



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT ELDORET

JUDICIAL REVIEW NO.4 OF 2017

IN THE MATTER OF AN APPLICATION BY SIKUKU EMMANUEL WANJALA

AND

IN THE MATTER OF THE COUNTY GOVERNMENT ACT, 2012

AND

IN THE MATTER OF PUBLIC SERVICE COMMISSION, DISCIPLINE MANUAL AND PROCEDURE MANUAL FOR PUBLIC SERVICE, 2016

AND

REPUBLICAPPLICANT

VERSUS

THE ACTING COUNTY SECRETARY,

THE COUNTY GOVERNMENT OF NANDI.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF NANDI.....2ND RESPONDENT

AND

SIKUKU EMMANUEL WANJALA.....EX PARTE APPLICANT

JUDGEMENT

1. The *ex parte* applicant, Sikuku Emmanuel Wanjala by application dated 16th January, 2018 is seeking for orders that;

(a) *An order of certiorari do issue directed at the respondents to quash the decision of the respondent made on 14th December, 2017 or thereabout which has the effect of interdicting the applicant from his employment.*

(b) *Costs be provided for.*

The application is premised on the following grounds;

(i) *The ex parte applicant is not an accounting officer within the meaning of section 148-158 of the Public Finance management Act, 2012.*

(ii) *The 2nd respondent was under a different county Governor up to the General Elections of 8/8/2017, when the new County Governor who came in threatened to sack all employees hired by his predecessor or by the transition authority in a public statement upon being elected.*

(iii) *On 21/8/2017 when the 2nd respondent's new governor took office he chased persons employed under the previous regime or by the Transitional Authority from office.*

(iv) The issues raised in the interdiction letter falls under the mandate of the Chief Officer as the Chief Officer is the accounting officer.

(v) That it is in the interests of justice and fair play that this application be allowed.

2. The respondents replied through the Replying Affidavit sworn by Dr Francis Sang, the 1st respondent and acting County Secretary of the 2nd respondent and avers that in August, 2017 he received reports against the *ex parte* applicant who was employed as director of the County Treasury (Finance Department) with regard to his absenteeism from work without reasonable cause for a period of 30 days from 12th July, 2017 to 24th August, 2017. By letter dated 24th August, 2017 to the *ex parte* applicant, he was required to show cause why disciplinary action should not be taken against him on account of the absenteeism and to which letter there is not reply to date.

3. Dr Sang also avers that on 14th December, 2017 he received other complaints regarding the general conduct and work performance of the *ex parte* applicant which acts amount to gross misconduct and related to him paying/causing to be paid persons other than the legal contractor; paying or causing to be paid persons for the same goods/services more than once knowingly and or should have been aware; paying or causing to be paid for goods and services without proper documentation hence colluding to defraud the county; and making payments to contractors for non-existent project and with respect to work with unclear descriptions. The *ex parte* applicant was directed to show cause why he should not be dismissed on account of gross misconduct and to which he replied vide letter dated 22nd December, 2017 seeking clarification.

4. Dr Sang also avers that the *ex parte* applicant has not been dismissed but on interdiction since internal investigations and disciplinary proceedings are on-going.

5. Under Article 235(1) (c) and 236(b) of the constitution, the county government has mandate of exercising disciplinary control over persons holding office. The Nandi County Public Service Board through letter dated 24th July, 2017 had delegated its disciplinary functions to the deponent and which included power to interdict the *ex parte* applicant in the public interest and proceeded to do so following misappropriation of public funds. The *ex parte* applicant continues to receive his salaries and benefits and the respondent are acting in good faith.

6. Dr Sang also avers that internal mechanisms have not been exhausted before the *ex parte* applicant filed the current matter in court and by seeking redress in court over issues under investigations he cannot claim he has been denied his right to a hearing while the interdiction is proper and within the law. As the director of the County Treasury the *ex parte* applicant is a public officer and should be held accountable. The acts committed by the *ex parte* applicant amount to gross misconduct under the provisions of section 44 of the Employment Act, 2007 but the respondent have opted for due process.

7. The *ex parte* applicant concealed to court that there were internal investigations on-going and has therefore come to court with unclean hands and the orders sought should not issue.

8. The respondents also filed a Further Affidavit and where Dr Sang avers that following the *ex parte* applicant suit herein and the reply by the respondents it has come to the respondents knowledge that the *ex parte* applicant has since been employed a chief Officer Finance by the County Government of Trans Nzoia under Payroll Number 19970020434.

9. On 6th June, 2018 The deponent received letter dated 28th May, 2018 from the County government of Trans Nzoia and requesting for the transfer of the *ex parte* applicant's payroll details in order to facilitate processing of his salary and allowances by the Count Government of Trans Nzoia. Such employment has the effect of automatically terminating employment with the respondents.

10. Dr Sang also avers that the application by the *ex parte* applicant before the court is rendered ineffectual and of no use because it has the effect of reinstating the *ex parte* applicant with the respondents but he has already secured new employment. The law does not allow the *ex parte* applicant to hold two officers at the same time.

11. For the *ex parte* applicant to pursue his application as herein based on these new facts amounts to abuse of the court process.

12. On 4th July, 2018 the *ex parte* applicant filed his Further Affidavit and avers that he was never absent from work for 30 days as alleged by the respondents and had travelled to Nairobi to requisition funds for the county and the immediate supervisor never raised concerns to any absenteeism as he was away on official duties. The show cause letter dated 24th August, 2017 and subsequent interdiction letter of 14th December, 2017 are based on completely different issues with the intent of the respondent kicking the *ex parte* applicant out of the county.

13. The *ex parte* applicant also avers that the allegations made against him do not fall within his mandate as he was not the accounting officer. He was not in charge of making payments. The respondents are misusing their powers to fix people perceived as outsiders and who hail from other communities outside Nandi County. The *ex parte* applicant moved to court upon the realisation that the respondents were applying selective disciplinary measures in a discriminative manner.

14. The *ex parte* applicant also avers that he applied and was successful in the recruitment as Chief Officer Finance by the County government of Trans Nzoia for a contract term of 5 years and will require returning back to the respondent upon the expiry of such term. Upon employment he informed the respondents and this is not a secret.

15. Prior to the establishment of the respondents, the *ex parte* applicant had been the employee of the Nandi Municipal Council on permanent terms and such employment cannot be terminated. The respondents are deviating to new issues to avoid matters set out in the suit herein. Upon expiry to he fixed term contract with Trans Nzoia County Government he will resume his employment with the respondents.

16. On 25th June, 2018 both parties attended court and agreed to address the application by the *ex parte* applicant by way of written submissions. Timelines were given and mentioned allocated for 25th June, 2018. On the due date, only the respondent had filed written submissions.

17. In submissions, it is the respondents' case that the orders sought by the *ex parte* applicant are premature and cannot issue as the interdict is proper and within the law vide powers delegated to the 1st respondent.

18. The *ex parte* applicant was interdicted pending investigations following reports of gross misconduct and such internal disciplinary measures have not concluded and should not be stopped through the court process and as held in the case of **Judith Mbaya Tsisiga versus Teachers Service Commission [2017] eKLR**.

19. The respondents also submit that they were within the law to interdict the *ex parte* applicant following various reports of misconduct and which required internal investigations as such related to the *ex parte* applicant making payments which were questioned. As a public officer, the *ex parte* applicant must be held to account over his functions. His interdict was a preliminary matter and before he would be called to respond thereto as held in the case of **Fredrick Saundu versus Principal Namanga Mixed Secondary School & 2 others [2014] eKLR**. The interdict was therefore lawful and in accordance with article 235 and 236 of the constitution, 2010.

20. The *ex parte* applicant is not entitled to the orders sought as orders of certiorari should only issue where a decision is made without or in excess of jurisdiction or where natural justice is not adhered to as held in **Kenya Notational**

Examination Council versus Republic ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR. The orders sought by the *ex parte* applicant have the potential of reinstating him to the respondents whereas he has confirmed to be in new employment with Trans Nzoia County Government and he cannot hold two government offices. The orders sought should be dismissed with costs.

Determination

21. The essence of the *ex parte applicant's* application is for an order of certiorari and seeking to quash the decision of the respondents made on 14th December, 2017 interdicting him from employment. Such would invariably require if allowed to have the *ex parte* applicant resume his duties with the respondents as the Principal Finance Officer. Such would be a reinstatement back to work.

22. Section 12(3) of the Employment and Labour Relations Court Act, 2011 read together with sections 49 (3) of the Employment Act, 2007 and Rule 17(10) of the Employment and Labour Relations Court (Procedure) Rules, 2016 the order of reinstatement can only issue in the clearest of cases as it requires specific performance and invariably should only issue as a final order.

23. The *ex parte* applicant moved the court while on interdict and his employment was subsisting. Such circumstances have since changed with his employment with Trans Nzoia County Government.

24. The *ex parte* applicant avers in his Further Affidavit that his employment with Trans Nzoia County Government was disclosed to the respondents and he is on contract for 5 years and since he was employed by the respondents on permanent basis, his employment should be secured so that once his contract term ends, he should resume his duties with the respondents. However, as a public servant and officer undertaking duties in the nature of a Principal Finance Officer with the respondents, while the *ex parte* applicant remained on interdict and as correctly submitted by the respondents in the case of **Fredrick Saundu versus Principal Namanga Mixed Secondary School & 2 others [2014] eKLR** an interdict is not termination of employment. The *ex parte* applicant remained the employee of the respondents pending the matters under investigations being concluded and being invited to attend any disciplinary proceedings if any. For this reason, the *ex parte* applicant remained on the payroll of the respondents until he requested the same be transferred to his new employers, Trans Nzoia County Government. Had he waited for the due process such would require the respondents to invite him to a hearing and whereupon he would get a fair chance to be heard on his defence? By taking new employment, even where investigations were on-going on matters addressed in letters dated August, 2017 and 14th December, 2017 the *ex parte* applicant frustrated his own employment with the respondents. The rationale of maintaining this matter in court so as to secure employment in the next 5 years and upon the end of his employment contract is not acting in good faith.

25. It is however taken that the *ex parte* applicant has since mitigated his circumstances and obtained new employment he should not be penalised for such effort. However, he should have moved with speed to stop these proceedings as the effect of his act in taking new employment would mean double employment and contrary to taking a public office in two county governments.

26. As set out above, an order of reinstatement should not issue where the interdict complained of is interim. The *ex parte* applicant had not exhausted the disciplinary mechanisms available at his work place and the orders sought of certiorari in their nature should only issue where a public officer has acted in excess of his/her powers as held in the case of **Kenya National Examinations Council versus Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996**;

.. an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons.

27. Noting the powers bestowed and in the office of the 1st respondent are statutory, the interdict of the *ex parte* applicant being interim, and the nature of orders sought being for certiorari only and which should relate to a decision taken without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons, such not being the case herein, the orders sought cannot succeed.

28. Also, the *ex parte* applicant by moving the court by way of Judicial Review, though allowed under the Rules of the Court is problematic

as held in the case of

Republic v Kenyatta International Convention Centre Exparte Maurice Adongo Anyango [2017] eKLR that;

... once an employee comes through the gate of Judicial Review, the Court misses the opportunity to interrogate not only their employment record but also the reason and circumstances of the termination. These are the factors which would move the Court to grant or decline the covered remedy of reinstatement.

For the foregoing reasons, the application for Judicial Review fails and is dismissed with costs to the Respondents.

Delivered in open court at Eldoret this 26th day of September, 2018.

M. MBARU JUDGE

In the presence of:

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