



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO. 18 of 2019

(Before Hon. Justice Hellen S. Wasilwa on 4th March, 2019)

MICHAEL EKAI AREMON.....CLAIMANT

VERSUS

ANTI-COUNTERFEIT AGENCY.....RESPONDENT

RULING

1. The Application before the Court is dated 15th January, 2019, brought under Article 41(1) (2) (b) of the Constitution, section 41, 44 and 45(1) of the Employment Act, Section 3 and 12(1)(3) of the Employment and Labour Relations Court Act, Section 62 of the Labour Relations Act, Rules 16 and 27 of the Employment and Labour Relations Court (Procedure) Rules, Fair Administrative Action Act No. 4 of 2015 and all other enabling provisions of the law seeking orders:-

- 1. That this application be certified as urgent, be heard ex parte in the first instance and service thereof be dispensed with.**
- 2. That this Honourable Court be pleased to restrain and/or issue conservatory orders directed at the Respondent prohibiting themselves from harassing, threatening to dismiss, advertising the position of the Claimant, dismissing and/or terminating and/or filling the position of the Claimant as Manager-Strategy, Planning and Quality Assurance pending the hearing and determination of this application and/or cause.**
- 3. That this Honourable Court be pleased to direct and/or compel the Respondent to maintain status quo of any disciplinary action against the Claimant pending the outcome of Industrial Area police station investigations and/or determination of this claim.**
- 4. Costs of this application be borne by the Respondent.**

2. The application is premised on the grounds that:

- a. By a letter dated 10th December, 2018, the Applicant was interdicted on account of exercising his Constitutional Right on self defence.**
- b. The Claimant was assaulted by his junior in male washrooms within the Respondent's office premises on 21st November 2018.**
- c. The matter being of criminal in nature the Claimant reported to Industrial Area Police Station under OB No. 62/21/11/2018 and still pending.**
- d. Subsequently on 19/11/2018 the assailant was arrested by the police at the work place and taken to record statement.**
- e. The Executive Director had sought explanation of the two incidents and furnished reports which led to issuance of both interdiction and show cause letters on 10th December, 2018.**
- f. It is the connotation of the Claimant that the employer has no jurisdiction to institute internal disciplinary action against the Claimant save to let the police take appropriate action on the culprit.**

g. The placement of the Claimant on under interdiction despite sound, cogent and plausible explanation is a clear indication that there are intents to terminate his contract of employment illegally and thus the urgency of the matter for conservatory orders as the process is flawed.

3. The Application is supported by the Affidavit of the Claimant wherein he states that he was placed on interdiction without affording preliminary investigation in particular the CCTV camera footage pin pointing that he was the one who started the fight in the male washrooms in order to lay grounds to dismiss the Applicant.
4. That the reports submitted by the Applicant to the Executive Director have been used against him instead of them conducting their own independent investigations. He contends that the administrative disciplinary action should be stayed to await the outcome of police action as parallel proceedings will jeopardise the intended criminal case against the culprit and the Claimant's employment contract.
5. He contends that he has not breached any code of conduct, Disciplinary Manual, Fair Administrative action Act, Regulations, and the Rights of an individual provided under the Constitution of Kenya, 2010. That there is no basis to sustain an illegal interdiction as no crime has been committed against the employer.
6. He states that there is a likelihood of the Respondent to treat the replies to the show cause letter and requested reports as a hearing and may proceed to summarily dismiss him on account of gross misconduct and hence the urgency of the matter for conservatory orders. He urges the Court to allow the application as prayed.
7. The Application is opposed and the Respondent has filed Grounds of Opposition and a Verifying Affidavit sworn by one Fridah Kaberia to this end. She avers that the Claimant is facing serious allegations of misconduct that involve, inter alia, the physical assault involving a junior member of staff; one Geoffrey Arori in the Respondent's male staff wash room on 21.11.2018 during office hours.
8. She claims the Claimant breached the Respondent's code of conduct under the Human Resource Policy and Procedure Manual, specifically, 10.13 Professionalism and Integrity, 10.15 Respect and Courtesy, 10.24 Harassment and 10.28 Pecuniary Embarrassment.
9. That these allegations constitute gross misconduct offences under the Respondent's Human Resource Policy and Procedure Manual and owing to the gravity of the allegations the Board of Directors of the Respondent resolved to interdict the Applicant to facilitate and preserve the integrity of investigations into the matter.
10. That the Claimant was required to offer an explanation into the circumstances behind the physical altercation that occurred on 21.11.2018. The Respondent avers that the Claimant was accorded all his procedural rights to a fair hearing and the Applicant has not alleged any procedural impropriety in his application before the Court.
11. That the Respondent has also initiated disciplinary proceedings against the said Mr. Geoffrey Arori who has also been interdicted to pave way for investigations.
12. Further that the Applicant/Claimant has provided a response to the show cause letter going to show that the disciplinary process is ongoing and should not be halted by the Court but should be allowed to run its full course.
13. That the Applicant has not come to Court with clean hands and he is guilty of misleading the Court and has only come to Court to avoid appearing before the Board which is meant to meet to deliberate on the Claimant's conduct.
14. That a decision on culpability of the Applicant is yet to be made and thereafter there are avenues of appeal and thus the instant application is premature. In any event the Respondent states that the Court will be able to intervene in the event of illegality. That the application before the Court lacks basis and should be dismissed.
15. In the brief submissions made in Court the Respondent urged the Court not to interfere with disciplinary processes and should the Applicant not be found culpable his dues will be paid to him and compensated accordingly.
16. I have considered the averments of both Parties. The Respondent have initiated disciplinary process against the Applicant on allegation of fighting with a colleague in the washroom which Applicant deny but state that he only defended himself against the fellow employee and also reported the matter to the police.
17. The Applicant alleges that he is being condemned unprocedurally but has not indicated where the process is flawed.
18. He has however indicated that the Respondent have not brought out all the evidence that need to be used including CCTV camera videos that will show what exactly took place. Indeed CCTV footage will be positive addition to the investigation, as what really transpired will come out.
19. This Court have indeed stated many times (**see Cause No. 1200 of 2013 Professor Gitile N. Naituli vs University Council Multimedia University of Kenya, Nairobi ELRC 1607 of 2016 Rose W. Kiragu vs Teachers Service Commission (2016) eKLR**), that it does not interfere with an employer's right to discipline its staff unless it is evident that the process is flawed and the interference will be to the extent of putting the right process in force.
20. In the current case, the Applicant has not demonstrated how the disciplinary process initiated against him is flawed except that the Respondent have not been able to rely on the CCTV footage from the washroom to show the correct position of what transpired between the Applicant and his fellow employee.

21. In order to ensure that the Applicant is not condemned without due process and also so that this Court does not interfere with the employer prerogative to discipline its staff, I will allow the disciplinary process to proceed but on condition that the Applicant is allowed access to all the evidence against him and all the CCTV footage of the incident before the hearing progresses.

22. Costs in the cause.

Dated and delivered in open Court this **4th day of March, 2019.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties