



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 NO. 3

1. For determination is an application dated 12 April 2018 by Ezra Chiloba (applicant) seeking orders

A.

B. spent

C. spent

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

E. Pending the hearing and determination of this Petition, 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 their internal memo dated the 6th of April 2018.

F. Pending the hearing and determination of this Petition, a Preservatory /Conservatory Order be issued in the first instance, restraining the Respondents by themselves, or their 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 6th April 2018.

G. An Order of this Court barring the Respondents by themselves, servants or agents howsoever from victimising and subjecting the Petitioner to vendetta, witch hunt, terror, psychological torture, intimidation, impunity, indignity, torment, ridicule, professional dishonour, stereotyping, profiling, vilifying the Petitioner in the devious scheme to hound him out of employment.

H. Any such further or other Order as this Court may deem fit and just to grant to safeguard the Petitioners constitutional fundamental right to fair labour practices.

I. Costs of this application be borne by the Respondent.

2. The 1st Respondent filed a replying affidavit on 20 April 2018 in opposition to the application on behalf of himself, the 3rd, 4th and 7th Respondents, while the 2nd, 5th and 6th Respondents filed separate replying affidavits on 27 April 2018.

3. The applicant filed a further affidavit and a case digest on 7 May 2018, the same day when the Court took arguments from the parties.

Background

4. The applicant was appointed as the Chief Electoral Officer by the 7th Respondent through a letter dated 13 January 2015 for a term of 5 years (renewable).

5. On 14 July 2016, the Cabinet Secretary, National Treasury designated the applicant as an Accounting Officer pursuant to the requirements of the *Public Finance Management Act, 2012*. The designation was renewed on 25 July 2017.

6. General Elections were called for on 8 August 2017, and the applicant in his position as Chief Electoral Officer and Accounting Officer played a pivotal role in the organisation and preparation of the general elections.

7. The general elections necessitated massive procurement of electoral items.

8. On 1 August 2017, Wafula Chebukati (1st Respondent), the Chair of the Independent Electoral and Boundaries Commission (7th Respondent) issued a Memo to the applicant asking him to give a written explanation on why a supplier, *Al-Ghurair* had printed in excess of 1% extra ballot papers contrary to a decision of the 7th Respondent (1,200,000 extra ballots instead of 196,115 ballots).

9. The applicant responded on the same day.

10. The matter did not stop there for on 21 December 2017, the 1st Respondent wrote a Memo to the Ag. Commission Secretary/Chief Electoral Officer asking to be furnished urgently with a performance report on ICT related contracts during the General Elections of 2017.

11. The Ag. Commission Secretary furnished the 1st Respondent with the report on 9 January 2018.

12. On 6 January 2018 (the memo is dated 6 January 2018 but it refers to events after that date), the 1st Respondent wrote back to the applicant seeking further clarifications on the tenders/contracts.

13. The applicant was requested to respond within 7 days and he responded through a Memo dated 19 February 2018.

14. In the meantime, the 1st Respondent had on 6 February 2018, issued a Memo to Ag. DLPA requesting for a status report on Election Petitions arising out of the elections held on 8 August 2017 and 26 October 2017.

15. It also appears that the 7th Respondent had caused an *Internal Audit* on Procurement related to the general elections to be conducted and a presentation was made to the *Audit Committee* on 13 March 2018.

16. The presentation of the *audit report* was also made to the plenary of the 7th Respondent on 16 March 2018, and it directed that that the *Audit & Risk Committee* make further inquiries.

17. A team comprising the Internal Audit Manager and Director Audit, Risk and Compliance issued a report on 5 April 2018.

18. The report noted that there had been non-adherence to procurement laws as well as of *resolutions* made by the plenary of the 7th Respondent.

19. On 6 April 2018, the 7th Respondent held a meeting where among the *resolutions* made included a decision to send the applicant on *compulsory leave* for three months to enable the undertaking of a *wider audit of major 2017 election related procurements*.

20. On the same day, the 1st Respondent wrote to the applicant, notifying him of the decision to send him on *compulsory leave* for three months to facilitate the carrying out of a comprehensive audit.

21. The applicant felt aggrieved and he wrote to the 2nd Respondent in her capacity as the Acting Chairperson on 9 April 2018 to register his concerns/misgivings about sending him on *compulsory leave*.

22. In a response on the same day, the 2nd Respondent disowned being part of the purported decision to send the applicant on *compulsory leave*.

23. On 12 April 2018, the applicant moved Court seeking the orders already enumerated herein above.

Case for the applicant

24. In attempting to assail the decision to send him on *compulsory leave*, the applicant contended that there was no quorum as envisaged by the second schedule to the Independent Electoral Boundaries Commission Act, 2011, when the decision to send him on *compulsory leave* was made.

25. Secondly, the applicant contended that he was not given an opportunity to be heard/informed that the *audit report* would form the agenda of the meeting on 6 April 2018, and that in any case the *audit report* did not contain adverse findings against him warranting *compulsory leave*.

26. Thirdly, the applicant challenged the decision to send him on *compulsory leave* as having no contractual foundation in the 7th Respondent's *Human Resources and Administration Policies and Procedures Manual*.

27. The decision, according to the applicant was contrary to the *Code of Conduct* for Members of the 7th Respondent, violated the right to fair administrative action, the national values and principles of governance, the right to equality and freedom from discrimination, right to freedom and security of the person and right to fair labour practices.

28. In the view of the applicant, the *compulsory leave* was tantamount to removing him from office without complying with the provisions of section 10(8) of the Independent Electoral Boundaries Commission Act, 2011.

Case for the 2nd, 5th and 6th Respondents

29. The 2nd and 6th Respondents maintained that the *audit report* which appeared to precipitate the decision to send the applicant on *compulsory leave* was not part of the agenda for the meeting of 6 April 2018, but was raised by the 1st Respondent as a *matter arising/any other business*.

30. These 2 Respondents deposed that they dissented to the presentation of the *audit report*, and to the agenda/decision to send the applicant on *compulsory leave*, and that they left the meeting thereafter.

31. According to these Respondents there was no quorum at the meeting where the decision to send the applicant on *compulsory leave* was made.

32. The 5th Respondent deposed that she was out of the country on the material date.

Case for 1st, 3rd, 4th and 7th Respondents

33. These Respondents in opposing the application started off by asserting that the applicant had not met the threshold for grant of conservatory orders.

34. As to the authority to send the applicant on *compulsory leave*, these Respondents drew the attention of the Court to section 11A of the Independent Electoral Boundaries Commission Act to suggest that in carrying out *the oversight mandate*, they could lawfully send the applicant on *compulsory leave*.

35. It was also contended that the majority of the Commissioners present at the meeting of 6 April 2018 agreed to expand the scope of the *audit* and to send the applicant on *compulsory leave*.

36. According to these Respondents, the withdrawal of the 2nd and 6th Respondents from the meeting of 6 April 2018 was of no effect as to the validity of quorum and of the decision to send the applicant on *compulsory leave*, and solace was found in the case of *Duffy v Loft* 17 Del. Ch. 140.

37. In the view of these Respondents, no adverse decision had been made against the applicant and that it was only investigations which were being conducted in terms of the *Regulations*, and therefore no right of the applicant had been violated by sending him on *compulsory leave* (reference was made to *James Omariba Nyanga & Ar v Speaker of the County Assembly of Kisii & 2 Ors* (2016) eKLR.

38. These Respondents referring to *Judith Mbayah Tsisiga v Teachers Service Commission* (2017) eKLR urged that the Court should not intervene in an employer's disciplinary proceedings unless in exceptional circumstances.

39. According to these Respondents, there was no legal requirement to hear the applicant at the investigative stage (*Nancy Makhoha Baraza v Judicial Service Commission* (2012) eKLR.

40. Relying on *Humphrey Makhoka Nyongesa & Ar v Communications Authority of Kenya & 2 Ors* (2018), it was urged that *compulsory leave* is not part of disciplinary process.

41. In sum, these Respondents contended that *public interest* tilted against granting the orders sought by the applicant.

The law on conservatory orders

42. The test for grant of *conservatory orders* was outlined by the Supreme Court in the case of *Gatirau Peter Munya v Dickson Mwendwa Kithinji & 2 others* (2014) eKLR, and the test has been explained in several decisions of the High Court and Court of Appeal (see for example *Lipisha Consortium Ltd & Ar. v Safaricom Ltd* (2015) eKLR.

43. The Supreme Court laid the test thus

‘Conservatory orders’ bear a more decided *public law* connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the *public interest*. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as ‘the prospects of irreparable’ harm occurring during the pendency of a case; or ‘high probability of success’ in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the *inherent merit of the case*, bearing in mind the *public interest*, the *constitutional values*, and the *proportionate magnitudes*, and *priority levels attributable to the relevant causes*.

44. In summary, a party seeking *conservatory orders* should demonstrate, a *prima facie* case with a likelihood of success; prejudice likely to be suffered if the orders are not granted; grant of the orders would enhance constitutional values and objects; that a Petition would be rendered nugatory if the orders are declined and that public interest favours grant of the orders (see *Lipisha Consortium Ltd & Ar. v Safaricom Ltd* (2015) eKLR.

45. This Court is therefore enjoined to consider whether the case material placed before it by the applicant fall within the threshold principles set out above to warrant grant of conservatory order(s) as sought.

46. And because the Petition is still pending hearing on the merits, the Court cautions itself that it must avoid making definitive findings on the facts or the law before hearing full addresses, unless it is absolutely necessary.

Evaluation

Common law

47. Although the Court intimated in its first ruling that this dispute herein might rotate around the common law powers of an employer, none of the parties saw it fit to make full addresses on that aspect of the dispute during the *inter partes* hearing.

48. After giving due consideration to the material placed before it and hearing from the parties, an advantage the Court did not have at the *ex parte stage*, the Court is of the view that the dispute at this stage revolves on the *how question* rather than on the *why question* of the sending of the applicant on *compulsory leave*.

49. The employment relationship always connotes both *economic control* by the employer, in that the employee always does more than the consideration paid for the work, and *legal subordination* in that the employer has not only disciplinary powers over the employee but the power to demand how and whether the work ought to be performed.

50. This relationship was best understood in the evolution of the nature of master/servant from the mediaeval ages of the feudal lord. The master at that time had absolute power over the servant.

51. But there has been an evolution mostly attributed to inroads made through constitutional and legislative interventions, international standards and societal pressures.

52. It is thus that we have contracts of employment and statutes setting out the rules of engagement.

53. While the master of yore could do with the employee as he wanted, the modern employer's hands are tied by the myriads of pieces of legislation which have intervened in the contractual context arena (or agreements with a Union where one exists). The employee is no longer a chattel of the employer.

54. The statutory and in some cases constitutional intervention has assured employees of certain protections.

55. In Kenya, the general protections are found primarily in the Constitution, 2010, the Employment Act, 2007, the Labour Institutions Act and the Labour Relations Act.

56. For those serving in the public office, various legislation such as the *Public Service Commission Act, the County Governments Act and the Judicial Service Commission Act* have provided for protections which are not assured to the ordinary employee.

57. In the instant case, the Constitution, 2010, the Independent Electoral & Boundaries Commission Act, the Employment Act, 2007 and the applicant's contract and terms and conditions of service as set out in the *Human Resources and Administration Policies Manual* become invaluable instruments in determining whether the 7th Respondent was acting within the law/contract in sending the applicant on *compulsory leave*.

58. And before examining the merits of the application, the Court wishes to note that judges of this Court appear to have taken parallel positions on the lawfulness of what is referred to as *compulsory leave* and such cases are *Elizabeth Cherono Kurgat v Kenya Literature Bureau* (2014) eKLR where Rika J equated it to suspension or interdiction; *John Mwaniki v Joshua Irungu & another* (2017) eKLR where I held that *compulsory leave* must be anchored on a contractual or statutory foundation; *Thomson Kerongo & 2 others v James Omariba Nyaoga & 3 others* (2017) eKLR where Onyango J found that *there is no law prohibiting an employer from sending an employee on compulsory leave where the circumstances warrant it and provided it is an interim measure. Compulsory leave has the effect of only removing an employee from the workplace temporarily without interfering with his terms of service. An action is only illegal if it is prohibited by law. Not all lawful matters are prescribed by law; Humphrey Makokha Nyongesa & another v Communications Authority of Kenya, & 2 others* (2018) eKLR and *John Ogutu Ragama v Bandari Sacco Limited* (2017) eKLR.

59. It is my hope that the issue will in good time reach the Court of Appeal to provide a definitive legal position.

Contractual authority

60. Common sense would dictate that it may be necessary at times to remove an employee from the workplace pending the outcome of a personnel/human resource investigation.

61. The objective would be to allow investigations to proceed without disruption of evidence, or to preserve a safe, orderly, and professional work environment.

62. In some jurisdictions, the removal may take the form of a *temporary reassignment* or *administrative leave/investigatory suspension*.

63. The terms *administrative leave* and *investigatory suspension* may therefore conceptually be terms of art, depending on the prevailing legal framework in a jurisdiction.

64. In this country, *compulsory leave* or *stepping aside* have gained notoriety in the recent past and more so as a mechanism of dealing with governance challenges within the public service.

65. While *compulsory leave* would be at the say so of the employer (unilateral decision), *stepping aside* suggests a voluntary or mutual concession on the part of the employee.

66. Some organisations including those in the public sector have expressly provided for *compulsory leave* in the contractual instruments and one such instance is the situation obtaining in the case *Humphrey Makhoka Nyongesa & Ar v Communications Authority of Kenya & 2 Ors* (2018).

67. In terms of the 7th Respondent's *Human Resources and Administration Policies and Procedures Manual*, the types of leave envisaged are *public holidays, religious holidays, annual leave, compassionate leave, sick leave, maternity leave, paternity leave and study leave*.

68. *Compulsory leave strictu sensu* is not contemplated therein.

69. The *Human Resources and Administrative Policies and Procedures Manual* in clause 10.2.5.1 and 10.2.5.2 however authorises the 7th Respondent to *interdict* an employee pending full investigations in cases of minor offences, and to *suspend* in cases of gross misconduct.

70. Considering that the 7th Respondent's *Human Resources and Administrative Policies and Procedures Manual* contemplates *interdiction* to facilitate investigations and *suspension* in serious cases, (the type of scenario it found itself in regard to the procurement over the general elections), it is doubtful at this stage whether the 7th Respondent could side step the processes allowing it to carry out investigations and or conduct an audit to establish wrong doing on the part of the applicant.

71. The doubt is even more apparent when comparative jurisprudence has tended to equate this type of leave with constructive dismissal (see *Potter v New Brunswick Legal Aid Services Commission* (2015) SCC 10).

72. The Court therefore can conclude that sending the applicant on *compulsory leave* did not have contractual authority. There were other contractual options available to the 7th Respondent but it did not consider them (or reveal why they were not considered).

Statutory authority

73. The primary statute making provision for the 7th Respondent's operations (Independent Electoral & Boundaries Commission Act) has not expressly provided for *compulsory leave* as a *sine qua non* for investigations which may lead to the removal of the Chief Electoral Officer from office even for a temporary period.

74. The employment law statute of general application, the Employment Act, 2007 is also of no assistance as to wherefrom the 7th Respondent's or any other employer for that matter (as an employer's) source of power to send an employee (and in this case the applicant) on *compulsory leave*.

75. The 7th Respondent however contended that it drew the authority to send the applicant on *compulsory leave* from its *oversight mandate* as provided for in section 11A of the Independent Electoral & Boundaries Commission Act.

76. And the purpose of the *compulsory leave*? It was asserted that it was necessary to carry out comprehensive investigations into procurement related to the general elections of 2017, and because it was not yet clear as to the outcome, the applicant could be vindicated by the investigations.

77. It is not clear to the Court, and the Respondents did not explain why they relied on a broad provision of law rather than the specific contractual provisions in dealing with a case where wrong doing was suspected of having been committed.

78. In the view of the Court, that broad provision of *oversight mandate* could not triumph over the contractual and legal provisions for dealing with cases where disciplinary action may be implicated considering the constitutional, statutory and contractual protections assured public office holders such as the applicant.

79. Having come to that view, the Court must consider whether the now accepted principles of constitutional values, public interest and proportionality would tilt in favour of granting *conservatory orders* sought in what at face value appear to be in the realm of private law.

80. The position of Chief Electoral Officer is underpinned by specific statutory provisions. It is a high position of trust and is meant to advance electoral democracy.

81. The holder of such a position should be beyond reproach.

82. The 7th Respondent as a constitutional organ on its part should also uphold the highest standards in its operations. The high standards include fidelity to the Constitution, the law and mutually agreed contractual terms.

83. In the view of the Court, it would not be proportionate or in the public interest to uphold a decision taken without legal or contractual foundation by an employer.

84. Before concluding, the Court wishes to observe that the applicant may also want to search his soul in respect of the circumstances surrounding the general elections of 2017 considering the high trust and confidence which was expected of him in his high public office.

85. It is also apparent to the Court that this ruling may have addressed the gravamen of the applicant's case and he may well have to take legal advice on what remains of the Petition.

Orders

86. In consideration of the foregoing, the Court will allow the application in terms of order F in the motion dated 12 April 2018.

87. The order issued hereby does not restrain the Respondents from dealing with the applicant's case in a manner which is provided for in terms of contractual agreement.

88. Costs in the cause.

Delivered, dated and signed in Nairobi on this 14th day of June 2018.

Radido Stephen

Judge

Appearances

For Petitioner Mr. Wandabwa instructed by Wandabwa Advocates

For 1st, 3rd, 4th and 7th Respondents Ms. Awuor instructed by Prof. Tom Ojienda & Associates

For 2nd, 5th and 6th Respondents Mr. Gitonga/Ms. Anyango instructed by Gitonga Mureithi & Co. Advocates

Interested Party did not participate

Court Assistant Lindsey