



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 107 OF 2018

(Formerly ELRC Cause No. 179 of 2017 and 180 of 2017 at Nyeri)

MATTHEWS ORINYA OYULE.....1ST CLAIMANT

STEPHEN MUANGE MUTUA.....2ND CLAIMANT

- VERSUS -

KENYA REVENUE AUTHORITY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 20th December, 2018)

JUDGMENT

The claimants filed a notice of motion on 23.11.2018 through SWAN Advocates. The substantive prayers are that pending the hearing and determination of the suit, there be an order of temporary injunction suspending the show-cause letters dated 12.11.2018, their effect and import issued to the applicants; that upon the hearing and determination of the suit, there be an order of injunction suspending the show-cause letters dated 12.11.2018, its effect and import issued to the Applicants; pending the hearing and determination of the suit, the show cause letters dated 12.11.2018 issued to the 1st and 2nd applicants be declared illegal, null and void and constituting unfair labour practices; and costs of and incidental to the application be provided for. The application was based on the attached supporting affidavits by the claimants and the exhibits thereto. The application was brought under Article 2, 3(1), 20(4), 41(1), 47(1), of the Constitution of Kenya; section 4(1) and 7(2) of the Fair Administration Act No. 4 of 2015; Order 51 rule 1; Order 40 rule 1, 2, 3 of the Civil Procedure Rules 2010; section 1A, 1B, 3A, and 63 (e) of the Civil Procedure Act Cap 21 Laws of Kenya; rules 17(3), (5), (6) and 28 (1), (b), (c), (g), of the Employment and Labour Relations Court (Procedure) Rules and all enabling provisions of the law.

The grounds in support of the application are as follows:

- a) The claimants filed suits against the respondent in 2017 for unfair labour practices for placing them under indefinite interdiction for 7 years which tort is subsisting to date. The suits are pending determination before this Court.
- b) In order to defeat the Court process and to subvert the cause of justice the respondent has on Wednesday 14.11.2018 issued the claimants with show-cause letters. The letter is dated 12.11.2018.
- c) The show-cause letter refers to Intelligence and Strategic Operation Report of 12.11.2018 and the investigation and Enforcement Report of 06.09.2011.
- d) The issuance of the show-cause letters will prejudice the hearing and determination of the pending suits. Further it would also amount to double jeopardy as the respondent had already take the claimants through a disciplinary process with respect to the matters in the show cause notice.

The respondent filed the replying affidavit of Wilson Gaconi on 29.11.2018 through Beatrice Odundo Advocate. The respondent opposed the application upon the following grounds:

- a) The affidavit supporting the application were not dated and signed. However the Court has perused the affidavits and observes that they are duly signed, dated and commissioned so that the technical opposition will collapse forthwith.
- b) The applicants were arrested on 13.07.2010 and Charged before the Anti-corruption Court in Mombasa. The offence was theft by a person employed in public service contrary to section 127 (1) of the Penal Code.

- c) The allegations led to issuance of the interdiction letters and subsequently the show-cause notices. The interdiction was an initial step in the disciplinary process and the notices issued 12.11.2018 were after the conclusion of the investigations in issue. The delay in investigations were due to complexity of the matters in issue as undertaken by the Kenya Anti-corruption commission, Criminal Investigation Department, and the police all who were beyond the respondent's control.
- d) By letters dated 22.11.2018 the respondent invited the claimants to attend the disciplinary hearing on 30.11.2018 as per the code of conduct.
- e) If the Court stops the disciplinary process then it would be unfairly interfering with the respondent's administrative processes.
- f) All along since 2010 after the interdiction the claimants have remained in the respondent's service with full medical cover.

The claimants filed the supplementary affidavit of the 1st claimant on 11.12.2018. It was urged that they had been on interdiction for 8 years and yet section 6A of the Code of Conduct by the respondent provides that interdiction shall be for no more than 3 months unless extended by the respondent's Commissioner General at his discretion depending on the circumstances of the case.

The Court has considered the material on record and the parties' respective submissions and makes findings as follows:

a) As submitted for the claimants, Mbari J in **Fredrick Saunda Amolo –Versus- Principal Namanga Mixed Day Secondary School and 2 others [2014]eKLR** held that the Court should not interfere with an ongoing internal disciplinary process except in exceptional circumstances.

b) In **Evans Mumo Mwangangi –Versus- Kitui County Public Service Board and Another [2016]eKLR**, Ndolo J held that the Court does not render itself a hapless bystander as injustice is meted out against an employee and, **“The restraint exercised by the Court is premised on the cardinal principle that the employer will act lawfully and reasonably.”**

c) The Court's opinion in the ruling in **Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others [2015]eKLR** was stated thus, **“The principles are clear. The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process.”**

d) The Court follows the foregoing principles as per the cited cases as applicable to the instant case.

e) The respondent's position is that the delay in issuing the show-cause letters is due to the complex investigations outside its control. The claimants have not opposed that factual position in any material respect or at all.

f) The claimants say that the disciplinary process has taken too long and unreasonably so. They also lament that the interdiction has persisted beyond the agreed or stipulated period of 3 months. The Court considers that the two lamentations do not amount to established position that the show-cause letters are irregular or in breach of the contract of service or statutory provisions in any respect. The Court finds that even if the disciplinary proceedings go on based on the show-cause letters, the claimants' lamentations and in particular the grievances by the claimants against the validity of the interdiction and the alleged delay in the disciplinary process as urged for the claimants in the instant suit, shall not, in the findings of the Court, be rendered nugatory.

g) Thus the Court finds that the disciplinary process based on the show-cause letters has not been shown to be proceeding contrary to contractual terms and conditions of service or relevant constitutional or statutory provisions and in any event, in case of any dissatisfaction the claimants will be able to resolve the grievances within the respondent's internal processes or originate a fresh cause of action before this Court.

h) The Court returns that in the instant case the claimants have failed to establish a case for the Court's interference in the respondent's exercise of disciplinary control over the claimants as initiated by the show-cause letters dated 12.11.2018 in issue.

i) The Court further returns that the prayers to declare the show-cause letters null and void will not issue as they are coined as final orders but which cannot issue at this interlocutory stage as the prayer has been found not justified.

In conclusion the application dated 21.11.2018 and filed on 23.11.2018 is hereby dismissed with costs in the cause.

Signed, dated and delivered in court at Nairobi this Thursday 20th December, 2018.

BYRAM ONGAYA

JUDGE