



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO. 63 OF 2019

[formerly Nairobi Cause No.595 of 2019]

BERNARD MWAURA MBUTHIA.....CLAIMANT

VERSUS

NYAHURURU WATER & SANITATION COMPANY LIMITEDRESPONDENT

AND

COUNTY GOVERNMENT OF LAIKIPIA INTERESTED PARTY

RULING

The claimant filed his application and Notice of Motion dated 6th September, 2019 and seeking for orders that;

Pending the hearing and determination of this claim, the court be pleased to stay the implementation of the decision of the respondent to send the claimant/applicant on compulsory leave as per the letter dated 4th September, 2019 and the claimant be allowed to proceed with his duties.

The court be pleased to issue restraining orders against the respondents, their agents, servants and anybody claiming through them from interfering with the claimant's employment pending the hearing and determination of this claim.

The claimant annexed his affidavit and on the grounds that he is the managing director of the respondent which is a limited liability company and the interested party, County Government of Laikipia is a shareholder of the respondent and which sent to the respondent letter dated 29th August, 2019 to convene a shareholder special meeting within 7 days for purposes of discussing various matters. The first agenda was to discuss and propose that the claimant to immediately step aside from office to allow for investigations on numerous grounds and illegalities to be addressed at the meeting.

Further grounds are that the second agenda for the special meeting was that there would be proposal for the placement of a senior employee to act in the claimant's place pending investigations.

The claimant moved the court on 4th September, 2019 to stop the concerning of the meeting as the interested party though a shareholder of the respondent was interfering with the running of the company. The court issued orders stopping the respondent from convening the meeting and upon getting information that the claimant had moved the court, the interested party by letter backdated 2nd September, 2019 accused the claimant of interfering with the passing of the proposed Laikipia Water Services Bill which county members had rejected. It also stated that the interested party had reported the claimant to the ethics and anti-corruption commission.

The board of directors of the respondent convened an urgent meeting on 4th September, 2019 without informing the claimant of the same and on the strength of the letter sent by the interested Party whereby they made a decision to send the claimant on compulsory leave for 30 days from 4th September, 2019. There were no disciplinary proceedings conducted before such decision was taken or notice issued to the claimant. The claimant was also directed to hand over his duties on 5th September, 2019.

Before the claimant was sent on compulsory leave he had no knowledge of any disciplinary matters with the respondent and has not been subjected to any disciplinary proceedings by the board of directors on behalf of the respondent. the interested Party has had issues with the claimant's employment and has tried on several occasions to offer him pay outs in order to leave his employment. The decision to send the claimant on compulsory leave is not supported in law or the contract of employment or a provision for compulsory leave as a disciplinary

measure. Such is contrary to article 41 of the Constitution as being an unfair labour practice.

In his affidavit the claimant avers that he has an employment contract with the respondent for 3 years and dated 17th June 2014 and upon applying for renewal the same was accepted vide letter dated 3rd July, 2017 and contract dated 30th June, 2017 for 3 years term accepted.

The interested Party has since written to the respondent seeking to convene a special meeting to seek his stepping aside and when he moved court to stop the meeting the respondent and the interested Party issued letter sending him on compulsory leave which is not addressed in law, his contract and is in perpetuation of unfair labour practices.

In reply the respondent filed Repaying Affidavit sworn by Peter Kariithi Mwangi and who avers that he is the acting managing director of the respondent and under instructions from the board of directors to respond herein. The respondent as a public company provides water and sanitation services in Nyahururu and its environs and the interested Party is its majority shareholder while the claimant is its managing director pursuant to a contract of service dated 28th July, 2017 and extended to 30th April, 2010.

Mr Mwangi also avers that on 29th August, 2019 the respondent received a written request dated equal date from interested Party to requisition for an extraordinary general meeting pursuant to section 44 of the Articles of Association and to discuss several items. The Articles of Association give the directors to convene such a meeting. One of the agenda items was to discuss the claimant's stepping aside from office to allow for investigations on numerous grounds and illegalities and the allegations made were so serious to warrant the directors to find it fit to convene such an extraordinary meeting.

It was within the respondent's board of directors to requisition for a meeting to deliberate and make a decision. By letter dated 2nd September, 2019 the interested Party lodged a complaint against the claimant that he had influenced certain members of the County assembly to reject the proposed Laikipia Water Services Bill that had been tabled before the Assembly and further informed the respondent that it had reported the matter to the EACC and several witnesses had made statements in support. By notice dated 3rd September, 2019 the directors meeting was to be held on 12th September, 2019 and in view of the serious allegations made against the claimant and the fact that the largest shareholder had requested for a meeting the respondent issued notice for a special meeting on 4th September, 2019.

Mr Mwangi also avers that the claimant was present at the special meeting and was given a chance to defend himself and upon deliberations it was resolved that he should proceed on compulsory leave to allow for investigations into bribery allegations made against him by majority shareholder. He was served with letter dated 4th September, 2019 requiring him to hand over his duties. The compulsory leave was for 30 days with full benefits and such would not be counted as part of normal leave.

The claimant proceeded on compulsory leave but refused to hand over his duties and another letter was done on 10th September, 2019 to hand over the motor vehicle in his use and when the respondent was served with conservatory orders of the court restraining it from convening shareholders meeting and for which the respondent has complied.

The respondent's resolution to send the claimant on compulsory leave for a period was informed by administrative and corporate governance obligations. This was also informed on the need to carry out objective and transparent investigations the respondent has human resource policy and procedures manual which it follows. The respondent also has a corporate duty to ensure investigations are conducted in a free and transparent manner. The conservatory orders issued against the respondent were not served until 10th September, 2019 and the general meeting scheduled for 12th September, 2019 could not proceed.

Mr Mwangi also avers that the decision to send the claimant on compulsory leave was temporary to allow for investigations. There is no termination of employment or suspension and the salary and benefits due have not been removed. The compulsory leave is just an administrative leave that the claimant is serving for 30 days and such does not prejudice the claimant in any way. The claimant has since issued a press statement that he accepted the respondent's decision to send him on compulsory leave to allow for investigations and should allow for the same to complete as held in the case of **Thomson Kerongo & 2 others versus James Omariba Nyaoga & 3 Others [2017] eKLR** and in the case of **Alfred Kimungui versus Bomas of Kenya [2013] eKLR**.

The interested Party in reply filed a Replying Affidavit sworn by Karanja Njora the Acting County Secretary, County Government of Laikipia and with authority to reply herein and avers that the claimant was sent on compulsory leave ending the conclusion of investigation into his conduct. There is no law prohibiting an employer from sending an employee on compulsory leave where the circumstances warrant it and provided it is an interim measure and which has the effect of removing the employee from the workplace without interfering with the terms of service.

Mr Njora also avers that the interested Party is the sole shareholder in the respondent company whose mandate is the supply of water to people of Laikipia County and therefore has great interests in the affairs of the respondent on account of its responsibility to supply water to the residents of the county which is a constitutional mandate. The interested Party has a public interest in these proceedings for the People of Laikipia County.

The interested Party by letter dated 26th August, 2019 lodged a complaint with the EACC against the conduct of the claimant and which included bribery and engaging in active politicking against the operations of the respondent. Following such complaints and desirous of subjecting the claimant to an investigation free from influence, the board of directors were informed of the complaint and recommended the claimant to step aside pending such investigations. A special board meeting as convened on 4th September, 2019 and on the agenda was the conduct of the claimant and it was thus resolved to send him on compulsory leave. The claimant was in attendance at the meeting of the board of directors.

The claimant filed ELRC No.584 of 2019 and in his affidavit avers that the respondent is his employer and if there are disciplinary issues

such should be undertaken by the board of directors on behalf of the interested Party and to now challenge the respondent's decision is double application of standards.

On 4th September, 2019 as the board was meeting, hired goons stormed their offices and began demonstrating in support of the claimant. They blockaded roads and caused commotion aimed at blocking the board from taking any action which does not foster peaceful work relations and amounted to gross misconduct on the part of the claimant and an intimidation of the respondent. The demonstrations were highly publicised by various national media houses and it was highly believed the claimant hired the goons.

Mr Njora also avers that following the board meeting on 4th September, 2019 it was resolved to send the claimant on compulsory leave to allow for investigations as a prerogative of the employer and which resolution was communicated to the claimant who was in attendance.

The claimant filed a **Supplementary Affidavit** and avers that the request to hold a special board meeting was upon the request of the interested Party and not the respondent as the employer and thus incompetent to discuss his employment. The allegations that there was influence of members of the county assembly is without evidence and the interested Party only requisitioned for a special board meeting after learning the claimant had filed suit with the court.

The claimant also avers that On 21st August, 2019 the County Government of Laikipia was conducting its business to pass the water bill and he was leading the board of directors and the staff of the respondent in participating in water games in Embu from the 19th to 24th August, 2019. The special board meeting held on 4th September, 2019 was unprocedural and illegally convened as the Governor of the interested Party had on 3rd September, 2019 forced the chairman to summon for a special board meeting and when the claimant was called to issue notice for the meeting he declined as a special meeting requires a notice of 6 days. The company secretary also declined to issue notice as there were no compelling reasons to call for a special board meeting. Eventually the meeting convened at 4pm with 5 members and who refused to pass any resolution as the meeting was not properly convened.

The claimant also avers that there was a Board meeting held on 4th September, 2019 and he did not attend as alleged. He was called at 8.30pm with information that he had been sent on compulsory leave which was not procedural and which forced him to move the court with the current application seeking to stay such decision and to stop the respondent from interfering with his employment.

The respondent is not acting in good faith since he has been changed as signatory of the respondent and been directed to return his official vehicle. This contrary to the human resource policy which do not provide for taking of compulsory leave as a disciplinary measure.

The interested Party has commissioned an external audit of the respondent despite the respondent being aware that there is **Nakuru ELRC Case No.61 of 2019** pending determination. This is meant to frustrate the claimant in his efforts to seek justice.

The claimant filed his list of cases – **John Mwaniki versus Joshua Irungu & another [2017] eKLR** and **Joseph Maina Theuri versus Gitonga Kabugi & 3 others [2013] eKLR**.

The respondent filed list of cases – **Thomson Kerongo & 2 others versus James Omariba Nyaoga & 3 others [2017] eKLR**; **David Wanjau Muhoro versus Ol Pejeta ranching Limited [2014] eKLR**; **Alfred Nyungu Kimungui versus Bomas of Kenya [2013] eKLR**; **Joseph Gidraph Wanjala versus Diane Hamick & another ELC 327 of 2014**; **Humphrey Makokha Nyongesa & Collins Agweyu versus Communications Authority of Kenya & another [2018] eKLR**.

The parties made their oral submissions in court.

The court has considered the application by the claimant, the various affidavits in reply and the submissions and the issues which emerge for determination are whether in the interim and pending the hearing of the main suit the court should stay the decision of the respondent to send the claimant on compulsory leave vide letter dated 4th September, 2019 and whether the respondent should be restrained from interfering with the claimant's employment.

The subject letter dated 4th September, 2019 issued to the claimant by the respondent stating as follows;

Re: Compulsory Leave

As you were verbally informed during the Special Board Meeting held today 4th September 2019, you are hereby notified that you are to take compulsory leave for 30 working days effective today from 4th September, 2019. This is to pave way for investigations of bribery levelled against you by the Shareholder vide letter dated 2nd September, 2019 which contents were shared with you. The investigations are expected to be completed during the said period. ...

Whereas taking of annual leave is a legal requirement under the provisions of section 28 of the Employment Act, 2007 compulsory leave is issued at the prerogative of the employer meant to be an administrative action on the employee for a purpose. It should therefore be seen as an administrative action imposed on an employee with stated reasons.

In the case of **Elizabeth Cheroni Kurgat versus Kenya Literature Bureau [2014] eKLR** the court in addressing the issue of sending an employee on compulsory leave instead of a suspension or interdiction held as follows;

the Claimant was suspended on being suspected to have committed the employment offence. It is not a material departure, that the Respondent termed this action as compulsory leave, instead of suspension or interdiction under the Terms and Conditions of

Employment. All are terms that may be used by an Employer on sending an Employee on administrative leave. She understood she was being placed on administrative leave to allow for investigations and the disciplinary process to take place. She was given the opportunity to show reasons why disciplinary action should not issue against her. She did this. She was called to a disciplinary hearing, and was accompanied by a Trade Union Representative at the shop floor level. She was heard, her representations considered, and a decision made to terminate her contract of employment.

Therefore where there are alleged workplace misconduct, the employer has the prerogative of taking administrative action in form of forced leave to allow for investigations, or issue a suspension or interdiction or as the case may require and the purpose is to remove the employee from the workplace to allow for investigations. Upon investigations, the employee may be issued with a show cause notice or where found not culpable be returned to work.

Therefore the sending of an employee on compulsory leave where the circumstances warrant it and provided it is an interim measure is within the purview of the employer. Such action only removes the employee from the workplace temporarily without interfering with his terms of service. where the employer finds it necessary to thus remove the employee from the workplace to undertake comprehensive investigations into a matter or alleged misconduct, by allowing the same to conclude could vindicated the employee or allow for him to be invited to show cause over specific allegations following the investigations. See **Ezra Chiloba versus Wafula Wanyonyi Chebukati & 7 others [2018] eKLR** and **Humphrey Makokha Nyongesa & another versus Communications Authority of Kenya, & 2 others (2018) eKLR**;

In this case the claimant was sent on compulsory leave to allow for investigations into matters of alleged bribery and a report made to the EACC and which matters had been brought to his attention and such details are set out in the letter sending him on compulsory leave. It is therefore only fair and just to allow for the investigation to complete and where there is proof of misconduct as alleged there is a duty to comply with the applicable law, the human resource policy and work place disciplinary procedures. where on the other hand the investigations result to nothing there is the duty to return the claimant to his office without delay.

Time is therefore of the essence. prolonged administrative action and removal of the claimant from work and without any feedback may result into unfair labour practice. see **Samson Omworo versus Maasai Mara University and others, Cause No.2367 of 2016** the court held that even where the employer has the prerogative to discipline its employees, this should be addressed within a reasonable time as to prolong the same only results in anxiety and is bound to raise concern. A period of 3 months was found reasonable In **Victor Sammy Mutiso versus Teacher Service Commission [2016] eKLR**.

In any event, sending the claimant on compulsory leave is interim to allow for investigations and should be addressed instantly and without his loss of work benefits and remuneration. In this regard, the benefits which flow to the claimant by virtue of his employment with the respondent should not be interfered with as employment is not terminated. The directive to return his allocated vehicle as part of his terms of employment is part of the due benefits.

Accordingly, the following orders issues;

- a. the claimant shall remain on compulsory leave to allow for investigations as communicated by the respondent vide letter dated 4th September, 2019;**
- b. the claimant shall be retained in his employment on full pay together with due benefits;**
- c. costs in the cause.**

Delivered at Nakuru this 17th day of October, 2019.

M. MBAR?

JUDGE

In the presence of: