents themselves are responsible for the absence of the Applicant having orally suspended him from duties and directed him not to show up to his previous work station.*

11. *It is for the above reasons resting with the Respondents' decision of 18th September 2018 that this matter ought to be certified as urgent and the orders sought herein granted.*

4. In his Supporting Affidavit, the Applicant avers that his Advocates have also written a demand letter dated 23/11/2017 (marked annexure "JWW8" in his bundle of documents) but which solicited no response from the Respondents. That he is in imminent risk of irreparable harm by the decision of the Respondents in terms of financial obligations that he cannot discharge and lack of career progression and he prays that the orders are granted as prayed.

Respondents' Case

5. The Respondents filed a joint Replying Affidavit dated 21/11/2018 on 23/11/2018 sworn by James Kathili, the Chief Officer, Legal Affairs of the Respondents who avers that the application is incompetent and premature and that the orders sought cannot be considered since the application as served upon them was not based on any statement of claim as required by law. Further, that the orders sought are conclusive and if granted would determine the matter herein without giving the Respondents an opportunity to be heard.

6. He also avers that there were many compelling reasons that led to the necessity of the action taken against the Applicant which they will ventilate once the main Claim is served upon them and that the application herein together with the reasons given in the Affidavit does not meet the standards upon which a mandatory injunction would be granted.

Applicant's Submissions

7. As to whether the prayers sought are merited, the Applicant submits that the Respondents have not terminated his employment and that his employment is governed by the **Human Resource Policies and Procedures Manual for the Public Service** published in May 2016. That while **Section K** of the said Manual deals with disciplinary control, at **Section K7** it sets out the salient procedures and/or features of suspension in the Public Service as follows:-

1) *An officer may be suspended from duty under the following circumstances:*

ii. *When he has been convicted of a serious criminal offence where a prison sentence may be imposed other than in default of payment of a fine...*

.....

4) *Where disciplinary or criminal proceedings have been taken or instituted against an officer under suspension and such an officer is neither dismissed nor otherwise punished under these regulations, the whole or any salary withheld shall be restored to him upon the termination of such proceedings with effect from the date the salary was stopped.*

8. He relies in the case of **Ahmed Sheikh Mohammed v Garissa Water & Sewerage Company [2014] eKLR** where the Honourable Justice Nzioki wa Makau directed that in order to ensure adherence to the regulations and the law, the Claimant be paid half salary from the date of suspension until he is either cleared or dismissed. The Honourable Court considered similar facts and stated thus:-

"5. In a case such as this, the provisions that govern the discipline of a public servant came into play. Under the Public Service Commission of Kenya Discipline Manual 2008 there is a provision under Clause 10(d) thereof....

6....The Manual provides for payment of house, medical and other allowances as may be applicable. The Claimant it has been submitted has been suspended without any pay since 10th July 2013. This is in contravention of the applicable regulations. The principle aim of such pay is to ensure the staff under suspension is not disadvantaged that he fails to meet his or her obligations. It also acts as a caveat against the employer from an indefinite period of suspension because after the resolution of the matter the staff concerned would be entitled to receive all the unpaid salary and allowances from date of suspension to the date of the lifting of the suspension."

9. As to whether the failure to serve the Memorandum of Claim in the first instance renders the Application a non-starter, the Applicant submits that he lodged the Notices of Summons, which were yet to be executed and sealed by the Deputy Registrar when this filed Application certified as urgent was being served on the Respondents. That the Memorandum of Claim could not therefore be served at that point bearing the urgency of the matter and that the Respondents have however subsequently with his submissions been served with the Memorandum of Claim and Notice of Summons in time to ventilate any other issues. Further, that the Respondents have not suffered any prejudice and that the failure to serve the Memorandum of Claim was due to normal procedures of the Honourable Court.

10. The Applicant finally submits that he fully relies on the filed Supporting Affidavit and prays that the application be allowed reinstating the dismissed application and directions issued by this Honourable Court on setting down the reinstated application for hearing and final determination.

Respondents' Submissions

11. The Respondents submit that the Applicant omitting the Memorandum of Claim at the point of filing the application rendered this application a non-starter and that they rely in the cases of **Yaya Towers vs Trade Bank Limited (In Liquidation) 2000 eKLR; Crescent Construction Co. Ltd Vs Delphis Bank Ltd 2007 eKLR** and **Naglers Feilden & Others (1966) 2QB 633 at 651** where the Court has held that it is unfair to drag a person to the seats of justice when a case purportedly brought against him is a non-starter; or where the Claim is an abuse of the Court process: as was observed by the Honourable Court in its ruling in **Oryx Energies Kenya Limited Vs Mastermind Kenya Limited [2017] eKLR**.

12. They also submit that the prayers sought by the Applicant are therefore not merited because at the point of filing the application he did not have a Claim as required by law and that the Respondents in their Replying Affidavit relied on the application as it were without a Memorandum of Claim. That this Court should dismiss the Applicant's application since the same is improper, incompetent and premature at this point.

13. I have examined all the averments and submissions on record. The main point of contention against this application by the Respondent is that they were not served with the Claim at the time of service of the application as no claim had been filed.

14. From the record herein, the application and the claim were both filed on 9/10/2018 as per the Court stamps and allocated Cause No. 1431/2018. The certificate and Claim were both paid for at the same point of filing as is evidenced from the Court receipt No.9479942 showing payment of Kshs.2,445/= being 1405 for the application and 1040/= for the Claim.

15. The averment that there was no claim filed is therefore not true. Now to the merits of the application, the Applicant seeks orders for reinstatement and payment of his full salary. It is apparent that the Claimant/Applicant had been charged with some criminal charges and interdicted. The charges were thereafter withdrawn by the Respondent under Section 204 of the Civil Procedure Code on 28/8/2017. Since then, there is no indication that there are any reasons as to why the Respondent should not have reinstated the Claimant to his service.

16. No disciplinary proceedings are pending against the Claimant and if there are, there is no communication to the Applicant on the same. It is therefore my position that the Respondent's action against the Applicant is not based on any known reasons. I will therefore direct that the Claimant's ½ salary be reinstated immediately and arrears not paid be paid immediately.

17. The Respondent if they so wish should proceed and conclude any disciplinary process within 6 months prior to this date herein. In default the Applicant to be considered cleared of any wrong doing.

18. Costs of the application in the cause.

Dated and delivered in open Court this 13th day of March, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties