



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

PETITION NO.19 OF 2018

DR BENJAMIN KIPKOECH KOSKEI.....PETITIONER

VERSUS

HIS EXCELLENCY, THE GOVERNOR NAKURU COUNTY.....1ST RESPONDENT

THE COUNTY SECRETARY,

COUNTY GOVERNMENT OF NAKURU.....2ND RESPONDENT

COUNTY GOVERNMENT OF NAKURU.....3RD RESPONDENT

JUDGEMENT

The petitioner is seeking for orders that;

- a. A declaration that the decision made by the respondents vide letter dated 16th of November 2018 suspending the petitioner is unconstitutional and therefore unlawful on account of violation of article 10, 41, 47 and 50 of the Constitution of Kenya hence null and void ab initio.*
- b. An order of certiorari be issued to bring into this court for purposes of being quashed the decision made by the 1st and the 2nd respondents vide the letter dated 16th of November, 2018 suspending the petitioner and forfeiting his monthly salary for being in contravention of article 10, 41, 47 and 50 of the Constitution, 2010 and the same be and is hereby quashed and the petitioner be reinstated without any loss of benefits.*
- c. The court be pleased to order for compensation and general damages to issue for violation of the petitioner's rights and an inquiry into quantum be undertaken.*
- d. The petitioner be paid costs of the petition.*

On 23rd January, 2019 parties attended court for hearing directions and it was agreed that the petitioner's suspension had ended and resumed duty but the petitioner stated that the suspension was unconstitutional and damages should be assessed and awarded.

The parties addressed the petition by way of written submissions.

The petitioner's case is that he was appointed chief officer in the department of Youth and Sports on 26th April, 2018. By letter dated 23rd August, 2018 the 1st and 2nd respondents accused him of breach of confidential information leaked to the members of the public from the petitioner's office and to social media whereupon there was a warning that he would be held liable for any subsequent breach. The petitioner responded and invited the respondents to conduct an investigation to find out the source of the leaked information. The petitioner was then suspended.

By letter dated 20th November, 2018 the petitioner was suspended for 60 days to allow for investigations for alleged breach of confidential information. He was also directed that his salary would not be paid until 18th January, 2019.

The petitioner submitted that the decision to suspend him and failure to pay his salary were unlawful. This is contrary to article 41 of the constitution for being unfair labour practice and contrary to fair administrative action as required under article 47 of the constitution, 2010. For a suspension to be lawful, it must be based on fair reasons and implemented pursuant to fair procedure as held in **Judith Mbayah Tsisiga versus Teachers Service Commission [2017] eKLR** and as held in

Frederick Saundu versus Principal Namanga Mixed Secondary School and 2 others. Suspensions which fail the administrative fairness injure the employee's reputation, advancement and job security.

The petitioner has a good case where there was breach of his right to fair labour practices and where a right is infringed and without a rebuttal damages are payable as held in the case of **Mrao Limited versus First American Bank of Kenya Ltd & 2 others [2203] eKLR.**

The petitioner submitted that his right to be heard and presumed innocent was violated when he was suspended for no good cause. He was never given a chance to give his defence and for such constitutional breach damages should be paid as held in the case of **Miller and Others versus Chairman of the Minister's Council: House of Representatives & others [1991]**. The orders sought should issue on the grounds that the actions of the respondent failed to meet due process. Costs are also payable to the petitioner.

The respondent's case is that the petitioner's suspension was lawful as the petitioner was found to have disseminated confidential information about the County to the public through social media. The respondents having established that the petitioner was at fault, he was issued with warning and in his reply invited respondents to conduct investigations.

It is the mandate of the respondents to address and take disciplinary measures against its officers as provided under the human resource policies. Upon a warning issuing to the petitioner and being given a chance to defend himself he was suspended to allow for investigations. Such is the prerogative of the respondents. Such suspension was lawful and within the rules of natural justice as held in the case of **Lewis versus Heffer & Others [1978] 3 Al ER**. There was no violation of the petitioner's rights so as to claim payment of damages as the action taken by the respondents was with fairness as held in the **case of R versus Secretary of State for the Home Department ex parte Doodt [1994] 1 AC**.

The respondents also submit that the orders sought cannot issue and the petitioner has since resumed duty and the orders of judicial review sought do not relate to the merits but the process. The decision taken by the respondents can only be challenged for legality, rationality and procedure. This is not the case for the petitioner and no breach of rights has been proved. The petition should be dismissed with costs.

The petitioner also filed a Supplementary Affidavits on 4th and 5th March, 2019.

These affidavits are on the same matter and sworn on 4th March, 2019.

The petitioner avers that he was never given details on the alleged leaked confidential information by the respondents and there has never been an investigation on the same or on his conduct. The suspension for work and the failure to pay the due salary were unlawful. Aggrieved the petitioner filed the petition and directly the respondents to pay half salary and full allowances for the period of suspension but declined to comply.

On 18th January, 2019 the petitioner resumed duty and was issued with letter of disciplinary hearing scheduled for 21st January, 2019 but fell ill and the doctor recommended bed rest for a week. On 28th January, 2019 he returned to work and was directed to return home until further communication and by letter dated 13th February, 2019 he was invited to a disciplinary hearing for 28th February, 2019 but was called off and was advised to take leave as new dates were communicated.

The respondents have not paid the due salary from the date of suspension.

Determination

The petition is premised on the decision of the respondents vide letter dated 16th November, 2018 suspending the petitioner from duty. The petitioner is also seeking for order of *certiorari* to quash the decision of the respondents to suspend him and forfeit his salary and he be reinstated without loss of benefits. The petitioner is also seeking for order for compensation and general damage for the violation of his rights.

The petitioner opted to file a petition.

The petition is a mixed bag as it were. The remedies sought relate to orders ordinarily issued in judicial review and orders of rights violations which arise out of a petition.

Under the Employment and Labour Relations Court (Procedure) Rules, 2016 provide for the procedures to apply for filing of judicial review matters, filing of petitions and Memorandum of Claim. Rule 7 provides as follows;

7. (1) A party who wishes to institute a petition shall do so in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012.

(2) A person who wishes to institute judicial review proceedings shall do so in accordance with section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules.

(3) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court.

These Rules are important as to give directions and clarity on matters relating to violation of constitutional rights and the due remedies,

matters which requires judicial review and the appurtenant procedures as under the Law Reform Act and order 53 of the Civil Procedure Rules.

The Rules are emphatic on the filing of a Memorandum of Claim as under such procedure a party is allowed the benefit of seeking for the enforcement of any constitutional rights and rights violation under any law with regard to employment and labour relations. However, matters with regard to judicial review and the remedies therefrom must be filed in accordance with section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules.

The rationale is that orders of *certiorari* issue to quash a decision already made and an order of *certiorari* will issue if the decision challenged by the applicant taken without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with. See **Republic versus Secretary of the Firearms Licensing Board & 2 others Ex -parte: Senator Johnson Muthama [2018] eKLR**.

Section 9 (3) of the Law reform Act provides as follows;

In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

The above provision are replicated in Order 53 Rule 2 of the Civil Procedure Rules, 2010 as follows;

Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

Where a party therefore moves the court under a petition and the remedy sought is that framed as under judicial review, the respondents thereto are denied crucial chance to respond thereto. The leave to move the court and the motions thereto with a time period within which the procedures allowed in judicial review are circumvented where a petition or memorandum of claim is filed instead.

As the Rules of the court are meant to give each litigant(s) a fair chance to frame and urge their case, failure to comply thereto deny a respondent a similar chance to give an appropriate defence of the allegations made. Such is the reason why rules of procedure exist to ensure fairness, balance and rule of law.

On the substantive issues set out by the petitioner, the case is that the respondents suspended him from duty vide letter dated 16th November, 2018 and also suspended the payment of his due salary. The same was for 60 days which has since ended and upon resumption of duty he was invited to a disciplinary hearing which was adjourned, he got sick and got time off and has since been advised to proceed on leave pending invitation to the disciplinary hearing.

The defence is that the petitioner was lawfully sent on suspension, he was issued with warning with regard to breach of confidential information and the disciplinary process is still in motion. There is no violation of any right and the petitioner's rights in natural justice have not been breached.

In employment and labour relations, an employer has the prerogative to deal with discipline of its employee(s) by application of the internal mechanisms, disciplinary measures or human resource management policies. Such prerogative can only be interfered with by the court where there is apparent illegality or apparent violation of the constitution or the law. In **Mulwa Msanifu Kombo versus Kenya Airways Ltd** and in **Prof. Francis M Njeru versus Jomo Kenyatta University of Agriculture & Technology [2013] eKLR**, the Court held that the Court can intervene in an administrative disciplinary process if it is established that the employer has offended fairness or due process and where the procedures applied are found to be in violation of clear legal provisions. That such intervention should be in exceptional cases especially where grave injustice might occur or justice cannot be attained through any other means as held in **Booyesen versus the Minister of Safety and Security [2011] 1 BLL, South Africa labour Appeals Court**. that the Court has jurisdiction to entertain urgent applications relating to lifting of a suspension for compelling reasons that are urgent pursuant to the provisions of article 165(5) of the Constitution as held in the case of **Joseph Mutuura Mberia & Another versus Council of Jomo Kenyatta university of Agriculture & Technology [JKUAT] [2013] eKLR**. Where the Court establishes that such disciplinary procedures are commenced with ulterior motive or the process is shrouded with illegalities, then the Court must intervene to stop the illegalities.

The suspension of an employee for purposes of conducting an investigation relating to the allegations that touch and concern the employee is a normal practice in any institution. The Court can only interfere in a case where there is sufficient prove that the employer acted contrary to the law. The employer should be allowed to manage its business without undue judicial intervention.

In this case, the petitioner was issued with letter dated 23rd August, 2018 referenced *Breach of confidentiality*. It stated as follows;

... on several occasions, confidential information in your office has leaked to members of the public via social media.

Confidentiality of County Information and documents under your docket is critical and a clause of your employment contract expressly addresses the issue of confidentiality and it is expected that you adhere to the same.

Please note and be warned that this office will hold you personally responsible for any breach of confidentiality. ...

The petitioner r replied vide his letter dated 28th August, 2018 and stated;

- ... 2. That the leakage might have originated from other offices which I had copied the letters.*
 - 3. that I kindly request you to do due diligence and thorough investigations concerning the same matter.*
 - 4. That on behalf of the entire department I regret the leakage and promise never to happen again.*
- I hope and pray that you will expedite the process so that the truth could be established.*

The petitioner therefore appreciated that there was leakage of confidential information relating to his office and work with the respondents. Such emanated from his office and was apologetic over the leakage. The petitioner also offered the respondents to undertake investigations on the matter and to expedite the process so that the truth could be established.

On 16th November, 2018 the petitioner was suspended for 60 days to allow for investigations following breach of confidentiality. Such period lapsed and the claimant resumed duty and has been invited to a disciplinary hearing but each time it was not held. At the time of hearing the petition, the hearing had not taken place.

As noted above, the employer enjoys the prerogative to discipline its employees. A suspension from duty is not termination of employment and it is a procedure allowed at the work place. In the petitioner's case there was a time frame to the suspension and this has since ended and invitation for disciplinary hearing commenced. This is part of due process to ensure that the petitioner is given a hearing following suspension to allow for investigations.

Where the respondent has commenced disciplinary proceedings against the petitioner for allegations brought to his attention and he was allowed to respond thereto this is part of the ensure due process, fair hearing and due regard to natural justice the petitioner is craving for. the court finds no matter for intervention to stop or quash the issued letters with regard to suspension of the petitioner. See **Ann Wambui Kamuiru versus Kenya Airways Limited [2016] eKLR**.

Unlike the cited cases by the petitioner in **Judith Mbayah Tsisiga versus Teachers Service Commission [2017] eKLR** and as held in **Frederick Saundu versus Principal Namanga Mixed Secondary School and 2 others** the petitioner herein has been invited to a hearing after the end of his suspension. Such the court finds is in tandem with due process contemplated under section 41 of the Employment Act, 2007 read together with articles 41, 47 and 50 of the Constitution, 2010.

The motions of article 41 of the Constitution, 2010 do not apply to a petitioner or employee only. The respondent and employer has similar rights to fair labour relations. Fair administrative action must also result from each party being able to address its case fairly and within reasonable limitations.

In this case, the court finds no rights violations to warrant or justify the remedy of *certiorari* or the assessment of damages as pleaded. By opting to file a petition as against proceeding in judicial review, the petitioner closed that window upon himself. Such orders cannot issue. Save to add that the petitioner remains in the employment of the 3rd respondent, such employment has not ceased, the disciplinary process is still alive and for the period of employment, the due salary and benefits are payable.

Accordingly, the petition is found without merit and is hereby dismissed save the petitioner shall be paid his due salaries which remain unpaid from the date of suspension until employment is terminated for any lawful cause.

Delivered in open court at Nakuru this 29th day of April, 2019.

M. MBARU

JUDGE

In the presence of: