



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 29 OF 2018

IN THE MATTER OF: ARTICLES 10, 19, 20, 21(1), 22(10), 23(1), 27, 28, 41, 47, 232, 258 AND 259 OF THE CONSTITUTION

AND

**IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 27 AND 41
AND 47 OF THE CONSTITUTION**

AND

IN THE MATTER OF: THE EMPLOYMENT ACT, 2007

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

BETWEEN

EZRA CHILOBA.....PETITIONER

AND

WAFULA WANYONYI CHEBUKATI.....1st RESPONDENT

CONSOLATA BUCHA MAINA.....2nd RESPONDENT

ABDI YAKUB GULIYE.....3rd RESPONDENT

BOYA MOLU.....4th RESPONDENT

MARGARET MWACHANYA.....5th RESPONDENT

PAUL KURGAT.....6th RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION.....7th RESPONDENT

HON. ATTORNEY GENERAL.....INTERESTED PARTY

RULING

1. Ezra Chiloba (applicant) is the Chief Electoral Officer of the Independent Electoral and Boundaries Commission (7th Respondent).
2. On 12 April 2018, the applicant filed a Petition alleging contravention of several provisions of the Constitution and his fundamental rights and freedoms.

3. Accompanying the Petition was a motion under certificate of urgency seeking orders

A.

B. Pending the inter partes hearing and determination of this application, a preservatory /conservatory order be issued in the first instance, restraining the Respondents by themselves, or their servants, agents or otherwise howsoever from implementing or enforcing the purported decision made on the 6th of April 2018, purporting to send the Petitioner/Applicant on compulsory leave as contained in the internal memo dated the 6th of April 2018.

C. Pending the hearing and determination of this application a preservatory /conservatory order be issued in the first instance, restraining the Respondents by themselves, servants, agents or otherwise howsoever from interfering with, stopping, blocking the Petitioner/Applicant from resuming his employment forthwith and from hindering him from carrying out his functions in furtherance of the purported compulsory leave contained in its memo dated the 6th April, 2018.

D. Directions be given as to the early inter-partes date of prayers E to I herein below.

4. When the application was placed before Court on 12 April 2018, the Court had brief oral submissions from Mr. Wandabwa for the applicant and certified it urgent (the Court has considered those submissions in this ruling).

5. The applicant was directed to serve the Respondents to appear in Court today so that directions could be given.

6. When the application was called out this morning, Mr. Gitonga and Ms. Anyango appeared for the 2nd, 5th and 6th Respondents. They asked for 7 days to file their responses to the application.

7. Ms. Awuor for the 7th Respondent also sought 7 days to file appropriate responses.

8. The 1st, 3rd and 4th Respondents were not in Court as they were stated to be out of Nairobi.

9. Mr. Njeru Kanyamba, Secretary General of the Kenya Independent Commissions Workers Union also appeared and made an oral application to have the Union enjoined in the Petition as an Interested Party (Court directed him to file a formal application).

10. In light of the requests by the present Respondents for more time, Mr. Wandabwa urged the Court to grant interim preservatory orders.

11. In an effort to persuade the Court to grant the interim preservatory orders, Mr. Wandabwa submitted that the 7th Respondent's Human Resources and Administration Policies and Procedures Manual did not envisage *compulsory leave* and that the sending of the applicant on such leave was disguised suspension without compliance with contractual agreement as contemplated by the Human Resources and Administration Policies and Procedures Manual.

12. On legal anchor to the interim preservatory orders, Mr. Wandabwa urged that the 2nd Schedule to the Independent Electoral and Boundaries Commission Act provided that a decision of the 7th Respondent could only be validly made when there was a quorum of 5 Commissioners.

13. It was also submitted that the compulsory leave was akin to a removal without due process.

14. According to Mr. Wandabwa, the meeting where the decision to send the applicant on compulsory leave was taken did not have the requisite quorum.

15. The interest of justice, the Court was informed tilted in favour of granting the *ex parte* interim orders otherwise, if the litigation were left to run its ordinary course, the applicant would have served and completed the 3 month compulsory leave, rendering the proceedings academic/moot.

16. The dispute presented to Court reveals a complex clash between the powers of an employer as an employer under the common law and constitutional and statutory protections afforded public officers in this jurisdiction.

17. Ordinarily, under the common law, the obligation of the employer is to pay wages/salaries and not provide work.

18. However, it has long been recognised under the common law that suspension of an employee with or without pay would be in breach of contract (see *McKenzie v Smith* (1976) IRLR 345).

19. Remedies for such breach are sound in damages and does not include forcing an employee on the employer.

20. This Court recognises that our Constitution and statutory framework has made fundamental inroads into that common law position but there is no indication as to whether *compulsory leave* would amount to a disciplinary action.

21. The instant application may require an examination of the interplay between the common law powers of an employer *vis a viz* the legal protection afforded public officers.

