REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.139 OF 2016

FRANCIS MWENDWA TITUS …….…….. PETITIONER

VERSUS

KENYA PIPELINE COMPANY LIMITED ….…….. RESPONDENT

RULING

1. The Petitioner through application and Notice of Motion dated 14th November, 2016 is seeking in the main for orders (2), (3) and (6) that;

> *1. Spent;*
>
> *2. Pending the hearing and determination of the application herein and the main Petition conservatory orders do issue restraining the Respondent whether by itself agents and or servants from recruiting and/or employing any person in the position Accountant III Job Group 7 or replacing the claimant [petitioner] with any such person to be recruited.*
>
> *3. Stay of execution be and is hereby granted on the suspension letter dated the 4th May 2016 addressed to be applicant by the Respondent and the petitioner/applicant be unconditionally reinstatement to employment pending the hearing and determination of the petitioner's application and the Petitioner herein;*
>
> *4. …*
>
> *5. …*
>
> *6. An order of Judicial Review in the nature of Certiorari to bring into this court the suspension letter dated 4th May 2016 addressed to the applicant for the purposes of being quashed.*

2. The application is supported by the annexed affidavit of the Petitioner on the grounds that the actions of the Respondent offends the fundamental rights and freedoms of the Petitioner as there is no compliance with mandatory and material procedure and conditions for the action communicated in a letter dated 4th May 2016 where the Petitioner was suspended. This action was unfair and in access of powers the Respondent had and the purported disciplinary hearing was contrary to the Respondent Staff Rules and Regulations (Staff Rues). That the Petitioner was denied a fair chance to state his case before an advance action was taken against him. This was unreasonable and contrary to the constitution and the law.

3. In his affidavit and Supplementary affidavit the Petitioner avers that he was employed by the Respondent on 1st July, 2003 as an Internal Auditor III Job Group 7 and was diligently undertaking his

duties and for the 13 years at work was never subject of any disciplinary proceedings. From November, 2015 to March, 2016 he was assigned duties by his supervisor Mr Joseph Nyanchama to conduct an audit of infrastructure and pipeline maintenance. He submitted his report which was forwarded to the department head Mr Felix Rerimoi who circulated to top manager. On 13th March 2016 the Petitioner was deployed to Finance Department and later moved to Mombasa due to the audit report he had done and noting it implicated senior officers of the Respondent with fraud.

4. In April, 2016 the Petitioner was called by the security manager to appear before the senior security officer who questioned the Petitioner over allegations of leaking the audit report to the media. The Respondent proceeded to block and denies the Petitioner access to his work place and when he reported at Mombasa on 9th May, 2016 he was issued with a suspension letter. The allegations therein related to leaking information to the media.

5. The Petitioner was suspended and put on half salary. This suspension went on for over 6 months which is contrary to the respondent's staff rules and regulations and contravenes the Employment Act.

6. On 11th July, 2016 the Petitioner was issued with a show cause letter. As the Petitioner had no access to his office and access to information, he requested for time to be able to respond but was ignored. On 4th August, 2016 the Petitioner was invited for disciplinary hearing scheduled for 9th August, 2016 where he proposed to attend with his colleague Mr Nyanchama but this was declined. The process was tainted with malice and unfairness as when the Petitioner asked for witness statements and materials relating to the allegations and the payment of per diem for the 3 days he was in Nairobi for the hearing he was never paid.

7. That there have been violation of the petitioner's rights and thus the orders sought should be granted.

8. In submissions, the Petitioner relied on various provisions of the constitution, articles 27, 28, 35, 47, and 50. That In the case of **Bella Vista Restaurant Mombasa Limited versus KRA [2016] eKLR;** the court held that conservatory orders in constitutional litigation must be considered in the light of the purpose of the constitution to uphold and enforce the Bill of rights. That in this case the petitioner's rights have been infringed and he has not been given a hearing and the sanction granted is unfair. Articles 57 and 50 of the Constitution were violated.

9. That the Petitioner has a *prima facie* case as he has been served with a termination letter. In the case **Macro and Small Enterprise Association of Kenya Mombasa branch versus Mombasa County Government and 43 others [2014] eKLR; where** the court held that to protect a party from harm the petitioner's rights under the constitution should be preserved. The Respondent has failed to follow its own staff rules, there was no fair hearing and the application and orders sought should be allowed.

10. Other cases that the Petitioner has relied upon are those of **Agnes Ongadi versus KETRACO, Cause No.1406 of 2016; Republic versus the Minister of State for Immigration and Registration of Persons ex parte Peter Sessy, HCCC, JR appl. No.361 o 2012; Alfred Nyungu Kimungui versus Bomas of Kenya [2013] eKLR; Clarice Odhiambo versus Coca Cola Co. & 2 Others [2015] eKLR.**

11. In response the Respondent filed Replying Affidavit sworn by Joe Sang who avers that he is the managing director of the Respondent and confirms that the Petitioner was an employee of the Respondent since 1st July, 2003 until his termination on 11th November, 2016. That the Petitioner was regulated by the terms of his contract of employment and staff rules and regulations, 2015. In March, 2016 the Petitioner was re-designated from Internal Auditor III to Accountant III in finance department at Kipevu, Mombasa and a transfer allowance paid.

12. Following investigations conducted by the Respondent on negative appearance in media print and social media that the Respondent tenders for supply materials and information on other projects, the Petitioner was found to have contributed to the provision of internal information to external parties in an unauthorised manner. On 4th May, 2016 the Petitioner was notified by the Respondent that initial

investigations revealed that he was responsible and was thus suspended from duty to allow further investigations into the matter. Clause 8.3.4 of the respondent's staff rules allow the Respondent to issue suspension to an employee under investigations and to put the employee on half pay and to keep off the place of work.

13. By letter dated 6th July, 2016 the Petitioner was informed that investigations conducted established that he had contributed to provision of confidential information on the Respondent to external parties in an unauthorised manner. That this amounted to gross misconduct as per the staff rules and was thus required to give a written explanation giving reasons why he should not be disciplined and or cited for gross misconduct.

14. On 13th July, 2016 the Petitioner presented his written responses and asked to resume his duties.

15. On 4th august, 2016 the Petitioner was invited for hearing before the Staff Disciplinary Committee and he was in attendance on 9th august, 2016 but the hearing could not proceed as the committee had many cases and this was moved to the next day where he was present. The disciplinary hearing proceeded without adjournment as the Petitioner did not ask to prepare or access any required information on the allegations of his gross misconduct.

16. The disciplinary committee found the written responses and presentations at the hearing not satisfactory and thus resolved that the Petitioner be summarily dismissed. This was communicated to the Petitioner vide letter dated 11th November, 2016. The summary dismissal was in accordance with provisions of section 44(4) (c) and (e) of the Employment Act and clause 8.5.5 of the staff rules. The actions taken by the Respondent were lawful and in the public interest.

17. Mr Sang also avers that the letter of termination was served upon the Petitioner at his residence on 11th November, 2016 but declined to receive it. The letter was then posted to his last known address via registered post.

18. On 14th November, 2016 the Petitioner filed the suit herein seeking to stop further disciplinary action but failed to take into account the termination effected on 11th November, 2016. The orders sought are thus overtaken by events as there is termination of employment. The *exparte* orders obtained by the Petitioner stopping the Respondent from recruiting and replacing the Petitioner and the suspension o he disciplinary hearing and that he remains on half pay were obtained without the disclosure of material facts that termination had been effected at the time of coming to court. That the position held by the Petitioner is crucial to the Respondent and would not be in the public interest to stop it being filled by another person as the Petitioner has since been dismissed.

19. That the application by the Petitioner should not be allowed in its prayers.

20. In submissions the Respondent counsel submitted that the Petitioner was taken through a lawful process following his suspension on matters relating to his gross misconduct; he was given a hearing on breaches committed while in the employment of the Respondent and the summary dismissal was justified. The orders sought cannot issue as a final determination of the disciplinary process exists and noting he business of the respondent, the position previously held by the Petitioner must be filled.

21. The Respondent also submit that in the case of **Rebecca Maina & Others versus JKUAT [20140] eKLR that disciplinary action against an employee is not an administrative action as defined under article 47 of the constitution as article 41 provides adequate safeguards to an employee facing disciplinary action. That in** Dr Anne Kinyua versus Nyayo Tea Zone Development Corporation & Others [2012] **eKLR** the court held that an applicant must demonstrate the exceptional circumstances of the case to persuade court to circumvent clear provisions of the law especially when seeking for orders of specific performance. In the case of **Job Mehta Oudia versus Coffee Development Board of Trustees [2014] eKLR**; where it was held that the court should not enter the work place to interfere with the employer's prerogative a position adopted in the case of **Benedict A Omollo versus JSC [2015] eKLR;**

that the position of a judiciary Accountant is crucial and the entity has to run and thus the court rejected prayers to stop the recruitment of a new officer and allowed the employer the prerogative to fill the position as necessary.

22. That in this case, the Respondent followed due process. The orders sought cannot issue and only up for consideration upon full hearing.

Determination

23. In the main the Petitioner is seeking conservatory orders as the fact of termination of his employment is clear. The court in **Rutto Kapo Hillary versus Officer in Charge Naivasha Main Prison & 2 Others [2016] eKLR** relied on the decision of the Supreme Court and its findings**;** and did set out various cases where the question of what "conservatory orders" test should be that;

> *'Conservatory orders' bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as 'the prospects of irreparable' harm occurring during the pendency of a case; or 'high probability of successes in the applicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributes to the relevant causes. [Emphasis added].*

24. In **Michael Osundwa Sakwa v Chief Justice and President of the Supreme Court of Kenya & another [2016] eKLR;** the court in disallowing an application seeking conservatory orders held that;

> *What then are the circumstances under which the Court grants conservatory orders? It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success. Accordingly in determining this application, the Court is not required-indeed it is forbidden- from making definite and conclusive findings on either fact or law. … apart from establishing a prima facie case, the applicant must further demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him or her. See* ***Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General****, Nairobi HC Pet. No 16/2011,* ***Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission,*** *Mombasa HC Pet. No. 7 of 2011 and* ***V/D Berg Roses Kenya Limited & Another vs. Attorney General & 2 Others [2012] eKLR.***

25. Thus the court must put into account the inherent merits of the main case; the public interest and constitutional values and the magnitude of the issues set out. These are priority attributes that must be put into account.

26. Therefore, in granting Conservatory orders in their nature the court must be satisfied that the subject matter of the suit is preserved pending hearing and determination of the matters in contest putting into account the above test(s). In the case of employment and in terms of the remedies available under section 49 of the Employment Act, even where the employee has filed a Petition and is setting out violations of the Bill of Rights, regard must be taken on the relationship exiting and that is sought to be preserved. In Dr. **Anne Kinyua versus Nyayo Tea Zone Corporation & others, Cause No.1065 of 2012, the court held that;**

> *Historically the Courts have been averse to granting injunction and specific performance in disputes concerning employer-employee relationship but this is not to say it cannot be done in exceptional cases. The traditional objections to the specific performance of an employment contract were first, that it would be wrong to enforce a contract requiring personal services and,*

secondly, that damages could provide an adequate remedy to an employee seeking to enforce their contract.

27. An applicant must therefore demonstrate the exceptional circumstances that exist for the grant of orders of specific performance and particularly in a case where the employer is to be stopped from recruiting or replacing an employee upon a summary dismissal. In the case above, the court went on to find that;

> *… the applicant has not demonstrated the exceptional circumstance of her claim to persuade the Court to circumnavigate the provisions of section 49(4)(d) which enjoins the court that in making an order for specific performance the Court must bear in mind the common law principle that it should not be made except in exceptional cases. The Court further finds that the measure of damages payable to the applicant if successful is determinable.*

28. The Petitioner has pleaded that he was employed by the Respondent and thus there existed an employer-employee relationship. Such a relationship was regulated by an employment contract with its foundation being the applicable law and further there was the staff rules setting out how employees were to conduct themselves at the work place.

29. The Petitioner relied on the case of **Agnes Ongadi versus KETRACO,** as cited above, and noting the principles enumerated therein, on the court finding that the employer had failed to follow its own human resource manual in addressing the allegations made against the employee, the court went back to the facts of the case noting that while the employee was awaiting the suspension to be addressed, A redundancy was declared which specifically targeted the position held by the employee. That;

> *The suspension of an employee for purposes of conducting an investigation relating to the allegations that touch and concern the employee is a normal practice in any institution. The court can only interfere in a case where there is sufficient prove that the employer acted contrary to the law. The employer should be allowed to manage its business without undue judicial intervention.*

30. In the Petitioner's case, the fact of the termination though contested is apparent to the court. As set out by both parties, there was a disciplinary hearing on 10th November, 2016 where the Petitioner was present and was heard though the procedures leading to the hearing are challenged. As such, the decision made on 11th November, 2016 to summarily dismiss the Petitioner which decision was served upon the Petitioner through various mode, at his residence which the Respondent avers was declined and the Petitioner avers this did not happen but there is evidence that there is a registered mail and posting of the termination letter to the Petitioner dated 11th November, 2016 and posted on 14th November, 2016.

31. There remains grey areas on the aspect of service – the disciplinary committee hearing on 9th and 10th November, 2016 were held in Nairobi, at the respondent's head office where the Petitioner had been invited to attend from his office in Mombasa where he had been posted to Kipevu as Accountant III as set out in the affidavit of Mr Sang annexure "JS-8". Also "JS-7" is an invitation for personal hearing to issue to the Petitioner addressed to his Kipevu, Mombasa office. I take it then the Petitioner is resident in Kipevu, Mombasa and not Nairobi. The resident where he refused to accept service of the termination letter is not stated in the affidavit of Mr Sang.

32. It is however apparent that on 14th November, 2016 the Petitioner was not back at his place of work as he was still on his suspension and thus filed the current application as noted in his supporting affidavit which is sworn and commissioned in Nairobi. So where was the Petitioner served with the termination letter on 11th November, 216 and he declined to accept?

33. As set out above, these are facts that require the call of further evidence as these cannot be resolved with the application herein. In the Supplementary Affidavit of the Petitioner at paragraph 14 he challenges the averments of Mr Sang with regard to the service of the termination letter and agrees that there is need for cross-examination.

34. Whether the termination was procedurally and substantively fair or unfair, such are matters the court can deal in the main. The process and reasons for termination are matters that the court can go into as there are the staff rules that regulate the same and in terms of section 35, 41, 43 and 45 of the Employment Act, the Petitioner shall be heard on his case. The orders sought to conserve the status quo and or stop the respondent from replacing the position held by the Petitioner shall not issue in this instance.

35. It is trite that work duties are allocated by the employer at all material times. An employee cannot insist that they must be placed and located at a particular point save that where a transfer occurs, a movement is required or the employee is re-deployed or re-designated new duties. A written notice is required. Also, where the employee is require making major changes and or movements from one point to the other within the employer's business, sufficient notice is imperative to enable the employee take the new changes and adjust accordingly. I take it that when an employee is in a particular office, they require other support systems for self and family and moving from one place to the next requires moving self and or with family and the necessary support by the employer is necessary. In **Severine Luyali versus Ministry of Foreign Affairs & International Trade & 3 others [2014] eKLR; the court held;**

> *Administrative action is therefore part of the wider exercise of public power that when analysed or reviewed must find reasoning to any challenge of invalidity of administrative action and find basis in lawfulness, fair procedure and reasonableness.*

36. The court in the above case also made a finding that when an employee is transferred or redeployed to a new work station such must be looked at in good faith as an employer has to organise its workforce and held;

> *… when the employer reviewed the letter of protest and concerns as noted in the letter dated 4th December 2013, there was an extension of duty by 3 months which was a reasonable period where the petitioner as a diligent employee was expected to re-organise her life and family so as to attend to her allocated duties. It does not only require an employer to act in good faith, the employee is equally bound by the same rule, to act with outmost due diligence and in good faith toward the directives issued by the employer.*

37. In this case, the Petitioner was designated from Internal Auditor III to Accountant III and also moved from Nairobi to Mombasa. These are changes within the prerogative of the employer unless the same are done outside the skills or substantive role of the employee which is not the case for the petitioner. However, when the Petitioner was required to attend his disciplinary hearing, the seating was in Nairobi and the staff rules and refutations set out the modalities to be addressed in such a situation, which were no followed to the letter.

38. The above matters and the adherence of the Respondent in terms of the procedures applied during the disciplinary hearing will be facts that can be gone into at the main hearing of the petition. The allowances due and facilitation required to be accorded to the petitioner, such are matters that can gone into the main hearing.

39. In issue herein is the letter dated 4th May, 2016 where the Petitioner was suspended and during the pendency of the application herein, it became apparent that the Petitioner has since been terminated from his employment with the respondent. The process of suspension is challenged by the Petitioner as lacking fairness and that the Respondent failed to follow its own staff rules and regulations and at the hearing of his case, he was not allowed to have his representative and further that the allegations made against him were never substantiated.

40. Under the provisions of Article 47 and 50 of the Constitution, the Respondent in the conduct of their public duty is under duty to ensure fair administrative action. However the case herein relates to an employer and employee well covered and protected under the ambit of article 41 of the constitution. Fair labour relations go round to ensure that whatever action is taken by an employer against an employee due process is given regard. To this Parliament has enacted the Employment Act to give the parameters within

which an employee is to enjoy their rights particularly when faced with a disciplinary case. Indeed in **Rebecca Ann Maina case,** cited above, the court held that;

> *… Disciplinary action against an employee is not an administrative action as defined in article 47 [of the constitution]. … Article 41 and the applicable labour laws provide adequate safeguards to an employee facing disciplinary action.*

41. In the petitioner's case, upon his suspension, he was issued with a show cause letter to which he responded to and was later invited to a hearing. The procedural and substance challenges to the notices and hearing process are attendant matters addressed in the applicable law. Where the court makes a finding that the Respondent failed to adhere to the provisions of article 41 of the constitution and the applicable law, there are remedies set out under section 49 of the Employment Act.

42. In the **Alfred Kinyungu versus Bomas of Kenya**, the court held that where the court, upon hearing the main suit, makes a finding that there was unfair termination of employment; there are ample remedies under section 49 of the Employment Act. Such remedies include compensation, reinstatement, reengagement and payment of terminal dues as appropriate.

43. Therefore, by the court hearing the Petition herein, all the issues between the parties shall be gone into, the circumstances leading and resulting in the suspension of the Petitioner and the eventual decision to terminate his employment. To grant the orders sought at this stage would be to deny the court evidence that is crucial noting the Petitioner requires amending the Petition and appraising the court on his current circumstances upon the receipt of the termination letter.

44. The Petitioner is however not without recourse as in the main he is seeking that his position not be advertised and or be replaced. Such are matters that can wholly be gone into at the hearing in the context of the remedies due under section 49 of the Employment Act and the remedies available with regard to any constitutional rights violations.

> **Without going into the merits of the main Petition at this stage, the orders sought shall not issue at this stage. As parties have taken directions on the filing and exchange of pleadings, a hearing date of the Petition shall be allocated on priority. Costs in the petition.**

Delivered in open court at Nairobi this 27th day of January, 2017.

M. MBARU

JUDGE

In the presence of:

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