



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI
CAUSE NO 1977 OF 2016

ANDREW AKENDO OGOMBE.....CLAIMANT

VERSUS

FAZUL MAHAMED YUSUF.....1ST RESPONDENT

NON-GOVERNMENTAL ORGANIZATIONS

CO-ORDINATION BOARD.....2ND RESPONDENT

RULING

1. By a Notice of Motion dated 26th September, 2016 the claimant sought orders among others that:

i. *That pending the hearing interpartes and determination of this application the 2nd respondent, its board of directors, employees and/or agents be and is hereby restrained from enforcing the resolution of the special finance and administration (FINAD) committee on 29th August, 2016.*

ii. *That pending the hearing interpartes and determination of this application the 2nd respondent, its board of directors, employees and/or agents be and is hereby ordered to allow the claimant continue working as the Deputy Executive Director with full access to office resources.*

iii. *That pending the hearing interpartes and determination of this application the 2nd respondent, its board of directors, employees and/or agents be and is hereby ordered to restore the claimant's full salary and benefits.*

2 The application was supported by the affidavit of the claimant who deponed on the main that:

i. *That I was employed by the 2nd respondent on 1st April, 2007 and confirmed as Deputy Director.*

ii. *That I diligently and faithfully executed duties assigned to me until 24th August, 2016 when I was served with an internal memo alleging that I solicited for a bribe from one Abdirahman Mohamed.*

iii. *That I responded explaining that Abdirahman sought my assistance to help his NGO develop proposals for funding from various donor agencies.*

iv. *That a while after I assisted Abdirahman to register his NGO, he reached out to me seeking assistance to draft funding proposals for the NGO.*

v. *That I introduced Abdirahman to him one George Omboga who is skilled in developing funding proposals.*

vi. *That Abdirahman sent a sum of Kshs 8,000 or thereabouts to my Mpesa account which he explained was part payment for Omboga for developing funding proposals.*

vii. *That I gave Omboga some Kshs 8,000 in cash as part payment.*

viii. That Omboga informed me that he had prepared proposals but Abdirhaman had paid him a sum of Kshs 15,000 only then disabled his line.

ix. That I was served with a letter suspending me from employment on 30th August, 2016.

x. That drafting funding proposals is neither part of my official duty or within the mandate of the NGOs Co-ordination Board.

xi. That despite giving a proper comprehensive and accurate explanation to the respondents and the EACC, I was suspended from employment on 30th August, 2016.

xii. That I became curious in realising that the Special Finance and Administration (FINAD) Committee (hereinafter "the FINAD Committee") met and resolved to suspend me on 29th August, 2016 being the same date of my suspension letter.

xiii. That I verily believe that the FINAD Committee being a creature of the Board, its decisions must be ratified by the Board of Directors.

xiv. That the Board of Directors has not sat since gazzettelement on 2nd October, 2015.

xv. That I verily believe that the Board of Directors cannot delegate its disciplinary power.

xvi. That my suspension is pursuant to a resolution of FINAD Committee despite not being approved by the Board of Directors as required by law.

xvii. That the FINAD Committee's resolution is ultra-vires sections 6(3) and 8(a) of the NGOs Co-ordination Act (Rev 2012) and the Code of Governance for state corporations.

3 The respondent filed a replying affidavit through one Mercy Cherutoh Soy in which she deponed on the main that:

i. Sometime in August 12, 2016 the 1st respot by virtue of his office received a letter from one Abdirahman, a director of an NGO known as Urban Rural and Development Organization (URDO); referenced as "corruption at the NGOs Co-ordination Board by Andrew Ogombe" who lamented that he had approached the claimant for assistance in securing recommendation letters for his organisation for purposes of fundraising; however owing to the fact that he required a number of letters, the claimant advised him that he was going to have to pay for the services, a matter which shocked him as he thought that the services he required were offered free of charge.

ii. The complainant further indicated that the claimant herein asked him for Ksh 30,000 which he was immediately unable to raise and upon consultation with his friends; he was advised to report the matter to Ethics and Anti-corruption Commission, which he did and recorded a statement.

iii. The complainant further claimed that he later gave the claimant herein money in cash and through mpesa transaction number KG595VQRTL.

iv. The 1st respondent issued the claimant with a notice to show cause dated August 23, 2016 in line with clause 10.2 paragraph 10 of the Human Resource Manual and Regulation K.8 (2) of the Public Service Commission Human Resource Policies (Revised) May 2016.

v. The claimant, being the Deputy Executive director, holds the second highest position in the organization. A position of authority and leadership. That as a result of the office the claimant holds the respondents had a legitimate expectation that he would discharge the functions of his office with utmost integrity and in compliance with chapter 6 of the constitution and the Leadership and Integrity Act.

vi. In view of the foregoing, it is unimaginable for the claimant to be accused of not only soliciting, but also aiding and abetting corruption and the respondents were therefore within their rights to take disciplinary action against the claimant.

vii. It is true that the claimant was summoned to the EACC to answer to allegations of corruption relating to the complaints received by the respondents and which has resulted in the disciplinary action being challenged by the claimant before this honourable court.

viii. Investigations against the claimant by the EACC have not yet been concluded as no material has been brought before this court to demonstrate that the claimant has been found innocent of the corruption allegations.

ix. Indeed if the claimant is as innocent as he alleges in his claim, he should not have any problem submitting himself to the process of investigations as there are well established mechanisms for the same under the Human Resource Manual.

x. The claimant by way of his own admission has indicated that he was approached by the complainant whom he claims wanted assistance in drafting proposal, and whom he refereed to his very good friend George Omboga

xi. The claimant further admits that he indeed acted as a conduit of the said George Omboga by receiving money on his behalf from the complainant. The claimant by all standards has contravened clause J.25 (1) of the Human Resource Policies as revised in May 2016.

xii. Given the gravity and nature of the allegations received by the respondent, the importance of the office held by the claimant and the public expectation especially in light of the allegations, the respondents have commenced disciplinary action in a very procedural manner as provided for under the respondents' human resource manual, the public service commission human resource manual and the Employment Act, 2007 and any claims or assertions that the claimant has been unfairly and/or unprocedurally suspended cannot stand.

xiii. The Finance and Administration Committee (FINAD) is a committee of the 2nd respondent that is charged with not only the general oversight role on the administration of the secretariat but also the appointment of officers and disciplinary of senior management staff as specified in the 2nd respondent's human resource manual.

xiv. The claimant has come to this honourable court prematurely as the respondents have only commenced disciplinary action as against him in accordance with the laid down procedures as demonstrated hereinabove and that upon the conclusion of investigations, the claimant shall be granted a hearing before the FINAD Committee wherein he shall be presented with the case before them and given an opportunity to respond.

xv. The FINAD Committee was duly convened to deliberate on the disciplinary action touching on the claimant. It is within the claimant's knowledge, having held the position of Executive Director in acting capacity for more than two years and therefore the secretary to the Board that the procedure relating to the Board meetings is that various committees charged with various mandates meet and upon discharging their functions, present their committee reports to the full Board meeting duly convened.

4 In his submissions in support of the application Mr Ongaro for the claimant submitted that the claimant's suspension was unlawful as the purported special FINAD Committee was not constituted in accordance with Section 6(3) of the NGO Co-ordination Act. The Board of Directors never exercised its powers under section 8 of the Act and that the suspension did not comply with the principles of governance and the role and functions of the board as stipulated in the code of governance for State Corporations.

5 According to counsel, the claimant maintains his innocence stating that he introduced Abdi Rahman to George Omboga to be assisted to develop funding proposals and only received money from Abdi Rahman on behalf of Omboga. Regarding Cheruto Soy's affidavit Mr Ongaro submitted that although she deposed that she was the 2nd respondent's legal officer and competent to swear the affidavit, she did not mention anywhere in the affidavit that she had the authority of the 2nd respondent to swear the affidavit.

6 According to counsel the 2nd respondent was established under section 3(1) and (2) of the NGO Act as a body corporate with perpetual succession. Being so, the replying affidavit ought to have been made with the authority of the 2nd respondent's Board of Directors. Mr Ongaro therefore submitted that failure to indicate authority to swear the affidavit and absence of authorising document was a substantial omission warranting the striking out of the replying affidavit. To support this submission, counsel relied on the case of **Microsoft Corporation Vs Mitsumi Computer Garage Ltd & another [2001] eKLR**.

7 Regarding suspension, counsel submitted that his client was unlawfully suspended from employment. The claimant contended that besides lack of valid reason for suspension, the respondent did not follow the prescribed procedure. The respondents did not adduce any evidence to show when the Board of Directors constituted FINAD committee, its composition and mandate, when its meeting was called, its minutes and its resolution to suspend the claimant.

8 According to counsel, section 6(3) of the NGOs Act provide for the manner of convening special meetings of the Board namely that the Board shall upon application by six members convene a special meeting of the Board. The respondent's according to counsel did not table any evidence that a special FINAD committee was lawfully in place at all material times let alone that it held a meeting on 29th August, 2016. According to the claimant, the board did not at all material time sit since the gazettelement of 2nd October, 2015.

9 Mr Ongaro further submitted that under section 8(b) of the NGO Act, the Board was the appointing authority not a special FINAD Committee. Furthermore, the code of governance for State corporations list the role and functions of the Board to include the exercise of their role collectively and not individually. No evidence had been adduced to demonstrate that the decision to suspend the claimant was a collective decision of the Board. Regarding the letter allegedly written by Abdi Rahman, counsel submitted that the same was not availed to the claimant until 5th December, 2016. This according to the counsel was critical information which the claimant could have responded to in his defence to the allegations against him.

10 Mr Ongaro finally submitted that the claimant was seeking orders restraining the 2nd respondent from enforcing the resolution of the special FINAD Committee. According to counsel the claimant recorded a statement with EACC on the issue on 25th August, 2016 and he has no capacity to interfere with investigations having fully co-operated with the EACC.

11 Mr Okuta for the respondent on his part submitted that the claimant misinterpreted the provisions of the NGO Act in a bid to mislead the court. According to counsel section 6(3) of the Act provided that the Board shall meet at least four times in each year but the chairman may and upon application by six members shall convene a special meeting of the Board. This according to counsel was contrary to the claimant's submissions that the section referred to the constitution of the FINAD Committee. Further, the claimant misinterpreted section 8 of the Act by referring to FINAD Committee as a subsidiary organ. According to counsel FINAD was a committee of the 2nd respondent not a subsidiary organ.

12 Concerning the suit against the 1st respondent, counsel submitted that the 1st respondent should be discharged from the proceedings since the material claim of events occurred when the 1st respondent undertook his duties as the Executive Director of the 2nd respondent. According to counsel, the respondent cannot be sued in his personal capacity for functions undertaken as an employee of the 2nd respondent.

13 Regarding the orders sought by the claimant, Mr Okuta submitted that the claimant sought to stop an ongoing internal disciplinary process immediate unconditional reinstatement. These orders according to counsel amounted to an intrusion into managerial responsibility. It would amount to the court sitting in place of an employer. In support of the submission counsel sought reliance on the case of **Professor Gutile Naituli Vs University Counsel of Multimedia University & Another**.

14 Concerning the constitution of the 2nd respondent, counsel submitted that the 2nd respondent was fully constituted and functional. According to counsel, the claimant himself had admitted that the membership of the 2nd respondent was duly appointed and gazetted on 2nd October, 2015. The Board also has a Chairman appointed by the President of Kenya.

15 Mr Okuta further submitted that the claimant sought to stop an internal disciplinary mechanism. The procedure according to counsel was a mandatory process provided for under clause 9.4 of the Human Resource Manual and Section 41 of the employment Act. According to counsel, the disciplinary process is underway and the claimant will be afforded an opportunity to make his representations before the Finance and Administration Committee. The claimant's case had just commenced thus no report was required to be taken to the full Board of the 2nd respondent. The suspension was therefore not a punishment but meant to pave way for impartial investigation into the claims against the claimant.

16 This is an interlocutory application and the concern of the court at this stage is to ascertain whether the applicant has demonstrated a *prima facie* case with probability of success and whether if successful damages would not be an adequate recompense. If the court is not sure, the matter shall be decided on a balance of convenience. Further being a claim based on contract of employment the court must consider whether it would be appropriate to issue the order sought at the interlocutory stage or await full trial of the main claim.

17 The applicant was suspended on account of allegations against him to the effect that he sought an obtained money from one Abdirahman Maalim Mohamed as inducement to write letters of recommendation to assist Mr Mohammed's NGO to raise funds for running the organization, a service the applicant knew was offered for free. The applicant in his response did not deny that he received money from Mr Mohammed. He however stated that the money was received on behalf of one George Omboga whom he introduced to Mr Mohammed to assist him in writing funding proposals. The applicant sought an order of this court restraining the 2nd respondent from enforcing the resolution of special Finance and Administration (FINAD) committee made on 29th August, 2016 the suspension and that the court orders the respondent's Board to allow the applicant to continue working in his appointed position with full access to office and resources.

18 The 2nd respondent's Human Resource Procedures manual attached to Mercy Soy's affidavit sworn on 5th December, 2016 provides at clause 9.4.7 (iii) as follows:

“In cases of services misconduct where dismissal or termination of service is likely or where interdiction or suspension from duty is deemed necessary to facilitate full investigation into the case, a show cause letter shall be written to the employee. The case shall be referred to the disciplinary committee. The employee shall remain interdicted or suspended until the disciplinary matter in dispute has been fully investigated and reported to the Board. This shall apply to officers from NGOB4 and below. For officers serving from NGOB3 and above the case shall be handled by the appropriate Committee of the board”.

19 The applicant herein moved the court on 27th September, 2016 challenging his suspension. The matter was certified urgent by Mbaru J and the applicant ordered to serve the same on the respondent but no interlocutory orders were made then. On 12th October, 2016 when the matter came before me. I ordered that the applicant shall remain on suspension however no disciplinary action would be taken against him pending the determination of the application. This was to enable the court receive response to the application and hear both parties in respect of the issues raised in the application.

20 As observed earlier the applicant was accused of acting inappropriately by receiving funds from one Mr Mohamed as inducement to write letters of recommendation to Mr Mohamed's NGO to enable them receive funding. The applicant did not deny receiving the funds concerned but stated that he did so on behalf of one George Omboga who he claimed he introduced to Mr Mohamed as the one experienced in writing funding proposals. The claimant further did not deny that he was summoned by the EACC concerning the matter and recorded a statement. The claimant's suspension was to allow investigations into the matter.

21 Under section 10.9.3 of the 2nd respondent's Human Resource Procedure manual, a suspension will be imposed for a major offence where dismissal is contemplated and where evidence of the offence is inclusive and proceedings for dismissal have been initiated.

22 The allegations against the applicant are no doubt serious since they touch on his own personal integrity but he too has a defence to these allegations which if becomes acceptable would exonerate him from the damaging accusations. This process of his acquittal or indictment can only happen in the course of a disciplinary hearing. Each party shall have the opportunity to table evidence and call witnesses.

23 Further, the applicant has in the application attacked the legal capacity and competence of FINAD and the 1st respondent to suspend him but nowhere had this been raised in writing and a demand made that the issue be regularised besides under regulation 10 of the 2nd respondent's human resource manual, an employee who has been aggrieved by any punishment which he/she considers unfair has the right to appeal to the appeals committee as either constituted by the Executive Director or the Board.

24 The court has stated severally before that it cannot usurp managerial role in handling human resource function in an organization. Where there is in existence a human resource procedure manual, the court cannot substitute its view of what it considers a better procedure for

handling disciplinary issues in organization unless it is obvious from the face of it that the procedure is contrary to natural justice and not in tandem with the practice in the industry concerned.

25 Until these internal mechanisms are exhausted the court would be reluctant to interfere unless it is demonstrated that there is a fundamental breach in the rules and procedures which the parties agreed to be bound by.

26 In conclusion, the court declines to grant the orders sought in the application and hereby directs that the parties herein especially the 2nd respondent strictly adhere to its own human resource procedure manual in handling the applicant's case. The court will however be seized of jurisdiction once these internal mechanisms are exhausted.

27 It is ordered.

Dated at Nairobi this 6th day of July, 2018

Abuodha J. N.

Judge

Delivered at Nairobi this 6th day of July, 2018

Abuodha J. N.

Judge

In the presence of:-

..... for the Claimant

..... for the Respondent