



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 256 OF 2018

**BENARD MWAU MUTINDA.....CLAIMANT**

**VERSUS**

**BOARD OF MANAGEMENT,**

**PANGANI GIRLS HIGH SCHOOL.....1<sup>st</sup> RESPONDENT**

**PRINCIPAL,**

**PANGANI GIRLS HIGH SCHOOL.....2<sup>nd</sup> RESPONDENT**

**RULING**

1. For determination is an extremely verbose application dated 28 February 2018 by Benard Mwau Mutinda (applicant) seeking orders against the Respondents

1. ... (spent)

2. ... (spent)

3. ... (spent)

4. ... (spent)

5. ... (spent)

6. **THAT** the Respondents, their agents, servants and/or any other persons acting on their behalf be restrained from harassing, intimidating, threatening to terminate and/or terminating the Applicant's employment pending the hearing and determination of this suit.

7. **THAT** the Respondents Internal Disciplinary Hearing process against the Applicant be stayed and/or set aside pending the hearing and determination of this suit.

8. **THAT** the verbal orders issued by the 2<sup>nd</sup> Respondent to the school Bursar stopping and/or freezing the Applicant's salary be set aside and the Applicant salary be released pending the hearing and determination of this suit.

9. **THAT** the Respondents, their agents, servants and/or other persons acting on their behalf be restrained from preventing, blocking and/or denying the Applicant access to the Applicant's residential premises located within the compound of Pangani Girls High School Nairobi pending the hearing and determination of this suit.

10. **THAT** the Respondents, their agents, servants and/or any other persons acting on their behalf be restrained from harassing, intimidating, threatening to terminate and/or terminating the Applicant's employment pending the hearing and determination of this suit.

11. **THAT** costs of this Application be provided for. 12. **THAT** any other and/or further orders of this Honourable Court do issue as it may deem necessary and expedient in the interest of justice.

2. When the application was placed before the Duty Court (*ex parte*) on 2 March 2018, the Court granted an order allowing the applicant to continue staying in the staff quarters pending *inter partes* hearing on 6 March 2018.
3. The Court at the said session directed the applicant to serve the application before the end of 2 March 2018.
4. On 6 March 2018 when the application came up for *inter partes* hearing, the applicant informed the Court that due to the weather on 2 March 2018, he could not serve the application as directed (the application was served on 5 March 2018).
5. The Court therefore rescheduled hearing of the application to 19 March 2018 and at the same time extended the interim orders on record.
6. On 19 March 2018, the Respondents attempt to secure an adjournment in order to file responses to the application were declined by the Court because about 2 weeks had passed from the date service was effected on them.
7. The Court proceeded to hear the application, but for reasons already on record, the application was heard afresh on 20 March 2018.
8. At the fresh hearing, the Court allowed the Respondents to address it only on the law, as they had not filed any replying affidavit(s) in opposition to the application within the set timelines.
9. The applicant's case at this stage is that the Respondents stopped his salary through a verbal notice without placing him on *interdiction* or *suspension* as demanded by the *Terms of Service for Non-Teaching Staff*.
10. According to the applicant, his salary could only be stopped validly if he were formally suspended from work.
11. The applicant also asserted that the Respondents had blocked him from the staff quarters allocated to him yet he was still an employee.
12. The applicant further contested the disciplinary process undertaken by the Respondents on the grounds that it was procedurally tainted as the invitation letter dated 1 February 2018 asking him to appear before the *Board of Management* did not set out the allegations he was to confront.
13. The Respondents in opposition to the application urged that the application should be rejected because it was premature.
14. The prematurity, according to the Respondents arose from the application of section 9(2) of the *Fair Administrative Action Act* and from the fact that the applicant had not exhausted the internal disciplinary procedures as set out in the *Terms and Conditions of Service for Non-Teaching Staff*.

## **Evaluation**

### *Withholding of wages*

15. It is correct as contended by the applicant that stoppage of salary is attendant to a suspension of an employee where a serious offence is suspected.
16. Considering the nature and organisation of the 1<sup>st</sup> Respondent, suspension should be a formal affair and because there is no indication that the applicant was formally placed on suspension, the withholding of his remuneration is unlawful.

### *Housing*

17. Section 31 of the Employment Act, 2007 obligates an employer to provide an employee with housing and in lieu thereof to pay house allowance.
18. An employee going through a disciplinary process such as the applicant is entitled to benefit from such right (housing) until and unless the employment relationship has been determined.
19. In the case at hand, the employment relationship is still subsisting.

### *Disciplinary process*

20. The invitation letter dated 1 February 2018 was not asking the applicant to attend a disciplinary hearing. It was calling upon him to attend an investigative process after which he was issued with a *formal show cause* and notice of a hearing on 14 February 2018.
21. The applicant responded to that show cause on 20 February 2018 and was expected to attend an oral hearing on 21 February 2018.
22. The Court cannot, on the papers find any unlawfulness on the disciplinary process so far and agrees with the Respondents that that part of the complaint by the applicant is premature.

## **Conclusion and Orders**

23. In light of the above, the Court orders

(i) The Respondents, their agents, servants and/or any other persons acting on their behalf are hereby restrained from preventing, blocking and/or denying the applicant access to the staff quarters while the employment relationship subsists.

(ii) The Respondents do release forthwith the applicant's withheld salaries while the employment relationship subsists.

24. For clarity, the other orders sought are declined.

25. Costs in the cause.

**Delivered, dated and signed in Nairobi on this 21<sup>st</sup> day of March 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For applicant     Mr. Ashiruma instructed by Khamati Githinji Ashiruma & Chege Advocates

For Respondents     Mr. Mungai instructed by Joan Emma Advocates

Court Assistant     Lindsey