



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 47 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 10th December, 2019)

JULIET WAMIRI.....CLAIMANT/APPLICANT

-VERSUS-

JAMES R. NJENGA,

HON. STEWARD MADZAYO, ALICE KYALA,

BENSON KAARIA, ACHIYA ECHAKARA &

HELLEN KOMBO, MS. RHODA AHONOBADHA

AND GEN JEREMIA KIANGA (Sued as Registered Trustees of

AGRICULTURAL SOCIETY OF KENYA.....RESPONDENT

RULING

1. Pending before me for determination is the Notice of Motion Application dated 1st August, 2019. The same is brought under Section 12 of the Employment and Labour Relations Court Act and Article 41 of the Constitution of Kenya, 2010 seeking Orders **THAT:-**

1. This Application be certified urgent and heard ex-parte in the first instance.

2. Pending hearing and determination of this Application, an interim injunction be issued restraining the Respondent either itself, servants, agents or any other person action on their instructions or behest from proceeding with the disciplinary action initiated against the Claimant vide a letter dated 31st July 2019 or vide any letter on the charges outlined in the letter of 31st July 2019 or in any way harassing or victimizing the Claimant herein directly or indirectly relating to the show cause letter of 31st July, 2019.

3. IN THE ALTERNATIVE to prayer 2 herein, an interim order of stay of the disciplinary action initiated against the Claimant by the Respondent vide a letter dated 31st July, 2019 or vide any other letter on the charges outlined in the letter dated 31st July, 2019 pending hearing and determination of the Application herein inter-partes.

4. Pending hearing and determination of the Claim, a temporary injunction be issued restraining the Respondent either by itself, servants, agents or any other person acting on their instructions or behest from proceeding with the disciplinary action initiated against the Claimant vide a letter dated 31st July, 2019 or vide any letter on the charges outlined in the letter of 31st July, 2019 or in any way harassing or victimizing the Claimant herein directly or indirectly relating to the Show Cause Letter dated 31st July, 2019.

5. IN THE ALTERNATIVE to Prayer 4 herein, an order of stay of the disciplinary action initiated against the Claimant vide a letter dated 31st July, 2019 or vide any other letter on the charges outlined in the letter of 31st July, 2019 pending hearing and determination of the Claim filed on 29th January, 2019.

6. Costs of this Application be provided for.

2. The Application which is premised on the grounds THAT:

- a) The Respondent herein has already commenced disciplinary proceedings and proceeded and issued a Notice to Show Cause letter to the Claimant/Applicant herein on 31st July, 2019 requiring the Claimant to respond within 48 hours.*
- b) On the same date, the Claimant received a letter alleging 'recalling the previous disciplinary actions already meted' against the Claimant and warning her that she will be charged 'a fresh' with similar charges and indeed she has again been charged a fresh with similar charges vide a letter of even date.*
- c) The charges the Claimant is being charged with had already been concluded and the Claimant had been punished accordingly by being issued warning letters, surcharge and suspension and the Respondent in a clear demonstration of acts of patent unfair labour practices, has unilaterally decided to withdraw the said proceedings and penalties and has decided to charge the Claimant afresh with the very said charges a procedure unknown in the entire employment and labour jurisprudence.*
- d) The Respondent does not have jurisdiction to charge the Claimant with an employment offence, proceed and issue penalties which completes the process and then later proceed to recall the said penalties with a view of charging the Claimant again and have higher and stiffer penalties to be imposed including eventual termination of the Claimant from the Respondent's employment.*
- e) There exists no policy, law or Court Judgment that authorizes the Respondent to proceed as highlighted in paragraph (c) herein.*
- f) The Respondent is entitled to fair labour practices as regards every single action of the Respondent touching on her employment and cannot be convicted twice for the same offence as the Respondent is seeking and the same is a clear abuse of managerial prerogative and deserving of suspension by this Honourable Court.*
- g) The Charges herein are now being 'revived' on the account of the fact that the Claimant raised a genuine grievance against the Respondent and which the Respondent chose to respond through their external lawyer clearly castigating her from raising the grievance and clearly stating that they can only address the grievances if the Claimant withdraws the present proceedings against the Respondent.*
- h) Section 46 of the Employment Act prohibits the imposition of disciplinary penalty or even rehearsing or recycling the same only on account of the employee raising a genuine grievance against the actions of her supervisor which has made the workplace toxic.*
- i) The action of the Respondent does not accord with the rules of natural justice and the Claimant's right to fair hearing.*
- j) The Claimant has established that it has a prima facie case capable of being successful at the main trial.*
- k) The Claimant has equally established that she stands to suffer irreparably should the otherwise unprocedural and unfair/illegal disciplinary proceedings is allowed to take effect as directed by the Respondent.*
- l) The Claimant as an employee of the Respondent is entitled to fair labour practices and a right for the Court to protect jealously these rights and curtail their blatant violations as the Respondent is currently doing.*
- m) We pray that the Application be allowed as prayed in the interest of justice and fairness.*

3. The Application further supported by the Affidavit of **JULIET WAMIRI** sworn on 1st August, 2019, in which she reiterates the averments made in the Notice of Motion Application.

4. In response to the Application the Respondent filed a Replying Affidavit deposed by **BATRAM M. MUTHOKA**, the Chief Executive Officer of the Respondent on 7th August, 2019, in which it is contended that this Honourable Court had impeached the previous disciplinary proceedings against the Claimant vide its Ruling delivered on 27th June, 2019 for want of procedure and that the same could only proceed if the processes and procedures are followed.

5. It is further contended that after the above Ruling the Claimant/Applicant subsequently committed sufficient grounds to subject her to another disciplinary process. Further, that the Respondent subsequently initiated the current disciplinary process by issuing the Claimant/Applicant with the Show Cause letter dated 31st July, 2019.

6. It is further the Respondent's assertion that the proceedings commenced were in respect of both unconcluded and later invalidated previous disciplinary proceedings as well as the subsequent offences.

7. The Respondent avers that the amount of Kshs. 112,135/= that was the subject of a surcharge on the Claimant/Applicant's salary was refunded vide a cheque number 046934.

8. The Respondent further avers that the assertion by the Claimant/Applicant that the charges as laid down in the Show Cause letter dated 31st July, 2019 had been concluded is untrue as the previous disciplinary proceedings were stopped by the Court for want of procedure.

9. It is further the Respondent's contention that its Show Cause letter dated 31st July, 2019 was made in compliance with the Court's Ruling of 27th June, 2019.

10. The Respondent therefore contends that the Claimant/Applicant has not been subjected to unfair labour practices as alleged and that the disciplinary proceedings herein are not made in bad faith and only aimed at meeting higher penalties and ultimately get rid of the Claimant's employment with the Respondent.

11. The Respondent further avers that the Claimant through her instant Application only seeks to have this Honourable Court, for the second time to involve itself in the merits and demerits of an incomplete disciplinary process which it urged this Court not to do.

12. The Respondent contends that grant of the orders sought in the instant Application shall greatly prejudice it and is tantamount to reducing it to an impotent employer who has no supervisory over its employee (the Claimant) herein.

13. In conclusion, the Respondent urged this Honourable Court to dismiss the instant Application with costs to the Respondent.

14. Parties thereafter agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

Claimant/Applicant's Submissions

15. It is submitted by the Claimant/Applicant that the act by the Respondent recalling a completed disciplinary process and even proceeding to refund the already paid sum by the Applicant as surcharge amounts to acts of unfair labour practice aimed at victimizing and harassing the Claimant/Applicant.

16. The Claimant/Applicant further submitted the allegation of subsequent employment offences committed by her require to be interrogated by the Court at the hearing of the main claim and that she is entitled to protection from violation of Section 46 (h) of the Employment Act. To buttress this argument the Claimant/Applicant cited and relied on the case of **Johnson Muema Musomi Vs Embu County Government & Another (2016) eKLR.**

17. The Claimant/Applicant contends that she has tendered sufficient evidence on a balance of probability that would allow this Honourable Court to interfere with the managerial prerogative of the Respondent.

18. It is further contended that the Respondent's actions contravenes the provisions of Article 41 of the Constitution of Kenya and Section 46 (h) of the Employment Act. It is on this basis that the Claimant/Applicant urged this Honourable Court to allow her Application as pleaded.

Respondent's Submissions

19. The Respondent on the other hand submitted that it has a right to commence the disciplinary proceedings as commenced by the Show Cause Letter dated 31st July, 2019.

20. It is further submitted that proceeding with the disciplinary proceedings would not amount to double jeopardy as alleged by the Claimant/Applicant herein as the charges as contained in the Show Cause letter are new charges and that it cannot be faulted in any way.

21. The Respondent further submitted that having been impeached and punishment recalled it was at liberty to recommence the disciplinary process afresh while following due process and in compliance with the Court's Ruling of 26th June, 2019. To buttress this argument the Respondent cited the provisions of Section 44 (4) (a), (c) and (g) of the Employment Act, 2007.

22. The Respondent further contended that this Court ought not interfere with its disciplinary proceedings as commenced vide the show cause letter dated 31st July, 2019 as the same is its prerogative. For emphasis the Respondent relied on and cited the cases of **A.S.L Vs National Bank of Kenya Limited & Another (2018) eKLR** and **Geoffrey Muthinja & Another Vs Samuel Muguna Henry & 1756 Others (2015) eKLR.**

23. The Respondent further contended that the Claimant has failed to establish her case for grant of the orders as sought in her instant Application. The Respondent cited and relied on the case of **Sunrise Properties Limited Vs Fifty Investments Limited & Another (2007) eKLR** for emphasis.

24. The Respondent submitted that the Claimant has failed to meet the threshold as set out in the case of **Giella Vs Cassman Brown** for grant of the reliefs as sought in her Application.

25. In conclusion, the Respondent urged this Honourable Court to find that the Claimant's Application herein is unmerited and that the same ought to be dismissed with costs to the Respondent herein.

26. I have considered the averments of both Parties. Vide a ruling of this Court dated 27/6/2019 the Applicant had wanted the Respondent's

CEO cited for contempt by going against this Court's orders. I issued a warning against the Respondent's CEO. In the ruling, I indicated that the action by the Respondent against the Applicant was viewed as harassment and victimization and the Respondents were enjoined against transferring the Applicant to Mombasa or in any way harassing or victimizing the Claimant directly or indirectly in relation to the transfer directive.

27. The question then is whether the Respondent have any valid basis to commence the disciplinary proceedings as per the show cause letter dated 31.7.2019

28. Indeed the Respondent have a prerogative to commence disciplinary hearing against their employees and this must be done procedurally and where there are valid reasons.

29. On 31/7/2019, the Respondent served the claimant with yet another show cause letter where they recalled previously disciplinary actions against her in show cause letters dated 12/3/2019, 12/3/2019 and 18/3/2019. They indicated they were going to commence fresh disciplinary action proceedings against the Applicant under a separate cover.

30. In the separate cover, the Claimant was asked vide another letter of even date to explain similar issues previously the subject matter of the withdrawn notice to show cause. No new cause of action was raised vide these letters.

31. The Claimant/Applicant's contention is that this Court had made an order that there be a warning against the Respondent not to issue any action against the Applicant against this Court's order pending hearing and determination of this case.

32. Indeed, in my ruling of 27th June 2019, I alluded to the fact that the many successive show case letters against the Claimant were meant to harass and intimidate her following stoppage of her transfer by this Court. It was as if the many successive show cause letters followed due to this Court action. There is nothing new following the order of the Court of 27/6/2017 and even the fresh show cause letter of 21/7/2017 relates to events this Court had already termed as harassment and victimization against the Applicant.

33. I therefore find that the complaint by the Applicant on the now initiated disciplinary action is still aimed at intimidating and harassing the Claimant. I therefore order any fresh disciplinary action against the Claimant stayed.

34. In order to avoid the continued action and harassment against the Applicant, I direct that the main claim should now be set down for hearing so that the main claim is resolved once and for all.

35. Costs in the cause.

Dated and delivered in open Court this 10th day of December, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ochieng holding brief Milimo for Respondent – Present

Ogabo for Claimant – Present