



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2164 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 25th June, 2018)

RHODAH KIILU & 106 OTHERS.....CLAIMANTS

VERSUS

GOVERNOR, MACHAKOS COUNTY.....1ST RESPONDENT

COUNTY SECRETARY, MACHAKOS COUNTY...2ND RESPONDENT

COUNTY PUBLIC SERVICE BOARD.....3RD RESPONDENT

RULING

1. The Application before Court is one dated 24th October 2017 and later amended on 22nd November 2017 and brought under Article 41(1)(2)(b) of the Constitution, Section 41,44 and 45(1) of the Employment Act, Section 3 and 2 (1)(3) of the Employment and Labour Relations Court Act, Section 62 of the Labour Relations Act, Section 59 of the County Governments Act, Rules 16 and 27 of the Employment and Labour Relations Court (Procedure) Rules and all other enabling provisions of the law seeking orders that:

a. This application be certified urgent, be heard ex-parte in the first instance and service thereof dispensed with.

b. This Honourable court be pleased to restrain and/or issue conservatory orders directed at the respondents prohibiting them from harassing, threatening to suspend, suspending, threatening to dismiss, dismissing and/or terminating and/or in any other manner victimizing any of the 437 employees send on immediate and/or compulsory leave on 18/8/2017 or any date thereof pending the hearing and determination of this application and/or cause.

c. This Honourable Court be pleased to direct and/or compel the respondents to reinstate and/or allow back to work all the 437 employees send on compulsory and/or immediate leave on 18/8/2017 or any date thereof.

d. This Honourable Court be pleased to quash, suspend, halt and/or lift the intended suspension and/or meted out against 437 employees of the County Government of Machakos forthwith pending the hearing and determination of this application and/or cause.

e. This Honourable Court be pleased to direct and/or compel the respondent to forthwith pay all the 437 employees their August and September emoluments and effect any other benefit the employees were entitled to during the months of August and September 2017.

f. This Honourable Court be pleased to refer this dispute for conciliation before the Labour Officer for Machakos County.

g. Costs of this application be borne by the Respondents.

2. This application which is supported by the affidavit of one Rhodah Mueni Kiilu is premised on grounds that:

1. On 18/8/2017 at around 1.00pm the 1st Respondent accompanied by the members of the press from over five media houses attended the County Finance Headquarters at Machakos and made a tour of every office enquiring about each employee's job designation.

2. Thereafter, the 1st Respondent convened a meeting of all employees working at the headquarters outside the county finance headquarters and addressed them in the presence of the media, informing them that he had decided to send 437 employees deployed within the county government's finance docket on immediate leave until further notice and until recalled. He also stated that the directive would apply to finance employees working at other stations across the county.

3. The 1st Respondent then directed armed police who had accompanied him to escort each grievant to their desk to collect their phone and handbags to the exclusion of anything else. The 1st Respondent also proceeded to post on his facebook and twitter accounts indicating that he had suspended all financial operations in the county and directed all finance officers to proceed on immediate leave until further notice. The employees were sent on compulsory leave which amounted to suspension on political grounds which do not impact on the employer-employee relationship and since then, the respondent have failed, refused and/or neglected to pay the claimants their salaries for the months of August and September 2017 which position is unlawful, wrongful and unfair especially considering the fact that the claimants were neither suspended nor terminated from employment.

4. On/or about September 2017 most of the finance officers were called from the 2nd Respondent's offices and informed to collect, fill and return job evaluation forms and wealth declaration forms which they complied with and upon submitting the said forms, the claimants were called to the office of the 2nd respondent directing them to attend interviews on scheduled dates and to take with them their academic certificates. The 2nd Respondent did not disclose the nature and purpose of the interviews, they were not informed of any offence they had committed whether individually or corporately, however the claimants attended the interviews which meetings were treated as disciplinary hearings for undisclosed offences and for which the claimants had not been informed beforehand to enable them prepare.

5. In sending the 437 employees of the county government of Machakos on immediate and/or compulsory leave, the 1st Respondent acted unlawfully by usurping the powers and functions of the 3rd Respondent as by law granted.

6. On 19/10/2017 the 1st Respondent unlawfully issued a press release indicating that he would announce a new staffing structure and the list of suspended employees. The Respondents have not indicated the reasons, if any for withholding of the claimants' salaries for the months of August and September and have therefore tormented the Claimants besides causing them unnecessary hardship, anguish and mental torture. Their actions are callous, malicious and actuated by political reasons that have no basis on the employer and employee relationship.

3. The Respondent filed their Replying Affidavit where they aver that the application is improper and dead on arrival as the Claimants filed Nairobi Employment and Labour Relations Cause No. 2127 of 2017 on 23rd October 2017 involving the same cause of action which is unlawful and an abuse of Court process. The complaint herein is completely uncalled for as the great majority of the Claimants are back on duty doing their right business in the county and that the claim is therefore overtaken by events and cannot stand.

4. In their further Replying Affidavit, they aver that the allegations that the Claimants were unfairly dismissed are untrue and unjustified because the applicants are in the process of appearing before the County Human Resource Committee for vetting proceedings. The Applicants have also not demonstrated in their applications they were dismissed from duty.

5. The Respondents objected to the application on the following grounds:

1. The application and the petition are flagrant abuse of the Court process.

2. The applicants on 23/10/2017 filed Employment and Labour Relations Cause No. 2127 of 2017 in Nairobi, involving exactly the same parties and exactly the same cause of action.

3. When Nairobi cause 2127 of 2017 came up for hearing by way of an application on 23/10/2017 the claimants were ordered to serve the respondents' lawyers and come back to court for hearing of application on 6/11/2017.

4. The applicants in flagrant breach, rushed to Nyeri and filed this cause, sought and obtained orders.

5. The employment court is civil by nature and therefore, this court cannot entertain the suit before the earlier suit.

6. The orders obtained in this suit offend the law and were obtained without disclosing the existence of the earlier suit.

7. The claim herein is incompetent and ought to be dismissed in its entirety.

6. The Claimant filed submissions in opposition to preliminary objections where they averred that Nairobi cause No.2127 of 2017 was withdrawn on 23/10/2017 and cause No.2146 of 2017 instituted on 24/10/2017 meaning that Cause No 2164 of 2017 is not duplex since no cause was existing between the same parties on the same subject matter at the time of filing the later cause. They relied on the case of **PIL Kenya Limited Vs Joseph Oppong [2009] eKLR.**

7. They further aver that there was no need and/or legal duty placed upon them to serve the Respondents with the notice of withdrawal since they were not served with pleadings and/or any other document relating to the cause No. 2127 of 2017 in the first place.

8. They state that Cause No. 2164 of 2017 was filed at the Employment and Labour Relations Court at Nyeri but sitting in Meru. There is currently no permanent seat of this Court at Meru and documents filed at the Meru sub registry are received with the Nyeri Court stamp and

allocated dates as per the Nyeri Court records therefore the Claimants do not regulate the working of the Court including its registries and therefore had no reason whatsoever to question the date stamp used to receive documents relating to the suit.

Submissions

9. The Claimants filed their submissions where they submit that the Respondent did not disclose the reason if any necessitating their being sent on compulsory leave, they were humiliated and treated as criminals with police officers being tasked to accompany each and every Claimant to their desks to collect their phones and handbags, if any.

10. They aver that the approach employed by the 1st Respondent to send them of immediate compulsory leave was unfair and unlawful, these actions violate the Claimant's right to fair administrative action as enshrined in the Constitution of Kenya which amount to propagation of unfair labour practice by the Respondents. They relied on the case of **Fredrick Saundu Amolo Vs Principal Namanga Mixed Day Secondary School & 2 Others [2014] eKLR.**

11. They further aver that the Respondent did not comply with the disciplinary procedure set out in the disciplinary manual and also Human Resource Policy and Procedure. They have not issued the Claimants with any show cause letters stating the offences they are alleged to have committed and the charges thereof and inviting them to respond in writing.

12. The Respondent filed their submissions where they submit that the Applicants did not disclose to the Court in Nyeri that there was a similar suit in Nairobi which in itself is evident that the Applicant did not come to Court with clean hands, failing to disclose material facts such as the pendency of similar suits is clearly an abuse of Court process and should be discouraged at all means. They relied on the case of **Aviation & Airport Services Workers Union (K) Vs Kenya Airport Authority & Another [2014] eKLR.**

13. They further aver that by failing to disclose material facts to this Honourable Court, the Claimants have also offended the provisions of Order 4 Rule 1(f) of the Civil Procedure Rules. They state that the Claimants were sent on compulsory leave to pave way for streamlining of County operations and in particular, the finance department which was necessitated by numerous complaints, the 3rd Respondent received from the public and suppliers after incurring huge losses.

14. They also state that the Claimants have offended the provisions of the Civil Procedure Rules as no Notice of Authority has been filed authorizing Rhoda Mueni Kiilu to depone the affidavit on behalf of the other Claimants which is against Order 4 Rule 1(3) of the Civil Procedure Rules making this claim fatally defective and hence urge this Court to dismiss it with costs.

15. I have considered the averments by both parties and the submissions filed herein.

16. From the averments of both parties, the 1st Respondent suspended the operations of the Finance Department to allow radical surgery on 18/8/2017 as per his letter of even date. Over 437 staff were affected in this operation.

17. I have not seen any individual letter addressed to each individual staff explaining they are on suspension except that their salaries were withheld as deponed.

18. The Applicants were not served with letters of suspension or interdiction, which in itself offends the rule of fair administrative actions act, which entails that an employee should be informed of any administrative action that is taken against him.

19. Section 4(1) of the Fair Administrative Action Act states as follows:-

1) "Every persons has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

2) Every person has the right to be given written reasons for any administrative action that is taken against him.

20. The Applicants were never informed of the offence/s that are facing them. The 3rd Respondent is the body with the mandate to hire, discipline and dismiss employees of the County Government.

21. The disciplinary action if any instituted was instituted by the 1st Respondent who does not have jurisdiction to do what he initiated. Section 58 of the County Government Act establishes the County Public Service Board. Section 59 of County Government Act states the functions of the County Public Service Board as follows:-

1) "The functions of the County Public Service Board shall be, on behalf of the county government, to:-

a) establish and abolish offices in the county public service;

b) appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;

c) exercise disciplinary control over, and remove, persons holding or acting in those offices as provided for under this Part;

d) prepare regular reports for submission to the county assembly on the execution of the functions of the Board;

e) promote in the county public service the values and principles referred to in Articles 10 and 232;

f) evaluate and report to the county assembly on the extent to which the values and principles referred to in Articles 10 and 232 are complied with in the county public service;

g) facilitate the development of coherent, integrated human resource planning and budgeting for personnel emoluments in counties;

h) advise the county government on human resource management and development;

i) advise county government on implementation and monitoring of the national performance management system in counties;

j) make recommendations to the Salaries and Remuneration Commission, on behalf of the county government, on the remuneration, pensions and gratuities for county public service employees.

22. It is apparent that the Respondent herein insulted powers of the County Public Service Board by action he took in apparently suspending the Applicants. The action cannot stand as it were.

23. Whereas the Applicant also approached Court through Rhodah Kiilu, there is no indication that the other Applicants gave her authority to institute this claim against the Respondent. The entire application is therefore a non-starter in view of the omission by and against each party. I direct that the action contemplated against the Applicants be stayed for want of jurisdiction by 1st Respondent.

24. The 3rd Respondent on their part are not estopped from instituting proper disciplinary processes against their staff following due process.

25. In the meantime, the parties are free to try reconciliation processes to resolve this matter.

Dated and delivered in open Court this 25th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Muli for Claimants – Present

Kioko holding brief for Mr. Waiganjo for 2nd Respondent – Present