



**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**

**1<sup>ST</sup> RESPONDENT**

**CONSOLATA BUCHA MAINA**

**2<sup>ND</sup> RESPONDENT**

**ABDI YAKUB GULIYE**

**3<sup>RD</sup> RESPONDENT**

**BOYA MOLU**

**4<sup>TH</sup> RESPONDENT**

**MARGARET MWACHANYA**

**5<sup>TH</sup> RESPONDENT**

**PAUL KURGAT**

**6<sup>TH</sup> RESPONDENT**

**INDEPENDENT ELECTORAL AND**

**BOUNDARIES COMMISSION**

**7<sup>TH</sup> RESPONDENT**

**HON. ATTORNEY GENERAL**

**INTERESTED PARTY**

**RULING NO. 4**

1. On 14 June 2018, the Court delivered a ruling in which it found that the decision to send the applicant on compulsory leave was unlawful. The order should have paved way for the applicant to resume duty.

2. It appears that the Respondents did not comply for on 22 June 2018, the applicant moved the Court under certificate of urgency seeking orders

A. ... (Spent)

B. ... (Spent)

C. This Honourable Court do issue a thirty (30) day notice to Wafula Wanyonyi Chebukati, Abdi Yakub Guliye and Boya Molu the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents respectively who purport to constitute the Independent Electoral and Boundaries Commission the 7<sup>th</sup> Respondent to personally attend Court to show cause why contempt of Court proceedings should not be commenced against them.

D. ...

E. Pending the hearing and determination of the Petition filed herein a conservatory order be issued in the first instance, restraining the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents by themselves, or by their servants, agents or otherwise howsoever from implementing or enforcing the purported decision made on the 14<sup>th</sup> of June 2018, purporting to suspend the applicant for a further three (3) months ostensibly pending a procurement audit as contained in the letter dated 14<sup>th</sup> of June, 2018.

F. The purported decision made by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents and issued as a purported decision of the 7<sup>th</sup> Respondent on the 14<sup>th</sup> of June 2018, purporting to suspend the applicant for a further three (3) months ostensibly pending a procurement audit as contained in the letter dated the 14<sup>th</sup> of June 2018 be set aside.

G. ... (Pending)

H. ... (Pending)

I. ... (Pending)

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

3. The 1<sup>st</sup> Respondent filed a replying affidavit in opposition to the application on 4 July 2018 prompting the applicant to file a further affidavit on 12 July 2018 (the Court expunged the affidavit from the record).

4. The Respondents also filed a preliminary objection which the Court directed would be taken as part of the response in opposition to the application.

5. The Court heard addresses from the advocates on record on 12 July 2018 and allowed order C (issuance of 30 day notice as a prelude to contempt proceedings and therefore that question will not be examined herein).

### **Applicant's case**

6. In support of his case, the applicant contended that the suspension on 14 June 2018 was meant to circumvent the order issued earlier that day; the suspension was contrary to the constitutional, statutory and contractual framework in place; the 7<sup>th</sup> Respondent lacked quorum to take decision to suspend him; he was not afforded an opportunity to be heard before the suspension; the decision to suspend breached his right to fair administrative action; the suspension was malicious; he stood to suffer irreparable harm, and that the decision violated the national values and principles of governance and public service, equality before the law and freedom of security of the person and right to fair labour practices.

### **Respondents' contentions**

7. The 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents opted to sit out the contestation which they left to the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 7<sup>th</sup> Respondents (hereinafter the Respondents).

8. In opposing the application, the Respondents contended that the order of 14 June 2018 did not prohibit the 7<sup>th</sup> Respondent from dealing with the applicant in the manner envisaged under contractual provisions and that the suspension was within their powers as saved under the *Human Resources and Administration Policies Manual*; that the suspension was to facilitate in-depth procurement audit; the applicant was attempting to have the orders of 14 June 2018 stayed; that the suspension was a fresh cause of action and could not be anchored on the pleadings; that the applicant was subject to oversight of the 7<sup>th</sup> Respondent; that the audit had a statutory basis in the *Public Finance Management Act*; that a preliminary audit report had raised serious concerns on procurement for the 2017 elections; the applicant had not established a *prima facie* case; reasons for suspension were given; that Courts should intervene in disciplinary processes reluctantly and only where exceptional circumstances existed; that the right to fair administrative action could not be invoked during investigations; that the question of quorum was pending before the High Court and thus *sub judice*; that in any case the 7<sup>th</sup> Respondent had a quorum in terms of constitutional provision on minimum number of Commissioners and therefore any statutory framework to the contrary was unconstitutional and that the 7<sup>th</sup> Respondent was properly constituted despite any vacancy in its membership.

### **Evaluation**

Authority for suspension

9. The Court has considered the legal authorities cited by the parties even if no specific analysis of any of them is made herein.

10. It is not in dispute that the 7<sup>th</sup> Respondent's *Human Resources and Administrative Policies and Procedures Manual* allow for suspension of an employee in cases where gross misconduct is suspected.

11. The suspension therefore unlike the *compulsory leave* the applicant was sent on earlier has contractual basis. It is to facilitate investigations. Such suspension is a preliminary process and may lead to disciplinary action.

12. It is equally settled that the Court will only intervene in the disciplinary process where exceptional circumstances have been demonstrated. Exceptional circumstances may be demonstrated by showing that the action of the employer has no foundation either in law or contract.

13. In this respect, a Court should not micromanage an employer, for if the Court were to take that route, disciplinary processes would rarely ever be completed.

14. The law must have contemplated that approach for robust remedies such as reinstatement and re-engagement which were unthinkable remedies only a decade ago are now provided for in law.

Hearing before suspension and violations of constitutional rights

15. In respect to the contention by the applicant that he was entitled to a hearing before the suspension, no direct constitutional or statutory provision was cited.

16. If the foundation to the contention was the right to fair administrative action, the Court is not convinced at this stage that the decision by the Respondent constituted *administrative action* as envisaged under Article 47 of the Constitution or the Fair Administrative Action Act.

17. For in the view of the Court, there ought to be a distinction between the action of an employer as an employer and its action pursuant to the performance of a function in exercise of *administrative authority* (see *Chirwa v Transnet Ltd* (2008 2 BLLR 97 (Constitutional Court of South Africa for an eye opening debate on the distinctions).

18. Whether the suspension was *administrative action* cannot be determined on the material before Court without appropriate addresses from the parties.

19. As to the allegations of malice, breach of constitutional rights, principles and values, the Court is of the view that it should wait for all the facts and law to be fully placed before it and allow the parties to interrogate the same.

20. The question whether there was malice in the suspension cannot be made before the facts are interrogated.

Orders not anchored in the Petition

21. By the time the applicant moved Court on 12 April 2018, the Respondent had taken a decision which he felt had no basis either in contract or law. The decision under challenge was the *compulsory leave*.

22. The immediate events surrounding the applicant's challenge to the *compulsory leave* decision were pleaded to have arisen around 6 April 2018.

23. The Court agreed with the applicant and directed that he resume duty unless and until the Respondents took action as contemplated by the terms of the *Human Resources and Administrative Policies and Procedures Manual*.

24. On the very day of the ruling, 14 June 2014, the Respondents purportedly met and decided to send the applicant on suspension.

25. Strictly, therefore the new factual scenario had shifted but the broad circumstances of the suspension remained.

26. Without expressly urging so, the Respondents were contending that the orders now sought were sought in *vacuo*.

27. In *Kihara v Barclays Bank of Kenya Ltd* (2001) 2 EA 420 Ringera J (as he was then) held that interlocutory injunctive relief should be anchored in a substantive suit.

28. That position has been applied by this Court before.

29. However, the Court is not convinced that the instant application should come a cropper merely on account that the orders sought were not set out in the Petition because of the interlinkage of the background facts.

Quorum

30. This Court deliberately avoided making any comments or reference to the quorum question in Ruling No. 3. The issue has again cropped

up.

31. The Court has been informed that two Petitions in which the question is substantively in issue are pending. That does not stop this Court from addressing the question.

32. However, in the view of the Court it would not be prudent to make a determination either way on how quorum implicates the present dispute before hearing full addresses.

33. With that broad overview of the state of facts and law as presented, the Court is of the view that the applicant has not met the legal threshold or made out a case warranting the granting of the orders as proposed.

34. Before concluding the Court observes (it drew the attention of the applicant to it) that the application sought composite/compound orders (contempt and injunctive relief) requiring application of different legal principles and that that practice or procedure should be discouraged.

#### **Conclusion and Orders**

35. Flowing from the above and in consideration of the robust remedies the law has now provided where a finding of unfair termination of employment is made, the Court regrettably declines the invitation by the applicant.

36. Orders (E) and (F) sought are declined with an order that costs be in the cause.

**Delivered, dated and signed in Nairobi on this 19<sup>th</sup> day of July 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For Petitioner Mr. Wandabwa instructed by Wandabwa Advocates

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

For 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Respondents Ms. Kamau instructed by Gitonga Mureithi & Co. Advocates

Interested Party did not participate

Court Assistant Lindsey