



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1034 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 9th March, 2018)

FELIX O. SIATA.....CLAIMANT

-VERSUS-

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

1. The Application before Court is the one dated 2.6.2017. this application was filed under Certificate of Urgency and brought through a Notice of Motion filed on 6.6.2017 under Sections 1A, 1B, 3A (Cap 21 Laws of Kenya), Section 12 Employment and Labour Relations Court Act, Order 57 rule 1 and all other enabling provisions of the law.

2. The Applicant Claimant sought the following orders:

- 1. That this application be certified urgent, the same be heard ex-parte in the first instance.***
- 2. That the Respondent immediately reinstates the Claimant to work.***
- 3. That a declaration that retirement of the Claimant by the Respondent in the authority's interest the attendant delay in taking administrative action including laxity in hearing the Claimant's appeal is illegal, null and void.***
- 4. That the costs of this Application be in cause.***

3. The Application is supported by the annexed affidavit sworn by the Applicant herein and in the following grounds:-

1. The Claimant was employed by the Kenya Revenue Authority Customs Department and worked diligently until 30th June, 2014. He received letter of retirement 'in the authority's interest' in July 2014. The disciplinary procedure was flawed and discriminatory based on the following:-

i) There was bias and discrimination since there was selective charging of the officers. The Claimant was excluded from the Disciplinary Committee deliberations of 20th and 21st March, 2013 while allowing Mr. Abdul Bonaya Station Manager (suspect) and I.O in the case. Further one of the officers the Claimant was working with called Martin Gichure who lodged an appeal with him on the same date had his appeal heard and determined then he was reinstated in the year 2015. The disciplinary committee never considered the evidence on record.

ii) There was lack of staff. Furthermore, the role of deploying officers lay with the Station Manager. At the time the Claimant joined the Station there were no officers at the lower gate, and no barrier at the said gate. These issues were overlooked by the Investigating Officer.

iii) Some of the alleged trucks passed even before the Claimant was deployed to the area. Motor vehicle registration number UAE 244N disappeared on 29th May 2010 while the Claimant was away in Nairobi on official duties meeting Mr. Peter Ndune at the Times Tower. (Refer to the Investigating Officer Memo of 11th May 2011 paragraph 2(ix).

iv) The report from the Legal Department recommended that the charges were harsh and decision harsh/punitive.

v) The Claimant was transferred to the Boarder Control office as supervisor on 10th August 2009. The functions of gate operations were removed from the docket of Enforcement and given to a new office. We refer the Honourable Court to a memo dated 17th

April, 2010 from the Assistant Commissioner Malaba to all Enforcement Officers.

vi) One of the suspects Abdul Bonaya was allowed to sit in the deliberations of the special disciplinary meeting (DISC) of 20th and 21st March, 2013 which came up with the final report. Abdula Bonaya was the station manager who was later retired (See the minutes of the disciplinary meeting of 20th and 21st March, 2013 and Recommendations of the Investigating Officer to Disciplinary Committee made on 11th May, 2011. The Investigating Officer (I.O) Peter Ndune was part of the deliberations. This was not in order since he went there to push his case. He should have done his investigations and left it there.

vii) The person the Claimant was alleged to have concealed his employment as per the charges was employed by the station manager and the said person was working in full public view. The Claimant is not the one who employed him.

viii) To tie the Claimant to the case again, the Respondent later introduced the issue of deposit in a customs ware house: Doc.F.89 issued in triplicate. Under this, the vehicle and a third copy is the book copy which cannot be detached. the document is supposed to be signed and stamped. It is also supposed to be counter-signed by the owner of the goods or his representative. The warehouse keeper is also supposed to sign. However in our case, all the three copies were intact in the booklet meaning the process was aborted. I wish to reiterate that this is an issue of witch-hunt.

ix) The Claimant was invited to appear before the Disciplinary Committee after earlier invitations had been cancelled twice. He therefore appeared before the Disciplinary Committee on 14th December, 2012. He was never offered technical advice by the head of Customs (refer to the Code of Conduct at paragraph 7.9) regarding his appearance at the Disciplinary Committee. He appeared in person and was later disused a letter of retirement 'in the authority interest': Received in July 2014.

x) The Claimant wrote a letter requesting for documents on 24th July 2014. He was however given a report excluding minutes of the deliberations of 14th December, 2012. He was also never given the statements of the drivers and other essential documents were concealed from him. After this he filed a Memorandum of Appeal of 21st August, 2014 to beat the deadline of 30 days. He used what he had (though scanty) to file the appeal. More than a year lapsed without hearing from them. The Claimant inquired about the status on 16th February, 2016 but the Respondent replied saying they are working on the appeal and will communicate in due course. I am yet to get any feedback.

xi) The flawed disciplinary process together with the dragged appeal contravenes his constitutional rights as provided under Article 47 of the Constitution of Kenya, goes against the provisions of the Employment Act 2007, Kenya Revenue Authority's (KRA's) Employee Code of Conduct and other labour related laws of Kenya. The delay in determining the appeal also goes against Amb. Francis K. Muthaura (Permanent Secretary, Secretary to the Cabinet and Head of the Public Service) Guidelines on handling of cases of public officers who are suspected of involvement in corrupt practices, issued on 24th May, 2010. The circular provides that the guidelines be strictly followed to ensure that administrative action in dealing with suspected cases of corruption by public officers is taken without delay and in accordance with relevant law and regulations.

xii) The delay to conclude the Claimant's appeal, flawed disciplinary process and other actions and/or inactions including acts of discrimination against the Claimant have infringed on the Claimant's right to fair administrative action and other Constitutional rights.

xiii) Despite demand and notice of intention to sue having been effected, the Respondent has declined and/or neglected to make good the claim.

xiv) There is no other suit between the same parties in relation to the subject matter.

xv) That it is in the interest of justice that the present application be allowed as prayed.

4. The supporting affidavit of the Applicant reiterate averments made in the grounds in support of this Application.

5. The Respondents opposed this application. They filed their submissions in respect of this application on 12.10.2017. They contend that the Claimant was given an opportunity to appear for disciplinary hearing on 17.10.2012 to defend himself. That he appeared before the Committee on 19.12.2012 for oral representation.

6. On 30.6.2014, the Committee recommended his retirement in the Respondents interest on the ground that the Respondent had faith in him. The Claimant was then retired vide a letter dated 30.6.2014 and he appealed the retirement vide a letter dated 19.8.2014.

7. The Respondent have submitted that this is not a case of termination of contract as per the terms of the contract and that the prayers sought cannot be granted at this stage.

8. I have examined the averments of both parties plus the submissions filed. I note that the application I am dealing with is an interlocutory application.

9. The Applicant is seeking reinstatement at this stage which are the same orders being sought in the main claim. This prayer is not tenable however by virtue of the provisions of the Employment and Labour Relations Court Act Section 12(3) which states as follows:-

“In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders:-

an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law.....”

10. The Claimant Applicant has told the Court that he was retired in 2014 June. The three-year window period for reinstatement if at all expired in June

2017 and therefore an order of reinstatement cannot issue.

11. That notwithstanding, this Court cannot make orders of reinstatement at the interlocutory stage unless it is in very clear circumstances where a greater injustice would be occasioned to the Applicant and which cannot be compensated in damages. In Pet No. 47 of 2016 **Idris Aden Mukhtar & 2 others vs County Government of Garissa (eKLR 2016)**, I rendered myself thus:-

“Reinstatement as a remedy should only be granted sparingly after hearing of both parties and the Court had at an Interlocutory stage ordered reinstatement of the Applicants which is tantamount to deciding the case to a conclusion”.

12. In the current case, facts obtaining are similar and I do not find it appropriate to grant orders sought.

13. I decline to allow this Applicant and direct the parties to set down this claim for hearing at the registry.

14. Costs in the cause.

Dated and delivered in open Court this 9th day of March, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Koima holding brief for Caro Mburungu for Respondent – Present

Applicant – Absent