



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

JUDICIAL REVIEW APPLICATION NO.3 OF 2019

STEPHEN KINUTHIA KIIRU.....APPLICANT

AND

THE GOVERNOR NYANDARUA COUNTY GOVERNMENT.....1ST RESPONDENT

COUNTY SECRETARY, AND HEAD OF PUBLIC SERVICE.....2ND RESPONDENT

**FAITH W MBUGUA, COUNTY BURSARY FUND ADMINISTRATOR.....3RD
RESPONDENT**

AND

NYANDARUA COUNTY GOVERNMENT PUBLIC SERVICE BOARD.....1ST INTERESTED PARTY

**COMMISSION ON ADMINISTRATION OF JUSTICE.....2ND INTERESTED
PARTY**

RULING

The ruling herein relates to application and Notice of Motion dated 27th February, 2019 and filed by the Applicant/Subject (applicant) and seeking for orders that;

- 1. This court be pleased to issue order of certiorari for purposes of quashing the letter dated the 25th day of January, 2019 by Nyandarua County Secretary & Head of Public Service suspending the applicant from employment secretly and contrary to the principles of natural justice and the constitution so that the same is quashed and its implementation nullified as void ab initio.*
- 2. In view of the urgency unprocedural, illegal, precarious and misadministrative consequences on the part of the respondents, this court be pleased to issue any further appropriate orders under its inherent power to avoid further accelerated miscarriage of justice regarding the applicant's rights in employment.*
- 3. The respondents be condemned to meet the costs of this application.*

The application is supported by the affidavit of the applicant and on the grounds that he was appointed the ward administrator for Gatimu Ward in the year 2015 before being transferred to Njabini Kibiru on the 19th January, 2018 and issued with letters of appointment and transfer dated 2nd February, 2015 and 19th January, 2018 respectively. He is tasked with duties to coordinate, manage, and supervise and general administration of his ward.

The applicant also avers that he was given letter of suspension too late after it had long been written on

25th January, 2019. Such was to condemn him unheard and without being given any written or oral communication. The procedure adopted of suspension was wrong and an ambush thus void ab initio because no grounds of misconduct were presented or allowed oral or written reasons. Such violated his rights to natural justice before being condemned as he stated in his letter of 30th January, 2019.

The applicant also avers that the respondents have defamed him by writing and condemning him through the media as a corrupt person and a thief as shown in the Daily Nation on 27th January, 2019. Such accusation are with malice and false. Such allegations as made by the respondents have been denied and there is evidence of how the applicant issued cheques to various beneficiaries. The Bursary Administrator for Nyandarua and Faith W Mbugua is the who make cheques and has the responsibility to verify and approve all the details supporting the issuance of the cheques to the beneficiaries and issued cheque for the amount of ksh.36,000.00 in favour of Loreto Kiambu Girls High School on the account of Regina Muthoni Ngugi.

The applicant thus avers that suspending him and denying him his salary or allowances is unfair and has subjected him to psychological torture especially after he left his teaching profession to join the County Government of Nyandarua from 10th January, 2015. The accusations made are without evidence and meant to deny him his rights in employment.

In reply, Francis Kariuki Macharia the chairman of the Njabini Kibiru Ward Bursary Allocation Committee avers that despite the applicant being inducted and trained as secretary to the Ward Bursary Allocation Committee he has refused to adhere to laid down guidelines and policies of the county government and disregarded instructions from his supervisors and failed to render any appropriate service to the public.

Mr Macharia also avers that on 9th August, 2018 the Njambini Kiburu Ward Bursary Allocation committee held a meeting and considered the applications for award of bursaries. The committee approved lists from the respective villages and handed over the names of beneficiaries to the applicant to compile final list of 333 for allocation of various sums amounting to Ksh.2, 128.00 and as the committee's secretary he was to prepare the minutes and resolutions and to circulate and publicise the list of beneficiaries but he refused and failed to submit as requested.

On 23rd August, 2018 the applicant presented to committee a list which was noted to have numerous errors such that the total amount allocated in the list was less Ksh.124, 000.00; he had altered the amounts allocated by the committee; he had removed the names of several students who are persons with disabilities; and he had inserted names of beneficiaries who had not been approved by the committee. In November, 2018 the applicant delivered the disputed list to the office of the county Bursary Fund Administrator to the county headquarters to which the deponent visited to verify the lists presented by the applicant and found he had prepared a list which did not number the applicants consecutively as required. The list was also contentious and did not contain all the beneficiaries agreed on by the Ward Bursary Allocation Committee.

Mr Macharia also avers that the County Bursary Fund Administrator advised him and the applicant to consult and upon comparing notes and notes from the full committee the list was revised to the 333 identified beneficiaries and the applicant submitted summary forms and lists for the purpose of drawing cheques. And which were issued in January, 2019 only to realise that majority of the listed beneficiaries did not receive the cheques and their names had not been listed. It was also noted that the list had 337 names instead of 333 as approved by the committee. The applicant had altered it and disregarded the decision of the Ward Bursary Allocation Committee. He had deliberately removed some names to those of his choice in contravention of the Nyandarua County Bursary Fund Act, 2014 and applicable policy guidelines.

Upon scrutiny to the complaints received it was noted that the applicant removed the name of Jesii Karanja Maina a student at Nyandarua School for the Hearing Impaired (who had been allocated serial Number 156 in the list) and who had been awarded Ksh.5, 000.00.

The applicant had also removed David Mwangi Njuguna a student at Muranga School for the hearing Impaired (serial Number 158) and who had been allocated ksh.5, 000.00.

The applicant removed Regina Ngugu a student at Loreto Kiambu Girls High School from the list despite the beneficiary having been awarded Ksh.36, 000.00 under serial number 212 on the list.

These actions constitute abuse of office by the applicant and insubordination. Such caused public outcry and protests demanding his impeachment and removal from office of Ward Administrator. The applicant was unwilling to cooperate with the committee and refused to record and implement the decisions taken. Such conduct has thrown the operations of the Njambini Kiburu Ward Bursary Allocation Committee into disarray.

There was also the Replying Affidavit of Faith W Mbugua the 3rd respondent and who avers that as the County Executive Committee Members Education, Gender Affairs and Social Services and the Administrator of the Nyandarua County Bursary Fund is conversant with the applicant's application. It is not true that the applicant was denied the right to be heard as alleged. By letter dated 22nd February, 2019 the applicant was required to respond to the charges of gross misconduct contained in his letter of suspension dated 25th January, 2019 but he disregarded the instructions issued and instead filed court proceedings in manifest of bad faith.

Ms Mbugua also avers that the 2nd respondent has served the applicant with letter inviting him for a disciplinary hearing before the County Human Resource Management Advisory Committee where he shall have the opportunity to make his representations and make option for the resolution of the charges against him and which shall resolve his employment situation.

Ms Mbugua also avers that In November, 2018 she received a list of beneficiaries for the Njambini Kiburu Ward delivered by the applicant and shortly thereafter the chairman Mr Macharia came to the office to verify the list and who noted alternations. The chairman did not agree with the list submitted by the applicant and who later submitted a revised list of 333 beneficiaries. Later the applicant submitted further details with a list of 337 beneficiaries which her office processed and issued cheques to 126 institutions for a total sum of Ksh.2, 128.00.

Upon the issuance of cheques, complaint were made that their cheques were missing yet they had been listed as beneficiaries. It was later established that the applicant had altered the final list by unilaterally removing and replacing some beneficiaries and changing amounts awarded by the Bursary committee in contravention of the express provisions of the Nyandarua County Bursary Fund Act, 2014. Such conduct was in abuse of office and amounted to gross misconduct.

In January, 2019 the applicant appeared before the ad hoc committee convened by the County Executive Committee Member for Public Administration and admitted that he had altered the lists on the grounds that it was within his discretion to do so and that some of the decisions of the Ward Bursary Allocation Committee were arrived at in ignorance. Such admission is contained in the applicant's affidavit.

The applicant has refused to adhere to laid down guidelines and policies of the county government, disregarded lawful instructions and failed to render service to the public as required. By his own admission the applicant has confirmed contravening the law and the constitution under article 232. Despite these contraventions the respondents have not terminated employment but has invited the applicant to formally present his case on 16th May, 2019. The suspension is therefore lawful and such does not constitute termination of employment and these proceedings are in abuse of court process.

The respondents also filed Grounds of Opposition to the applicant's application

The respondents filed his Supplementary Affidavit Sworn by Beatrice Macharia and who avers that as director of Legal Services with Nyandarua County the applicant has not been denied a hearing which by letter dated 26th April, 2019 he was invited an opportunity to present his case to the County Human Resource Management Advisory Committee to be held on 20th May, 2019. Such hearing is meant to

resolve the issues between the parties and the employer has 6 months within which to concluded disciplinary proceedings against an employee and make a final determination.

Parties filed written submissions.

The applicant submitted that he has been denied a hearing contrary to the rules of natural justice. Orders of certiorari sought is to enable the court quash the decision that has been made in excess of authority. The orders of the respondents are in excess of authority in law and in abuse of official operations of their offices. By suspending the applicant with loss of salary is contrary to the rules of natural justice.

The applicant relied on the cases of **Mary Chemweno Kiptui versus Kenya Pipeline Company Limited Cause No.435 of 2013; Alex Wainaina Mbugua versus Kenya Airways Limited Cause No.430 of 2019; Prof. Rose Aoko Ogwang Odhiambo versus National Gender and Equality Commission.**

The respondents submitted that the respondents have reasonable grounds to justify the decision to suspend the applicant which includes his admissions in his affidavit in support of the Notice of Motion. There arose complaints with regard to altered list of beneficiaries of bursaries in Njambini Kiburu Ward as confirmed in the affidavits of Mr Macharia and Ms mbugua for the respondents. The respondents then exercised their jurisdiction and responsibilities to suspend the applicant following gross misconduct but acting with restraint opted to send him on suspension. During such period the applicant has been paid his full dues.

The respondent also submitted that the application before court does not meet the threshold for judicial review as a suspension is not a dismissal from employment. The applicant has moved the court prematurely and letter dated 25th January, 2019 is now overtaken by events through subsequent developments including steps to convene the County Human Resource Management Advisory Committee to hear and determine the charges against the applicant.

The respondents have relied on the case of **Mary Chemweno Kiptui versus Kenya Pipeline Cop nay Limited Cause No.435 of 2013; Justice Amraphael Mbogholi Msagha versus Chief Justice Republic of Kenya & 7 others Misc. Appl. No.1062 of 2004; Humphrey Makokha Nyongesa & another versus Communications Authority of Kenya & another JR No.4 of 2018.**

The applicant opted to commence judicial review proceedings seeking orders of certiorari against the respondents and seeking for the quashing of letter dated 25th January, 2019 suspending him from employment. Judicial review is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application

This may not be the most efficacious and appropriate proceedings to adopt in view of Rule 7 of the Employment and Labour Relations Court (Procedure) Rules, 2016 and taking into account Law Reform Act and Order 53 of the Civil Procedure Rules. See **Halima Gababa versus H.E. Lee Kinyanjui and another Petition No.17 of 2018 (Nakuru)** and Court of Appeal in giving emphasis on taking appropriate judicial proceedings in the case of **Gabriel Mutava & 2 others versus Managing Director Kenya Ports Authority & another [2016] eKLR;**

*Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation. Indeed, in the case of **Harrikissoon v Attorney General [1980] AC 265**, the Privy Council held that:-*

...The notion that whenever there is a failure by an organ of the Government or public authority or public officer to comply with the law necessarily entails the contravention of some fundamental freedom guaranteed to individual by Chapter 6 of the Constitution is

fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedom is, or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for normal proceedings for invoking judicial controls of administrative action...

the case of Speaker of the National Assembly v James Njenga Karume [1992] eKLR, where this Court again emphasized:-

“...In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed....”

It is therefore imperative where orders which ordinarily issue in judicial review be appropriately addressed to give the other parties necessary and before court a fair chance to respond as apposite. To fail to follow the necessary procedures would be to deny the other parties a fair chance to articulate the defence.

By letter dated 25th January, 2019 the applicant was suspended *pending finalization of your case. While on suspension you will not be entitled to any salary but you will be paid full house allowance and medical allowance.*

In the affidavit of Ms Mbugua filed on 11th April, 2019 the applicant was invited for a hearing for 16th May, 2019. Employment is subsisting and the employer retains the right and prerogative to send an employee on leave or on suspension to allow for investigations and upon which such an employee has the right to a hearing and to know the charges he faces if any and to have time to respond and give his defence.

As things stand when the parties attended for submissions, no decision had been taken which is adverse and which warrants the quashing of the impugned letter. The court agree with position taken in the case of **Humphrey Makokha Nyongesa & another versus Communications Authority of Kenya & another JR No.4 of 2018** that;

... the sending of an employee on compulsory leave is not disciplinary action but the beginning of an investigation process ... is just a holding operation pending inquiries and the rules of natural justice do not apply at that stage.

It is however imperative that even where the employer has the right and prerogative to suspend the employee, such must be done within the timelines set out in the operations manual or a human resource policy or as the case may be to determine the issue for investigation and invite the employee back to the shop floor to address in defence or resume work. This is aptly captured in the case of **Samson Omwoyo versus Maasai Mara University & Another Cause No.2367 of 2016** the court held as follows;

... the employer has the prerogative to discipline its employees. However, a prolonged suspension of an employee that is not addressed within a reasonable time only results in anxiety and is bound to raise concern. ...

To retain an employee on suspension for period of over three (3) months was held as unreasonable in the case of **Victor Sammy Mutiso versus TSC [2016] eKLR**. the rationale is that suspension is akin to an interdict and a *preliminary* step in the disciplinary process. The applicant may as well be vindicated by the investigations and that could be the end of the matter. Any pecuniary loss he may have suffered during the suspension can be restored as provided for in the regulations.

In this regard and ending the hearing of the application, the court ordered for the restoration of the due salary and full benefits and for which the respondents complied. As no adverse decision to terminate

employment has taken effect, parties shall return to the shop floor and address any findings made and arising from *pending the finalisation of your case*.

Before conclusion, The court wishes to bring to the attention of the respondents the provisions of section 47(h) read together with section 41 of the Employment Act, 2007.

As the claimant remains an employee of the respondents, he shall ensure strict compliance with directions issued to him by the employer during the pendency of such employment and unless there is termination for any lawful cause.

In this regard, application dated 27th February, 2019 is declined. Parties shall return to the shop floor and address as appropriate save where there is no conclusion within the next three (3) months and period ending 31st December, 2019 the applicant shall return to work and resume his duties with the 1st respondent as of 1st January, 2020 and without any further reference to proceedings herein.

On the order to return to the shop floor, each party shall bear own costs.

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

M. MBARU

JUDGE

In the presence of:

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