



IN THE REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 97 OF 2017

(Before Hon. Lady Justice Hellen S. Wasilwa on 17th July, 2018)

WYCLIFFE GISEBE NYAKINA.....PETITIONER

VERSUS

THE COUNCIL OF THE INSTITUTE OF HUMAN RESOURCE MANAGEMENT.....RESPONDENT

AND

ELIJAH SITIMAH.....1ST INTERESTED PARTY

STEPHEN MALAKWEN.....2ND INTERESTED PARTY

DORCAS WAINAINA.....3RD INTERESTED PARTY

RULING

1. The Petitioner herein Wycliffe Gisebe Nyakina filed Petition on 6/11/2017 through Murunga & Associates Advocates. The Petition was accompanied with a Certificate of Urgency where the Petitioner sought some interim reliefs filed through a Notice of Motion brought under Articles 20, 22, 50(1) 23(3), 159(2) (d), 165 and 258 of the Constitution of Kenya 2010, Section 18, 19, and 24 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms), Practice and Procedure Rules 2013 and all other enabling provisions of the law.

2. No interim orders were given by Court in respect of the application. In the Application, the Applicant sought the following orders:-

1. That this application be certified as urgent and fit to be heard forthwith, and be granted ex-parte, and in priority to any other matter herein.

2. That pending the inter-partes hearing and determination of this application and/or the Petition herein the Honourable Court be pleased to issue a conservatory order suspending the Respondent's letter of 23rd October 2017, suspending the Petitioner and inviting him to a disciplinary hearing.

3. That pending the inter-partes hearing and determination of this application and/or the Petition herein the Honourable Court be pleased to issue a temporary order of prohibition prohibiting the Respondent, whether by itself, or any of its employees or agents or any person claiming to act under its authority from proceeding to give effect, in any way whatsoever, to the Respondent's letter of 23rd October 2017, suspending the Petitioner and inviting him to a disciplinary hearing.

4. That pending the inter-partes hearing and determination of this application and/or the Petition herein the Honourable Court be pleased to issue a temporary order compelling the Respondent to supply the Petitioner with the documents he requested vide his letter dated 30th October 2017.

5. That consequent to the grant of the prayers above the Honourable Court be pleased to issue such orders as may be necessary to give effect to the foregoing orders, and/or favour the cause of justice.

6. That the costs of this application be provided for.

3. The Application was also based on the following grounds that:-

- 1. The matter is extremely urgent as the Respondent has suspended the Petitioner with no regard to the provisions of the Constitution and the law.**
- 2. The Petitioner's rights to a fair trial will be violated should he appear before the Respondent's Disciplinary Committee on Monday 6th November 2013.**
- 3. The Petitioner has a reasonable apprehension that the Respondent's Disciplinary Committee will be biased against him because it is composed of the same individuals who recommended his suspension and investigation to achieve an undisclosed collateral purpose.**
- 4. If the impugned disciplinary hearings are not suspended to allow the Court time to determine the issues herein the Petitioner's case will be rendered nugatory where successful.**
- 5. This Application and Petition will be rendered nugatory if the orders sought herein are not granted.**
- 6. The Applicant/Petitioner has established a prima facie case.**
- 7. The Respondent and Interested Parties will suffer no prejudice if the orders are granted.**
- 8. Granting the orders sought herein will advance the cause of justice.**
- 9. Granting the orders will not be determinative of the Petition.**
- 10. The balance of convenience favours the granting of the orders sought in this application.**
- 11. This Honourable Court has unfettered powers and jurisdiction to grant the orders sought.**
- 12. It is meet and just, for purposes of justice and equity and the overarching purpose of constitutional integrity and rule of law, to make the orders sought.**

4. The Petitioner/Applicant further filed a Supporting Affidavit deponed to on 3.11.2017. The affidavits reiterates averments in the grounds above save that it is supported by annexures showing the employment relationship between the Applicant and the Respondent.

5. The Respondent filed a Replying Affidavit to this Application. The affidavit was sworn by Elija Sitima, the Chairman of the Council of the Respondent and the 1st Interested Party herein.

6. The Respondents opposed the application herein. They confirm the employment relationship with the Applicant save that when he was employed, he submitted his certificate and testimonials amongst them a degree certificate from Kenyatta University which when investigated was found to be a forgery.

7. Following this discovery, the Petitioner was suspended to pave way for investigations. He was expected to present himself before the Respondent's Disciplinary Committee on 6/11/2017 but the same postponed owing to ongoing investigations (ES7).

8. The Respondent procured the services of M/S Darubini Screens and International Company Limited for purposes of establishing the authenticity of the Petitioner's degree certificate and on 1.11.2017, the investigator gave its report wherein it was confirmed that the certificate was a forgery.

9. The Petitioner was thereafter issued with a show cause letter on 21.11.2017 (Appendix ES10).

10. The Petitioner in the meantime moved to Court and was issued with status quo orders rendering the hearing of the Petitioner's Application dated 3.11.2017.

11. The Respondent have further deponed that they had previously had a case with the Applicant in 2013 when he filed a constitutional petition acting alongside an entity called Human Resources Practitioners of Kenya t/a Association of Human Resource Practitioners of Kenya (AHRPK) of which he is the Chairman (ES11).

12. Following judgement in the aforementioned Petition 450/2013 the Petitioner was invited by the Respondent into the Interim Council and Technical Committee on the implementation of the Act.

13. Thereafter after operation of the said Act, the Respondent offered the Applicant a job in their organization. The Respondents deny that the 2nd Interested Party was a member of the Petitioner's Council in 2014 but assumed office in April 2016.

14. The Respondents therefore aver that the Petition is misconceived as it is based on misapprehensions and conjecture. They submit that they would be greatly prejudiced if the orders sought by the Applicant are granted. They therefore seek to have this Application and Petition

dismissed.

15. This Court directed the parties to file submissions on both the Application and the Petition on 31.5.2018. It however appears that the Applicant and Respondent filed their submissions restricting themselves on the Application and therefore the Petition remains largely untouched.

16. In considering whether or not to grant the orders sought, I refer to the celebrated case of **Giella vs Cassman Brown (1973) EALR 358** where the principle governing the grant of interlocutory injunctions was well laid down as follows:-

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience”.

17. The Applicant rushed to Court seeking injunctive reliefs to prevent disciplinary action. Whereas this could be warranted, this Court has over and over again indicated that it will not normally interfere with internal disciplinary processes between an employer and an employee unless the process is manifestly flawed and the interference will be limited to putting the right process on course.

18. In **Alfred Nyungu Kemungui vs Bomas of Kenya (2013) eKLR**, the Hon. J. Rika rendered himself as follows:-

“15. The protections given under the Employment Act are to be taken by employees as a shield, not a sword placed in their hands to impose themselves, with the aid of the Court, at the workplace. The Court has witnessed a large inflow of interlocutory applications where employees wish to be protected against disciplinary processes. Some of the employees have approached the Court seeking ex parte orders of reinstatement. Rule 16 (8) (a) of the Industrial Court (Procedure) Rules 2010, states that the Court shall not grant an ex parte order which reinstates an employee whose service has been terminated. Interim reinstatement should not be granted ex parte.

16. Although the Industrial Court has jurisdiction as argued by the Claimant to grant a wide range on interim reliefs and remedies in employment and labour disputes, it must exercise caution and draw a distinction between workplace disciplinary process, and the judicial process. Judicial officers should not descend into the arena of the disciplinary process, determining how termination letters should be written or nullifying termination letters. The Court agrees entirely with the Respondent.....”.

19. As indicated from the Pleadings herein, the Applicant came to Court seeking stoppage of the suspension and the disciplinary process commenced by the Respondent.

20. The Applicant has not pointed out the manner in which this process is flawed in order to allow this Court a chance to put it back on proper cause. As held in several other causes: See (J. Nderi) **Cause No. 1200 of 2012 Prof Gitle Naituli vs University Council, Multimedia University College** and **Another Cause No. 1607 of 2016 Rose Kiragu vs the TSC** (J. Wasilwa), the process of seeking stoppage of a disciplinary process is premature unless it is flawed.

21. I do not wish to depart from the above position. In this application, the Petitioner/Applicant has also failed to point out the manner in which the disciplinary process is flawed. I therefore find the application not merited and I dismiss it accordingly. I will allow the disciplinary process to be concluded.

22. Interim orders given on 21/11/2017 are hereby vacated.

23. Costs in the cause.

Dated and delivered in open Court this 17th day of July, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Chobika for the Petitioner

Respondent – Absent