



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

ELRC PETITION NO. 42 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

AMOS WILLIAM OMOLLO.....PETITIONER

VERSUS

THE COUNTY GOVERNMENT OF KISUMU.....1ST RESPONDENT

GOVERNOR, KISUMU COUNTY.....2ND RESPONDENT

COUNTY SECRETARY, KISUMU COUNTY.....3RD RESPONDENT

THE CHAIRMAN, COUNTY PUBLIC SERVICE BOARD....4TH RESPONDENT

RULING

The Petitioner is the County Attorney and Chief Legal Officer of the County Government of Kisumu having been appointed to that position by letter dated 11th February 2015 signed by the then County Secretary, one Humphrey O. Nakitari. The recruitment followed an open and competitive selection process through which he emerged as the best candidate. He filed this petition alleging violation of his constitutional rights by the Respondents and seeks the following reliefs:-

- a) A declaration that within the intendment of article 41 of the constitution, the 1st, 2nd and 3rd respondents cannot impose compulsory leave on the petitioner.
- b) A declaration that within the intendment of Article 47 (2) of the Constitution, the respondents cannot take administrative actions without giving valid reasons for the same.
- c) An order of Judicial review in the nature of *certiorari* do issue to bring into the Honourable Court for purposes of quashing the 3rd respondent's letter dated 11th of October, 2017 sending the petitioner on compulsory leave, for being invalid, illegal and unconstitutional.
- d) An order of Judicial Review in the nature of *certiorari* do issue to bring into the Honourable Court for purposes of quashing the 3rd respondents' show cause letter dated 30th of October, 2017 for being invalid, illegal and unconstitutional.
- e) An order of Judicial Review in the nature of *certiorari* do issue to bring into the Honourable Court for purposes of quashing any other letter, memorandum and/or communication imposing sanctions upon the petitioner for decisions and/or action taken by the petitioner in the course of his employment and in performance of his duties as the County Attorney for the County Government of Kisumu.
- f) An order of Judicial Review in the nature of Mandamus does issue compelling the respondents to recall and reinstate the petitioner to his position as the County attorney and chief legal officer.
- g) An order of compensation for general and exemplary damages to compensate the petitioner for the harassment, financial constraints, intimidations, defamation and mental torture he has suffered resulting from the unfair and unconstitutional imposition of compulsory leave.

h) A permanent injunction against the respondents stopping them and their officials from proceeding with the intended unfair termination, dismissal and/or suspension of the petitioner from his employment.

Together with the petition the Petitioner filed an application seeking orders that:-

- 1) This application be certified as urgent and service hereof be dispensed with in the first instance.
- 2) Pending *interpartes* hearing of this application, this Honourable Court be pleased to suspend the letter dated 11th October 2017 or any other letter thereof and all consequential actions taken from the date of the letter.
- 3) Pending *interpartes* hearing of this application, this Honourable Court be pleased to issue an interim injunction restraining the respondent from interfering with the petitioner's emolument and benefits.
- 4) Pending the hearing and determination of this petition, this Honourable Court be pleased to suspend the letter dated 11th October 2017 or any other letter thereof and all consequential actions taken from the date of the letter.
- 5) Pending the hearing and determination of this petition, the Honourable court be pleased to issue an order restraining the respondents from terminating the petitioner's employment.
- 6) Pending the hearing and determination of this petition, the Honourable Court be pleased to issue an interim injunction restraining the respondent from interfering the respondent from interfering with the petitioner's emolument and benefits.
- 7) Pending the hearing and determination of this petition, the Honourable court be pleased to issue an interim injunction restraining the respondent from advertising, employing and/or deploying anyone to the position of County Attorney and Chief Legal Officer in the county Government of Kisumu.
- 8) Such further and other relief be granted to the applicants as this Court deems fit.
- 9) Costs be provided for.

The application is supported by the grounds on the face thereof and the affidavit of the Applicant in which he deposes that on 11th October 2017 he received a letter from the 3rd Respondent directing him to proceed on indefinite compulsory leave. The letter raised the following issues:-

- a) *"Your conduct in ELRC Pet. No. 39 of 2016 Doris Chandi Ombara –Vs- County Government, Kisumu County.*
- b) *Your conduct in HCCM No. 104 – 195 of 2015 Ken Pundo & Co. Advocates –Vs- County Government of Kisumu & 3 others.*
- c) *Legality of your office and recruitment."*

It is the averment of the Petitioner that none of the issues raised in the letter warrant his being sent on compulsory leave and that the letter is an excuse by the Respondents to use to eventually terminate his employment because he was appointed by and served under the previous government.

The Petitioner deposes that on 30th October 2017 he received yet another letter from the 3rd Respondent requiring him to show cause why intended disciplinary action should not be taken against him on allegations of -

- (i) *"Acting ultra vires in ELRC Petition No. 39 of 2016 Doris Ombara –Vs- County Government of Kisumu by summoning and issuing directions to the City Manager against the scope of your powers.*
- (ii) *Improper and careless attendance to duty in Kisumu HCCM No. 104 – 195 of 2015 Ken Pundo & Co. Advocates –Vs- County Government of Kisumu & 3 others leading to County Government incurring unnecessary debts in terms of interests on the decretal sum and legal fees."*

The Petitioner avers that he responded to the show cause notice on 1st November 2017. The Petitioner deposes that the cases referred to in the show cause letter are still pending before court and the 3rd Respondent is therefore estopped from discussing them or dealing with them outside the court in any manner as the matters are *sub judice*. He further deposes that the County Attorney as an advocate of the High Court of Kenya and officer of the Court can contact any person about a matter he is seized of which is what he did and his actions are not *ultra vires*. He deposes that he advised the County Government to comply with court orders in Kisumu HCCM No. 104-195 of 2015, as it was the right thing to do. He deposes that the Respondents have no cause to send him on compulsory leave or subject him to disciplinary action.

Respondents' Reply

The Respondent filed a replying affidavit of Dr. Olango Onudi, the acting County Secretary and Head of Public Service. He deposes that upon taking office following election the 2nd Respondent formed task-forces to look into various sectors such as finance, human resources and governance and submit reports to him that would form the basis for effective service delivery to the public during his tenure, that several

complaints were raised by the public relating to the said sectors which required urgent intervention, among them complaints against the Petitioner, as the County attorney. He deposes that the complaints necessitated investigations to be carried out to determine if they warranted administrative action against the Petitioner by the 1st Respondent.

Dr. Onudi deposes that the Petitioner was asked to proceed on compulsory leave while investigations were carried out. That following investigations the Petitioner was invited to respond to allegations by way of show cause letter which he responded to by his email dated 30th October 2017. He deposes that the Petitioner did not opt for an oral hearing or to appear before the organ investigating the matter before a decision was made.

Dr. Onudi deposes that the leave was not indefinite but was to terminate upon conclusion of investigations, that the Petition is premature as an employer is entitled to send an employee on leave pending investigations and to take appropriate action based on results of the investigation provided the action is in accordance with the law. He deposes that the Petitioner's rights have not been violated or threatened and no cause of action has arisen as alleged.

Submissions

The application was argued on 16th November 2017. The Petitioner appeared in person while the 1st, 2nd and 3rd Respondents were represented by Mr. Yogo instructed by Otieno, Yogo, Ojuro and Company Advocates. There was no appearance for the 4th Respondent.

The Petitioner submitted that he was not irregularly employed as alleged by the Respondents, that the position was advertised and interviews carried out as is evident from documents filed in court. He further stated that the cases under investigations are pending before the Labour Court in Nairobi and cannot be subject of investigations. He further submitted that the other matters under investigation are pending in Kisumu High Court and cannot be a basis for investigations on misconduct. He submitted that these are matters handled by external lawyers in the Respondents' panel and the Petitioner has never argued any of the matters personally. He further submitted that they are matters handled by the Petitioner in the course of employment and cannot be faulted merely because the Respondent did not like the outcome. He further submitted that the Respondent is targeting people who worked in the previous government. He prayed that the application be allowed.

Mr. Yogo for the Respondents opposed the application and relied on the replying affidavit of the 3rd Respondent. He submitted that the application is premature, that no violation of the Applicant's rights had occurred or was threatened at the time of filing petition and therefore no cause of action had arisen. He submitted that the Respondent is at the investigative stage, which necessitated the Applicant being sent on compulsory leave, and the Applicant has been given an opportunity to respond to the issues against him through the notice to show cause letter. He submitted that the issue of the legality of office has been dropped, that a decision will be made after the Applicant responds to the notice to show cause. Should the Applicant's response be satisfactory the leave will be lifted. He submitted that until a decision is made the steps taken by the Respondent are within the law.

Determination

I have carefully considered the pleadings and submissions of the parties. The issue for consideration is whether the Applicant meets the principles for interim injunctions as enunciated in the case of **Giella v. Cassman Brown** being that the Applicant must demonstrate a prima facie case with likelihood of success, that he is likely to suffer irreparable harm and if in doubt, on a balance of convenience.

In the case of **Mary Aliviza & Another v Attorney General** (cited with approval in **Petition No.39 of 2013 Gladys Boss Shollei v Judicial Service Commission**) the court observed as follows;

*"The Judges relying on the authority in **Sergeant V. Paul (1949) 16 E.A.C.A. 63** stated;*

"One, the grant or refusal of a temporary injunction which is an interlocutory order, is an exercise of Judicial discretion which must be exercised judiciously.

*Two, the purpose of a temporary injunction is to preserve the status quo (see: **Noor Mohamed, Hanmohamed V. Kassamali Virji Madhani (1953) 20 E.A.C.A. 8** and **Garden Cottage Food Limited V. Milk Marketing Board (1984) A.C. 130**).*

Three, the conditions for the grant of an Interlocutory Injunction are now well settled in East Africa;

a. an applicant must show a prima facie case with a probability of success;

b. an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and

c. if the Court is in doubt, it will decide an application on the balance of convenience."

On the issue of prima facie case, the Court of Appeal in **Mrao v First American Limited & 2 others (2003) KLR** observed that it is -

"a case which on the material present to court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation from the latter."

In **Mary Aliviza** case the court further stated that;

"At this stage we must of course refrain from making any determination on the merits of the application or any defence on it. A decision on the merits or demerits of the case must await the substantive consideration of the facts and applicable law after full hearing of the reference."

In the present case the Applicant avers that he has been sent on compulsory leave by the 3rd Respondent who has no capacity to send him on leave as he is the employee of the 4th Respondent. The Applicant's letter of appointment which he has annexed to his affidavit in support of the application as Appendix AWO-2 is signed by the County Secretary, the very same office that sent him on compulsory leave. His letter of appointment does not state that he is an employee of the 4th Respondent. Under section 51 of the Interpretation and General Provisions Act, the power to appoint includes the power to remove, suspend, dismiss or revoke the appointment. The Applicant has not submitted any evidence to show that the 3rd Respondent has no power to discipline him or that the 4th Respondent is the one with capacity to discipline him.

I find no merit in the argument.

The Applicant further contends that he cannot respond to queries on his handling of matters pending in court. I do not agree with him. His conduct is not the subject of the cases pending in court. The issues raised by the Respondent have nothing to do with the manner in which the court will handle the pending cases. What he has been asked to explain by his employer is his conduct in **ELRC Petition No. 39 of 2016 Doris Chandi Obara v County Government, Kisumu County and HCMC No. 104 – 195 of 2015 Ken Pundo and Company Advocates v County Government of Kisumu & 3 Others**. The Applicant cannot refuse to respond to administrative inquires under the excuse of *sub judice*.

The role of the courts in disciplinary cases has been stated in many cases and can now be said to be settled, that the courts should not intervene unless there are exceptional circumstances. The Court is not expected to enter into the boardrooms of the employer to micro manage its affairs. The court would only interfere if there is proof of violation of the law or the process of the Respondent. **Ndolo J** in the case of **Rebecca Ann Maina v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR** stated as follows-

As held in the case of Alfred Nyungu Kimungui Vs Bomas of Kenya (Industrial Court Cause No 620 of 2013) the Industrial Court should not take over and exercise managerial prerogatives at the work place.

However, in cases where an employee facing disciplinary action legitimately feels that the process is marred with irregularities or is stage managed towards their dismissal, the Court will intervene not to stop the process altogether but to put things right.

I find that the Applicant has not proved any exceptional circumstances to warrant interference by the court at this investigative stage of the disciplinary process. The Applicant has not demonstrated any violation of his rights by the Respondents as all that has been done is to ask him to show cause why disciplinary action should not be taken against him. This being a preserve of the employer it would be interference by the court in the administrative functions of the employer to stop the process and shield the Applicant from investigation even before he responds to the notice to show cause.

I find that the applicant has not established a prima facie case as he has failed to prove that any of his rights have been infringed or are threatened. The balance of convenience is in favour of allowing the Respondents to carry on with the disciplinary process.

For these reasons the application must fail with the result that the same is dismissed.

Costs will be in the cause.

DATED AND SIGNED AT NAIROBI ON THIS 14TH DAY OF MARCH 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 12TH DAY OF APRIL 2018

MATHEWS NDERI NDUMA

JUDGE