



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

PETITON NO. 6 OF 2018

(Before Hon. Justice Mathews N. Nduma)

JOSEPH MARANGA AMENYA.....PETITIONER

VERSUS

THE SECRETARY TO THE COUNTY ASSEMBLY SERVICE BOARD....1ST RESPONDENT

KISII COUNTY ASSEMBLY SERVICE BOARD.....2ND RESPONDENT

THE CHAIRMAN, KISII COUNTY ASSEMBLY SERVICE BOARD.....3RD RESPONDENT

RULING

1. The petitioner/applicant brought the application on a certificate of urgency seeking reliefs set out in the Notice of motion that may be summarized as follows:
2. That the court issue conservatory order restraining the respondents from commencing and or continuing with any disciplinary action against the applicant and/or interfering with the Applicant's discharge of his duties in the position of Director of Finance and budget of the Kisii County Assembly. That the court be pleased to issue an order directing the respondents to release to the Applicant his salary and emoluments that have been withheld since his suspension.
3. The application is supported on grounds set out on the face of the notice of motion to wit that the applicant was by a letter dated 15th December 2012 suspended from office and charged with various framed up offences by the respondent particulars of which are detailed in the body of the petition. That the applicant earned Kshs. 128,014.50 per month but had been placed on quarter pay during suspension in the sum of Kshs 27,237.10. The application is further supported by an affidavit of the petitioner/Applicant and sworn to on 16th February 2018 in which details of alleged unlawful conduct by the respondents against the Applicant are set out as follows:
4. That the County Assembly in May 2012, constituted an *Adhoc* Committee on recovery of overpayments and to among other things inquire into the deductions for overpayment of allowances to County Assembly members. That further information was sought from salaries and Remuneration Commission (SRC) on the matter.
5. The petitioner was summoned to appear before the *Adhoc* Committee on 17th May 2017.
6. The petitioner was prevented by the 1st respondent the Assembly clerk from attending the inquiry and was sent to Nairobi on official duties. The clerk communicated to the committee accordingly on 18th May 2017. The Committee declined the request for postponement and so the petitioner attended the committee as scheduled against the wishes of the 1st respondent.
7. The petitioner was questioned and requested to furnish the committee with all relevant documentation. The committee concluded its inquiry and furnished the report to the County Assembly in June 2017. The Committee recommended recovery of monies from all officers and members who had been overpaid allowances.
8. The petitioner provided all required documentations upon request by the County Assembly Public Service Board and same was forwarded to the Ethics and Anti-Corruption Commission (EACC). The petitioner further provided the committee with information regarding County Assembly Service Board sitting allowances.

9. The clerk accused the petitioner for having set him up for dismissal. The report was adopted by the assembly in June 2017.

10. On 5th July 2017, the clerk was sent on compulsory leave to pave way for investigations. The clerk embarked on inciting the staff against the petitioner. A suit was then filed by a member of the public against the clerk in Kisumu ELRC Petition No. 32 of 2017. The clerk blamed the petitioner for this action.

11. The case was found in favour of the clerk and he resumed duty on 24th January 2017. On 15th December 2017, the petitioner was issued with a suspension letter which action he states was malicious, unlawful and illegal. The letter was signed by the clerk following recommendation by the Staff Advisory committee that sat on 8th December 2017. The Chairman service Board, the 2nd respondent ratified the decision. The petitioner was to earn quarter of basic salary during suspension.

12. The applicant seeks confirmation of the interim orders pending the hearing and determination of the petition.

Replying Affidavit

13. The replying affidavit in opposition to the notice of motion and the petition is sworn by the clerk of the County Assembly on 12th March 2018. The sequence of events leading to the suspension of the petitioner is not different from what is deposed to in the supporting affidavit except that the respondent states that the action against the petitioner/applicant was lawful and procedural.

14. That at a sitting of the staff Advisory Committee on 7th December 2017 which was done under *Section 29(9)*, the committee recommended suspension of the petitioner on several grounds including impersonation of the Assembly office, Drunkenness, Absenteeism, Negligence, fraud and financial impunity. That prior to his suspension the petitioner was a member of the same committee he was now vilifying in his case.

15. That the charges are clear and unequivocal and the petitioner/applicant was invited to appear before the Board to answer to the charges. That the petitioner/applicant has failed and/or neglected to respond to the serious charges leveled against him. The petitioner declined to participate in any disciplinary process instead and the petitioner/applicant ran to court to avoid a lawful and procedural disciplinary process.

16. The decision to suspend the petitioner/applicant was implemented by the Board upon recommendation of the Staff Advisory Committee.

17. The petitioner/applicant was in the letter dated 13th December 2017 given 21 days within which to respond to the charges.

18. That the application and the petition lack merit. The interim orders issued by the court on 16th February 2018 be set aside in their entirety to allow the disciplinary process to be concluded. That the jurisdiction of the court was prematurely invoked in the circumstance of the case. That the petitioner/applicant lack clean hands and all the allegations of malice, vendetta and victimizations are concocted and without basis. That the court finds the same to be without merit and dismiss the application and subsequently the petition. A further replying affidavits to the petition and notice of motion was filed on 20th March 2018 by the clerk of the assembly which in the main augments earlier deposition by the clerk to the assembly.

19. The petitioner filed further affidavit on 6th April 2018 in which he joined issues with the deposition made by the clerk to the assembly while retaliating earlier averments in the petition and the Notice of Motion Application. In short, the petitioner/applicant alleges gross violation of the rules of natural justice.

20. That the 2nd respondent was declared to have been unlawfully constituted by M. Onyango- J. in Kisumu ELRC Petition No. 32 of 2017 and thus could not lawfully suspend the petitioner.

21. The petitioner/Applicant prays to be granted the reliefs sought.

22. The petitioner/applicant filed written submission on 22nd May 2018 with regard to the application and not the petition.

23. The 1st respondent filed its submission on 8th June 2018 addressing a notice of preliminary objection it filed on 19th March 2018 alleging lack of jurisdiction by the court to entertain the suit and the application.

24. When the matter came for directions on 11th July 2018, Advocate, Oyier held brief for Mr. Maloba for the petitioner whereas the counsel for the petitioners were absent.

25. M/S Oyier informed the court that written submissions had been filed and the matter was pending judgment.

26. The court was misled to record that matter was pending judgment. It is however apparent that the papers filed in the record only address the confirmation of the interim orders granted by the court on 16th February 2018 but not the merits of the petition. We shall proceed to deal with the application and the objection raised by the 1st respondent to the petition therefore.

Determination

27. The issues for determination are:

i. Whether the court has jurisdiction to hear and determine the matter.

ii. Whether the applicant has satisfied the requirements for grant of a conservatory order/injunction pending the hearing and the determination of the petition.

Issue I- Jurisdiction

28. The jurisdiction of this court is established under Article 162 of the constitution and Section 12 of the Employment and Labour Relations Court Act, 2011 as amended. It is common cause however that employees of County Governments such as the petitioner/Applicant have an employer employee relationship with the County Government. The petitioner herein was employed by the Kisii County Assembly Service Board, the 2nd respondent. The dispute is primarily between the petitioner and the 2nd respondent. Following the Decision of the court in Nick Githinji Ndichu vs clerk Kiambu County Assembly and another followed by Sitati J. in Peter Kongoima vs County Assembly of Nyamira, an employee/employer relationship exists where there is a “contract of services as defined under Section 2 of the Employment Act 2007”. There is a contract of service between the petitioner and the 2nd respondent. This court has jurisdiction to entertain the suit. The preliminary objection on jurisdiction is dismissed.

Issue II

29. Regarding the issue whether the applicant has satisfied the requirements for grant of interim conservatory orders, the court has referred to the case of Mrao Ltd vs First American Bank of Kenya Ltd and 2 others (2003) eKLR in which the renowned case of Giella vs Cassman Brown and Company Ltd 1973 EA 358 was discussed in detail.

30. The requirements are firstly whether the applicant has established a prima facie case with a probability of success, secondly if the applicant has proved that he is likely to suffer irreparable harm if the interim orders are not granted and thirdly, if the court is in doubt, to determine in whose favour the balance of convenience falls.

31. It must be remembered that it is the mandate of the employer to exercise disciplinary control over its employees. The court has variously expressed reluctance to interfere in the internal processes of an organization unless extra ordinary circumstances tending to disclose unlawful conduct on the part of the employer are disclosed.

32. Furthermore, at the interlocutory stage, the court is loath to dwell on the merits of the facts in dispute. Nonetheless a measure of consideration of the facts of the case is necessary to determine if a *prima facie* case to warrant grant of interim orders has been made.

33. The applicant in this case declined to submit to the disciplinary process commenced by the 2nd respondent and blames the 1st respondent for his troubles. The 2nd respondent is the employer of the applicant and conduct bordering on illegality has been exposed, prima facie against the Petitioner/Applicant. To that extend, the court is reluctant at this stage to hold the hand of the 2nd respondent to conduct the initiated disciplinary process of the Applicant to conclusion.

34. Accordingly, the court finds that a *prima facie* case with a probability of success has not been established at this stage by the applicant, especially as against the 2nd respondent. The dispute of fact between the Applicant and 1st and 3rd respondents shall await the hearing of the suit on the merits and we shall not dwell into them at this stage.

35. In the final analysis, the application for grant of interim orders in favour of the applicant against the respondents is refused. The interim orders being enjoyed by the applicant are discharged.

36. Costs in the cause.

Judgment Dated, Signed and delivered this 23rd day of May, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Maloba for petitioner/Applicant

Mr. Odusoro for 2nd and 3rd respondents

Mr. Ogutu for 1st respondent

Chrispo: Court clerk