



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 90 OF 2017

(Before Hon. Justice Hellen S. Wasilwa on 6th June, 2018)

KENYA COUNTY GOVERNMENT WORKERS UNION1ST PETITIONER
JOHN BARONGO OMBONGI.....2ND PETITIONER
EVANS MORIRE.....3RD PETITIONER
ERICK ODHIAMBO ABWAO.....4TH PETITIONER
NEWTON MUNG'ALA5TH PETITIONER
KARISA IHA.....6TH PETITIONER
JULIUS KIHANYA NDICHU.....7TH PETITIONER
BERNARD P.W. MURAGE8TH PETITIONER
VIOLET AVOGA OYANGL.....9TH PETITIONER
JOHN MBUGUA KARUKU.....10TH PETITIONER
NYAGARA NYAMWEYA.....11TH PETITIONER
BENJAMIN MWANGI WANG'OMBE.....12TH PETITIONER
PETER M. MURITHI.....13TH PETITIONER

VERSUS

THE COUNTY SECRETARY, COUNTY GOVERNMENT OF NAIROBI.....1ST RESPONDENT
HON. MIKE MBUVI SONKO THE GOVERNOR, NAIROBI COUNTY2ND RESPONDENT
COUNTY GOVERNMENT OF NAIROBI.....3RD RESPONDENT
PUBLIC SERVICE BOARD, COUNTY GOVERNMENT OF NAIROBI.....4TH RESPONDENT

RULING

1. The Application before Court is the one dated 17/10/2017 filed by the Applicant/Petitioners herein under Certificate of Urgency through the firm of Brian Otieno and Company Advocates.

2. This Application was filed under Rule 17(1) (4) (5), Rule 28, Employment and Labour Relation Procedure Rules (2016), under Articles 10, 27, 28, 41, 47, 50, 176, 179, 232, 235 and 236 of the Constitution of Kenya 2010 and Rule 12, 13, 20, 21 and 33 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Right and Freedoms of the Individual) High Court Practice and Procedure Rules, 2013.

3. The Applicants sought orders as follows:-

a. THAT this application be certified as urgent and service of the same be dispensed with in the first instance and heard on the priority basis.

b. THAT pending the hearing and determination of this application inter-partes, this Honourable Court be pleased to issue a conservatory order by way of injunction restraining the Respondents, their officers, staff, agents, servants, and/or any other persons acting at their behest howsoever or any of the Respondents from victimizing or airing or publishing in the printing media of any content or information adverse to their reputation and standing or which ridicules and portrays the 2nd to 13th Petitioner negatively in the eyes of the general public.

c. THAT pending the hearing and determination of this application inter-partes this Honourable Court be pleased to issue an order staying the letters of compulsory leave addressed to the 2nd to 13th Petitioner and/or decision contained therein sending the Petitioners on compulsory leave.

d. THAT pending the hearing and determination of the Petition, this Honourable Court be pleased to issue an order staying the letters of compulsory leave addressed to the 2nd to 13th Petitioner and/or decision contained therein sending the Petitioners on compulsory leave.

e. THAT pending the hearing and determination of this application inter-parties this Honourable Court be pleased to issue an order compelling the Respondents to unconditionally allow access/ingress to the 2nd to 13th Petitioner within the Respondents offices or place of work.

f. THAT pending the hearing and determination of this Petition this Honourable Court be pleased to issue an order compelling the Respondents to unconditionally allow access/ingress to the 2nd to 13th Petitioner within the Respondents offices or place of work.

g. THAT costs be provided for.

4. The Applications is based on the following grounds:-

1. On 26th September, 2017, the 1st Respondent issued letters to the 2nd to 13th Petitioner sending them on compulsory leave, without laying out any allegations and/or reasons for the said action and/or according them a chance to be heard.

2. On 4th October, 2017 and through subsequent press statements the 2nd Respondent indicated that he sent the 2nd to 13th Petitioner on an indefinite compulsory leave effective from 26th September, 2017 for unsubstantiated allegations of and grabbing.

3. The said press statement and the letters sending the 2nd to 13th Petitioner on compulsory leave was followed by barring the 2nd to 13th Petitioner from accessing their offices. This situation left the 2nd to 13th Petitioner bewildered of the happenings at their place of employment, which unreasonably deprived them access and ownership of personal belongings a their paces of work.

4. The process and mode of sending the 2nd to 13th Petitioner on compulsory leave constitutes a gross violation by the Respondents of the National Values and Principles of Governance set out in article 10 of the Constitution.

5. That the said letters sending the 2nd to 13th Petitioner on compulsory leave were drafted by the County Secretary who lacks the authority and powers to address disciplinary issues which is under the direct supervision of the County Public Service Board.

6. That the said letters further failed to adhere to the laid out procedures prescribed under the Collective Bargaining Agreement.

7. In addition, the disciplinary processes which ought to be initiated by the Human Resource Department as provided for under Section 58 and 59 of the County Government Act were not adhered to.

8. Further, the Respondents' decision, action and omissions offend the rule of law and natural justice hence violated the 2nd to 13th Petitioner's human dignity and rights as enshrined by articles 27, 28, 41, 47 and 50 of the Constitution.

9. The sending of the 2nd to 13th Petitioner on compulsory leave was actuated by apparent malice and ill-will on the part of the 2nd Respondent contrary to the provisions of the law.

10. The 2nd to 13th Petitioner are now apprehensive that the Respondents may at any time move to advertise a vacancy and fill their positions following the said unlawful compulsory leave.

11. The 2nd to 13th Petitioner are further apprehensive that the 2nd Respondent may further tarnish their names by making unwarranted defamatory statements in a manner adverse to their reputation and standing and/or which ridicules and portrays them negatively in the eyes of the general public, as shown vide the statement in the daily nation dated 4th October 2017.

12. The said words have injured reputation, diminished the esteem, respect, good will and/or confidence in which the 2nd to 13th Petitioner are held, they have also excited adverse, derogatory or unpleasant feelings for opinions against them and further exposed them to contempt, hatred, and/or ridicule.

13. The Respondents through their actions have demonstrated their total disregard to the spirit of the Constitution and the rule of law.

14. The decision of the Respondents is not only outrageous but also capricious and whimsical.

15. The Respondents have abdicated their duty under the law by failing to respect the law and subverting the same.

16. That the Respondents have collectively acted in an opaque manner by denying the 2nd to 13th Petitioner, an opportunity to know who their accusers are, the nature of the accusations, when the accusations were made and the reasons why the alleged accusations or complaints were not brought to their attention immediately.

17. That the decision to send the 2nd to 13th Petitioner on compulsory leave was made without jurisdiction since it is the mandate of the County Public Service Bard Secretary to institute disciplinary proceedings against persons who have committed any wrong doings at their places of work.

18. That the Respondents have collectively acted towards the 2nd to the 13th Petitioner in a manner that is manifestly irresponsible and inimical to good leadership and governance.

19. That the letters were issued contrary to the provisions of Section 58 of 59 of the County Government Act which bestows the responsibility to effect disciplinary action on the County Public Service Board Secretary and not on the County Secretary.

5. This Application was supported by the affidavit of one Roba S. Duba the 1st Petitioner National General Secretary who has deponed that the 2nd to 14th Petitioners are members of the 1st Petitioner and who were engaged by the 3rd Respondent in the Legal Department as seen from Annexures RSD-2.

6. The Deponent also depones that the 2nd to 13th Petitioners/Applicants were engaged under terms and conditions obtaining in the Collective Bargaining Agreement negotiated between the Respondents and the 1st Petitioner which terms stipulated among others, the disciplinary process to be followed in case of breach- RSD-3 is the said Collective Bargaining Agreement.

7. The Deponent further reiterates averments in the Grounds above and states that the act by the 2nd Respondent of sending the Applicants on compulsory leave is contrary to the law and disregard to the spirit of the Constitution and the rule of law.

8. They depones that Section 58 of the County Government Act provides for the appointment of the County Public Service Board, which is vested with the functions of establishing and abolishing offices in the County Public Service. It is this board that can appoint persons to hold or act in offices of the County Public Service and also exercise disciplinary control over, and remove persons holding or acting in those offices.

9. The Petitioners/Applicants also depones that the County Public Service Board is prohibited by virtue of Section 79 of the County Government Act from issuing directions contrary to the Constitution which states as follows:-

1. In exercising its disciplinary powers, the County Public Service Bard shall observe the principles of natural justice.

2. No public officer may be punished in a manner contrary to any provisions of the Constitution or any Act of Parliament.

10. They depones that the Respondents acted in contravention of the law since the 2nd to 13th Applicant/Petitioners were not issued with any show cause notice nor were they taken through a fair administrative process contemplated under Article 47 and 48 of the Constitution.

11. When this Application came before Court ex parte on 17.10.2017 Hon. Judge Mbaru certified Application urgent and gave Interim Conservatory order by way of Injunction and ordered that the Applicants remain on leave but be paid their monthly wages, benefits and allowances when due but to remain out of their work places during their leave.

12. The Respondents filed their replying affidavit on 8/12/2017 through CM Advocates LLP. The affidavit was deponed to by one Leboo Ole Morintat the 3rd Respondent's Acting County Secretary and current occupier of the 1st Respondent. He also deponed that he had the

authority of 2nd and 4th Respondents to swear the affidavit on their behalf.

13. He deponed that the current Application is premature and an abuse of the legal and Court process. He avers that the 2nd to 13th Petitioners are Advocates of the High Court of Kenya and employees of the 4th Respondent but deployed in the Legal Department of the 3rd Respondent wherein they have been serving for diverse periods.

14. However, complaints were lodged with the 2nd Respondent over illegal sale of private land and eviction of private land owners which actions were sanctioned, engineered, perpetuated and/or abated by officers of the 3rd Respondent.

15. That investigations revealed that there was a cartel involving members of Lands, Rates, Legal, Debt Collection and Urban Planning of the 3rd Respondent whereof they would target certain private properties within the County, conspire with others within and outside the 3rd Respondent, inflate property rates, file frivolous Court cases purporting to recover fictitious and exaggerated rates, fraudulently obtain ex-parte decrees, attach and sell private properties in purported execution of the decree.

16. Other averments refer to the Deponent as a Senator yet the Deponent has already stated he is the 3rd Respondent's Acting County Secretary (see paragraph 10).

17. The rest of the averments refer to illegalities purportedly committed by the Applicants in relation to Nairobi Block/209/403/3, and Civil case 7 of 2013 where the rates demand of 12,920,000.00 was fake and did not emanate from the Respondents.

18. The Respondents want the Application dismissed as the same is premature and that conservatory orders sought should not be given.

19. I have considered averments and submissions of the parties herein. I note that the Application sought seeks stoppage of an investigation and disciplinary process that has been initiated against the Applicants. Some of the reasons the Applicants seek orders sought are that the process is being conducted by persons not endowed with the powers to do so. Indeed Section 58 of County Government Act which provides for appointment of the County Public Service Board also sets out the duties and powers of the said Board.

20. Section 58 of County Government Act states as follows:-

“Composition of the County Public Service Board

1. The County Public Service Board shall comprise:-

- a. a chairperson nominated and appointed by the county governor with the approval of the county assembly;**
- b. not less than three but not more than five other members nominated and appointed by the county governor, with the approval of the county assembly; and**
- c. a certified public secretary of good professional standing nominated and appointed by the governor, with the approval of the county assembly, who shall be the secretary to the board.**

2. The appointment of the members of the Board shall be through a competitive process”.

21. Further Section 59 of the County Government Act 2012 provides for 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. Some of the duties of the Public Service County Board is to discipline errant staff. The letters sending the Applicants on leave are signed by one Leboo who is not the Public Service County Board and he does not explain his relationship to the said Board. It is apparent that the disciplinary process has been initiated by an entity not clothed with powers to carry out the process.

23. This Court would not normally interfere with internal disciplinary processes between an employer and an employee save where the process is flawed and the interference will be limited to having the process put on course so as not to be laden with illegalities.

24. This has been the finding of this Court in various cases. (See **Kenya Airways Limited vs. Aviation and Allied Workers Union and 3 others (2014) eKLR; Prof Gitile Naituli vs University Council, Multimedia University of Kenya (Case No. 1200/2012** where the Court observed that:-

“The prerogative of the employee in managing its business and administration of its staff should not be unduly styled by judicial intervention through issue of provisional injunctive measures such as those sought by the Claimant. The Employment Act and the Industrial Court Act seek to protect the weakness of the two parties in an employment relationship and not to derive the employer of the management prerogative altogether”.

25. This same position is reiterated in Cause 2244/2014 – **Nixon Bugo vs the Alliance for a Green Revolution in Africa** where J. Nderi stated as follows:-

“Courts of law should be very slow to interfere in the internal disciplinary process at work unless it is manifestly clear that the action by the employer derogates materially from the internal disciplinary process and the law”.

26. I do find that in this case, this Court will not interfere with the process of discipline that could be on going. However, in order not to perpetuate an illegality, this Court finds that the disciplinary process already initiated is flawed in that the identity pursuing the same is not clothed with powers to do so.

27. The 4th Respondent have not come out to state that they are part and parcel of the process or are the ones conducting the investigations in place.

28. In the circumstances, I find that the Application is meritorious and I order as follows:-

1. That the disciplinary process against the Applicants in as much as it is not initiated by the Public Service County Board is flawed and is hereby halted pending hearing and determination of this Petition.

2. The 4th Respondents are free to initiate proper disciplinary process based on law and proper procedures against the Applicants if they so wish.

3. Costs in the cause.

Dated and delivered in open Court this 6th day of June, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Oketch holding brief for Otieno for Petitioners – Present

Otieno holding brief for Litoro for Respondents – Present