



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 15 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

ABDI ELEMA ALLI.....CLAIMANT

VERSUS

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....RESPONDENT

JUDGMENT

The Claimant herein was employed by the Respondent as a Procurement Officer from 6th July 2011, earning a basic salary of Kshs.55,380. He worked until November 2013 when the Respondent vide its letter dated 8th November 2013 suspended his services at half pay in line with the provisions of Section 60(1) of the Anti-Corruption and Economic Crime Act (ACECA) which provides as follows:

“A public officer who is charged with corruption or economic crime shall be suspended at half pay with effect from the date of the charge.”

Indeed the Claimant admitted that he was charged in ACC No. 19 of 2013, which matter is pending final determination before the Ethics and Anti-Corruption Court No. 2 at the Milimani Law Courts – Nairobi. He further confirms as rightfully provided under Section 60(1) of the ACECA that he was put on half salary until the month of December, 2018 when he learned that the Respondent had removed him from its payroll denying him half pay contrary to the provisions of labour Laws and the Constitution of Kenya, 2010.

The Claimant contends that the decision made by the Respondent to remove him from the payroll goes against his legitimate expectation as the Anti-Corruption Case No. 19 of 2013 is still pending before the Anti-Corruption Court and therefore such a decision goes against the principle that one is presumed innocent until the contrary is proved as envisaged in the Constitution of Kenya, 2010.

Aggrieved by this decision the Claimant moved to Court and filed the instant Memorandum of Claim in which he seeks the following reliefs:

- 1) A declaration that the Respondent decision and subsequent removing of the Claimant from the payroll is unfair and unlawful
- 2) A declaration that the rights of the Claimant to a fair administrative action has been violated contrary to Article 47 of the Constitution of Kenya, 2010
- 3) An order directing that the Claimant’s name be reinstated in the payroll
- 4) An order directing the Respondent to continuously pay the Claimant half salary until EACC No. 19 of 2013 is determined, and the salary be computed from December, 2018
- 5) An order that the Claimant shall not be victimized in any manner and whatsoever for and because of suing the Respondent in Court
- 6) Costs of this suit and interest at court rates.
- 7) Any other or further relief that the Court may deem just and fit to award to the Claimant in the circumstances.

In the interim the Claimant did file a Notice of Motion Application under certificate of urgency seeking the following orders that:

1. This Application be certified as urgent, be admitted to hearing during this Court's vacation and service dispensed with in the first instance owing to the urgency of the matter (Spent).
2. Pending hearing and determination of this Application inter-partes, the Court be pleased to make an order compelling the Respondent to re-introduce the Applicant's name in the payroll and pay him half salary as stated in the suspension letter dated 8th November, 2013
3. Pending hearing and determination of the main suit/Claim filed herewith the Court be pleased to make an order stopping the Respondent from victimizing the Applicant or taking any adverse action against him pending inter-partes hearing and determination of the main Claim filed herewith.
4. The Costs of this Application be borne by the Respondent.

The Application is premised on the grounds set out on the face of the Notice of Motion Application in which the Applicant contends that he was suspended from his duties following being charged in anti-corruption Case No. 19 of 2013 and that his suspension was subject to payment of half his salary.

The Claimant contends that the Respondent without any explanation from December, 2018 did remove him from its payroll a result of which he is yet to receive any payments during the said period. He further contends that this move was unfair as the ACC No. 19 of 2013 is yet to be finalized.

The Claimant avers that should the Orders sought in the Notice of Motion Application dated 14th January 2019 not be granted he will suffer and will be greatly prejudiced. He urges the Court to allow the Application as prayed.

The Application is further supported by the affidavit sworn by ABDI ELEMA ALI, the Claimant herein sworn on 14th January 2019 in which he reiterates the grounds on the face of the motion.

On 6th February 2019, the Court made the following orders:

1. That pending inter-partes hearing of the Application the Respondent be compelled to re-instate and re-introduce the Applicant's name in the payroll and pay him half salary in terms of Section 62 (1) of ACECA in force at the time of suspension.
2. That the Respondent is granted 14 days to file a response for both the application and Claim.
3. That the hearing of the Application be consolidated and heard with the suit on 21st May 2019.

Despite the above orders, the Respondent failed to file its response to both the application and the main claim within the stipulated timelines.

The matter thereafter proceeded for hearing on 21st May 2019, on which date the Respondent failed to attend court despite service of the Court order dated 6th February 2019 as evidenced by the Affidavit deposed by Felix Omondi Owino on 17th May 2019 and filed in Court on 21st May 2019.

Claimant's Case

The Claimant testified on his own behalf on 21st May 2019. It was his testimony that he was employed by the Respondent in July 2011. He further testified that he was charged in ACC 19 of 2013 which matter is still pending before the Anti-corruption Court in Nairobi.

The claimant further testified that as a result of the Anti-corruption case he was suspended by the Respondent in line with the provisions of Section 62(1) of ACECA and was put on half salary. He further stated that the Respondent vide its letter dated 8th November, 2013 committed to pay him half of his salary during the period of his suspension.

The claimant contended that the Respondent failed to adhere to the conditions set on his suspension as he learned in December 2018 that his name had been removed from the payroll and thus did not receive his half salary and that his half salary was stopped from November 2018.

The claimant confirmed that since November 2018 to date he has not received any payments of his half salary for November 2018 to 6th February 2019 when the court ordered the reinstatement of his salary. He further urges the Court to allow his Claim as drawn.

Claimant's Submissions

It is submitted on behalf of the Claimant that the decision by the Respondent to withhold half of his salary goes against the principle of presumption of innocence until the contrary is proved as provided under the Constitution of Kenya, 2010 as the Anti-corruption case is pending determination. He further submitted that the decision is similarly contrary to the doctrine of legitimate expectation as the Respondent in its suspension letter dated 8th November 2013 makes a commitment to pay the Claimant half of his salary pending hearing and determination of his anti-corruption case.

The Claimant further submitted that this act by the Respondent is contrary to the provisions of Article 47 of the Constitution of Kenya, 2010

and Section 4(3) of the Fair Administration of Actions Act.

The Claimant contends that the Respondent ought to have accorded him the right to be heard prior to it reaching the decision of withholding his half salary.

The Claimant further contends that the Respondent is further not justified to withhold his half salary as no disciplinary action has been taken against him by the Respondent herein.

In conclusion the Claimant urged the Court to allow his Claim as prayed.

Analysis and Determination

Having considered the facts of this cause, evidence, submissions and statutory authorities cited by the Claimant herein there is no dispute that the Claimant was engaged by the Respondent with effect from 6th July 2011. It is further not in dispute that the Claimant was suspended from duty in accordance with Section 62(1) of the Anti-Corruption and Economic Crime Act (ACECA) vide the Respondent's letter dated 8th November, 2013. The only issue for determination therefore is whether the Claimant is entitled to the reliefs sought in his Memorandum of Claim.

The Claimant contended that he is entitled to the reliefs sought in his Memorandum of Claim as the suspension letter dated 8th November, 2013 did provide that he is entitled to half of his salary by virtue of Section 62(1) of the ACECA which provided as follows:

“(1) A public officer who is charged with corruption or economic crime shall be suspended at half pay with effect from the date of the charge.

Provided that the case shall be determined within twenty four months.”

He further contended that his subsequent removal from the Respondent's payroll goes against the principle of legitimate expectation and is therefore unfair and unlawful.

The Respondent on the other hand did seek leave of the Court to file a response to the Claimant's Notice of Motion Application dated 14th January 2019 together with a response to the Main claim also dated 14th January 2019. Regrettably, the Respondent neither filed its responses to rebut the Claimant's averments nor did it attend the hearing on 21st May 2019 despite service of the Court Order issued on 6th February 2019 as confirmed by the Affidavit of Service filed on 21st May 2019.

The suspension letter issued to the Claimant states:

“RE: SUSPENSION

I refer to the Criminal Case 141/520/2013 and ACC 19/2013 where you are one of the accused persons.

The Commission in line with Section 62(1) of the Anti-Corruption and Economic Crime Act (ACECA) which states that “a Public Officer who is charged with corruption or economic crime shall be suspended at half pay with immediate effect from the date of the charge” hereby suspends you from Commission work from the date of the Charge.

You are hereby ordered to surrender and handover all Commission's

assets and work in your custody to the Manager, Procurement with immediate effect.

Yours sincerely

SIGNED

Betty Sungura- N

Ag. Chief Executive officer/Commission Secretary”

From the wording of the letter the Claimant was entitled to half salary during the period of his suspension. To date no letter of termination has been served on the Claimant nor has he been issued with a letter varying the terms of the suspension.

I agree with the Claimant that the Respondent's decision to unilaterally remove him from the payroll was unfair and goes against the principle of legitimate expectation as from the letter it is clear that the Claimant was entitled to half salary during the period of his suspension in line with the provisions of Section 62(1) of ACECA.

No explanation on the removal from the payroll was offered by the Respondent. Further, the Respondent despite the Court order of this Court of 6th February 2019 failed and/or ignored to re-introduce the Claimant to the payroll as directed.

In view of the foregoing, it is not in contention that the Claimant has been charged in ACC No. 19/2013 and the matter is still pending to date. It is also not in contention that the suspension letter dated 8th November, 2013 created legitimate expectation for payment of half of his salary and that the Claimant relied on the same entirely for payment of his half salary pending determination of the Anti-corruption case. It is therefore my view that the Claimant is entitled to the following reliefs:

1. A declaration that the Respondent's decision and subsequent removing of the Claimant from the payroll is unlawful and unfair.
2. An order is hereby issued directing the Respondent herein to reinstate the Claimant's name on its payroll and that it proceeds to pay the Claimant half salary from November 2018 pending final hearing and determination of ACC No. 19/2013.
3. This Court further directs that the Claimant should not be victimized in any manner for suing the respondent.
4. In view of the fact that the Anti-corruption and Economic Crimes Act provides at the proviso to Section 62(1) that the provisions thereof are subject to the case being determined within twenty four months and in view of the time the case has already taken, the claimant is directed to ensure that ACC No. 19 of 213 is concluded within 12 months from the date of judgment failing which the respondent shall be at liberty to stop further payment of his salary. The court has granted this reprieve to the claimant only because the proviso to Section 62(1) was not brought to the attention of the claimant at the time of suspension.
5. The respondent shall pay the claimant's costs of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE