



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 386 OF 2018**

**JUDY CHELANGAT KIMETO.....CLAIMANT**

**- VERSUS -**

**YOUTH ENTERPRISE DEVELOPMENT FUND.....1<sup>ST</sup> RESPONDENT**

**MORIASI ARABU JOSIAH.....2<sup>ND</sup> RESPONDENT**

**RONALD OSUMBA.....3<sup>RD</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 8<sup>th</sup> June, 2018)

**JUDGMENT**

The claimant filed the statement of claim on 22.03.2013 through McKay & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the respondents' decision to suspend the claimant is illegal, null and void.
- b) An order quashing the suspension letter dated 05.03.2018.
- c) A permanent injunction restraining the respondents from investigating the claimant as per their letter of 05.03.2018.
- d) An order quashing the findings of the Board as contained in the suspension letter of 05.03.2018.
- e) Any other relief as the Court may deem fit.
- f) Costs of the suit.

The claimant, together with the statement of claim, filed an application by way of a notice of motion dated 21.03.2018 and supported with the claimant's affidavit and the attached exhibits.

The respondents filed on 17.04.2013 the replying affidavit of Josiah Arabu Moriasi, the 2<sup>nd</sup> respondent and the 1<sup>st</sup> respondent's chief executive officer. The respondents appointed K. Mberia & Partners Advocates to act for them in the suit.

The claimant filed a supplementary affidavit on 23.04.2018 together with the claimant's supplementary list of documents.

On 26.04.2018 by consent of the parties, it was ordered that the suit be determined on the basis of pleadings and documents on record together with the submissions to be filed for the parties.

The respondent employed the claimant as a Lending and Investments Manager effective 12.03.2013 and the respondent's board reserved the right to terminate the contract based on the claimant's performance. It was the claimant's case that she had a clean record of service.

Sometimes in January 2018, it was reported to the claimant by an officer from North Eastern region that there had been some suspicious disbursements in the loan book for that region. The matter was scrutinized by the claimant and it was found out that the credit and lending department of the respondent had not sanctioned the loan. The claimant then forwarded the case to the finance department to investigate the matter. Internal audit was undertaken. The claimant's case is that she provided all documents needed during the audit. It is her further case that under the respondent's credit policy, loans are processed by the credit and lending department but disbursed by the respondent's finance

department. The relevant payment voucher is signed by various authorized officers including the 2<sup>nd</sup> respondent.

The claimant's further case is that pursuant to the audit report in the matter, the respondent's board met on 02.03.2018 and its decision was communicated to the claimant by the letter dated 05.03.2018 suspending the claimant to pave way for further investigations. The letter stated as follows:

**“Dear Judy,**

**RE: NOTICE OF SUSPENSION PENDING FURTHER INVESTIGATIONS**

**Following a special Full Board meeting held on 2<sup>nd</sup> March 2018, it was resolved that you proceed on suspension with effect from the date of this letter.**

**This is meant to allow for further investigations relating to possible loss of funds through irregular multiple disbursements, thus contravening the Fund's credit policy.**

**The Board found you negligent in undertaking your duties as the Head of Leading and Investment Department based on the following reasons:**

- i) That you consistently received the email communications on purported failed EFTs but did not confirm their authenticity prior to approval for re-disbursement;**
- ii) That you failed to properly delegate authority to approve schedules for disbursement thus allowing any officer from the department to sign and forward the schedules for disbursement;**
- iii) That poor departmental supervision led to multiple disbursements and fictitious repayment of loans from the suspense account; and**
- iv) That you failed to update and share status reports to aid in monitoring and loan recoveries.**

**You are hereby directed to handover any Fund's assets or otherwise in your possession to the Ag. Credit Manager. Terms and conditions regarding suspension of public officers shall apply.**

**Yours Sincerely,**

**Signed**

**MORIASI ARABU JOSIAH**

**CHIEF EXECUTIVE OFFICER”**

The claimant's case is that she is not opposed to any investigations or disciplinary measures but the same should be both substantively and procedurally fair. Thus, it is her case that the suspension should be set aside and the Court directs that due process be followed.

In particular the claimant's case is that if at all there were grounds for commencing disciplinary proceedings, the 1<sup>st</sup> respondent ought to have complied with its disciplinary procedures as set out in its Human Resource Manual. Her case was that the board had already found the claimant culpable without due process and the intended investigations were a smokescreen calculated to fish for evidence to justify the board's findings.

The claimant's case is that she took steps to initiate the internal audit as a whistle blower and had the respondents taken into account and followed its internal procedures and regulations as well as accorded her an opportunity to be heard, then the outcome would have been different. Further, she had not been shown the internal audit report in issue prior to the suspension or been asked relevant or any question by the internal auditors prior to the audit report being concluded and relied upon to suspend her.

The claimant's case is that clause 14.5 of the respondent's Human Resource Manual was not invoked in so far as:

- a) the claimant was not served with a statement of alleged offences committed;
- b) the claimant was not accorded an opportunity to defend herself;
- c) the claimant was not given a formal hearing;
- d) the claimant was not accompanied with a representative at disciplinary hearing;
- e) the claimant was not served with a show cause letter.

Further, the claimant's case was that the suspension breached clause 14.6 (g) sub-clauses 2 under which suspension could be imposed only where:

- a) the claimant had a criminal proceeding of serious nature instituted against her; or
- b) the claimant had been convicted by a court of law of a criminal offence and the question of his dismissal was being contemplated;  
or
- c) the claimant had been charged with gross misconduct and the issue of her dismissal was being contemplated.

The respondent's case is that the board's meeting of 02.03.2018 was convened for purposes of discussing the special audit report affecting matters to do with wrongful and fraudulent disbursements of funds to various groups without following the proper procedures. The audit report had found that the lending and investment department (headed by the claimant) was culpable of generating disbursements schedules with inclusion of purported failed EFTs without confirmation from the finance department; disbursements done to groups without physical evidence of repayment of previous loans; and lack of proper scrutiny of group status reports which would have raised suspicion on abnormal group loan repayments and high frequency of subsequent borrowing by the same groups. Accordingly, the claimant was found to be responsible for failing to perform her duty in accordance with the Manual and the board resolved to send her on suspension to facilitate further investigations.

It was the respondents' case that at the end of the investigations, the claimant will be accorded a hearing as per the provisions of the manual and the Employment Act, 2007. The claimant being a senior officer, the investigations would not be effectively undertaken in her presence. Further, negligence in performance of duties was contrary to the provisions of the Act and the Manual as it constituted gross misconduct (per section 44 of the Act and clause 14.3 (iv) of the manual) which states that it is gross misconduct if an employee willfully neglects to perform any work it was her duty to perform or carelessly and improperly performs any work which, from its nature, it was her duty under contract to have performed carefully and properly. It was said for respondents that it was a misconception by the claimant that on 02.03.2018 the Board sat as a disciplinary committee because further investigations were being carried out and once concluded and the claimant is considered culpable, she would be called upon to defend herself in a fair process. Further, the salaries withheld during suspension would be released if the claimant was not found culpable.

The **1<sup>st</sup> and main issue** for determination is whether the suspension is in accordance with the respondent's Manual. Clause 14.6 (g) (2) of the Manual on suspension provides that an officer may be suspended if the officer has a criminal proceeding of serious nature instituted against the officer; is convicted by a court of law of a criminal offence and the question of the officer's dismissal is being contemplated; or has been charged with gross misconduct and the question of the officer's dismissal is being contemplated. The Court returns that all the conditions that must pre-exist prior to imposition of a suspension as contemplated under the provision have not been shown to exist. There is no criminal charge the claimant is facing; the claimant has not been convicted of a serious or other crime; the claimant has not been given a show-cause notice alleging gross misconduct; and in any event it has not been shown that the dismissal of the claimant is contemplated. On that account, the suspension letter is unfair as it is in breach of that provision of the Manual. Further, as contemplated under the provision, the Head of Human Resource and Administration (HHRA) did not make appropriate recommendation prior to the offensive suspension being issued. The Court returns that the procedure leading to the suspension was in breach of the Manual.

The claimant has lamented that she has been found culpable without due process as per the Employment Act, 2007 and the provisions of the Manual. The respondents are in agreement that the provisions of the Manual and the Act apply but it is their case that in the instant case the disciplinary process has not yet commenced. The suspension letter clearly states that the claimant had been found culpable of negligence in the undertaking of her duties. The Court returns that such a finding could be arrived at only after due process of a show-cause notice and the claimant being heard in self defence. The respondents do not deny that the disciplinary procedure had not yet been invoked or followed. Thus, the court returns that the claimant was entitled to lament as she did. The suspension was procedurally unfair, substantively unfair and it amounted to a proposal of a further investigation but which would not serve genuine ends of justice because the claimant had already been found negligent by the board and therefore culpable, but the finding being arrived at devoid or free of due process as set out in the Manual or section 41 of the Employment Act, 2007.

To answer the **1<sup>st</sup> issue** for determination the Court returns that the suspension was not in accordance with the respondent's Human Resource Manual.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to remedies as prayed for. The Court returns that the claimant is entitled except that in prayer (c) the investigations are permissible only in accordance with the relevant provisions of the Human Resource Manual and the Employment Act, 2007.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the 1<sup>st</sup> respondent's decision to suspend the claimant is illegal, null and void.
- b) An order is hereby issued quashing the suspension letter dated 05.03.2018 with effect from 05.03.2018 and all withheld monthly payments be released to the claimant by 01.07.2018 failing, interest to run at Court rates from the date of this judgment till full payment.
- c) There is issued the permanent injunction restraining the 1<sup>st</sup> respondent from investigating the claimant as per their letter of 05.03.2018 and any disciplinary investigations and proceedings thereafter, if necessary, shall be in strict compliance with the relevant provisions of the 1<sup>st</sup> respondent's Human Resource Manual and the Employment Act, 2007.

d) An order quashing the findings of the board against the claimant as contained in the suspension letter of 05.03.2018.

e) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 8<sup>th</sup> June, 2018.**

**BYRAM ONGAYA**

**JUDGE**