



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT KISUMU**  
**PETITION NO. 31 OF 2016**  
*(Before Hon. Lady Justice Maureen Onyango)*

- 1. AUDREY WAFUBWA**
- 2. BENARD KWALIA**
- 3. MIKE MUSUNGU**
- 4. VALENTINE BIEGO**
- 5. DAVID MUSUNDI**
- 6. ABISAI AMUGUNE.....PETITIONERS**

- Versus -

- THE SPEAKER TRANS NZOIA COUNTY ASSEMBLY.....1ST RESPONDENT**
- COUNTY ASSEMBLY TRANZOIA.....2ND RESPONDENT**
- THE CLERK TRANZOIA COUNTY ASSEMBLY.....3RD RESPONDENT**
- TRANS NZOIA COUNTY ASSEMBLY BOARD.....4TH RESPONDENT**

**RULING**

Before me for determination is a motion filed by the Petitioners herein seeking the following orders:-

- (a) THAT this application be certified urgent and the same be heard ex-parte in the first instance.
- (b) THAT this Honourable court be pleased to issue a temporary order of injunction against the 1st 2nd 3rd and 4th respondents restraining them jointly and each of them from taking any or the intended disciplinary actions of dismissal of the petitioners from the employment of the 2nd respondent County Assembly of Trans Nzoia, or in any other manner victimizing the petitioners pending hearing of this application inter-parties.
- (c) **THAT** this Honourable court be pleased to issue a temporary Order of injunction restraining the **1st 2nd 3rd** and **4th** respondents jointly and each of them from taking any or the intended disciplinary actions of dismissal of the petitioners from the employment of the 2nd respondent

County Assembly of Trans Nzoia, or in any other manner victimizing the petitioners pending hearing and determination of this petition.

(d) Cost of this application be provided for.

The grounds upon which the motion is premised are that the petitioners were suspended from duty on 2nd September, 2016 and locked out of their offices within the premises of the 2nd Respondent contrary to the conditions in the letters of suspension. They further allege that the Respondents are bent on exercising unlawful disciplinary action over the petitioners with the intention to dismiss them and fill their positions with persons in whom the holders of the offices of the Respondents have immense interest in, in contravention of the petitioners' constitutional rights.

The application is supported by a joint affidavit of the petitioners in which they state that they were interdicted by the 3rd Respondent by letters dated 2nd September, 2016 in contravention of article 47(1) and (2) of the constitution, that the allegations made against them were not clearly outlined in the letters of interdiction and are spurious as no misconduct is disclosed in the letters. They further depose that the letters of interdiction did not state the action intended to be taken against them, that the letters required them to stay in their stations but they had been blocked by the 1st Respondent from accessing their offices and ordered to stay away from the Respondents' premises. They state that the Respondent is likely to find them guilty of desertion should they fail to report to work and that the actions of locking them out contradicts the letters which require them to remain on duty.

The Respondent filed grounds of opposition as follows:-

1. **THAT** the Petitioners'/Applicants' application is fatally defective in form, law and in substance;
2. **THAT** the application is incompetent, bad in law, misconceived and an abuse of the Honourable Court's process.
3. **THAT** the application is hasty, reactionary and premature.
4. **THAT** the court lacks jurisdiction to micromanage the Respondents on how to conduct disciplinary procedures against the employees.
5. **THAT** the application is merely speculative.
6. **THAT** the prayers sought in the application are untenable.
7. **THAT** the application does not lie and should be dismissed with costs.

At the hearing of the application Mr. Indimuli holding brief for Mr. Nzaku represented the petitioners while Mr. Biko appeared for the Respondents.

Mr. Indimuli submitted that the Applicants were interdicted and then barred from going to the office, that they have not been supplied with any concrete reason for interdiction and have not been summoned to any tribunal. That the interdiction smirks of malice. Mr. Indimuli further submitted that the Respondents have not complied with the disciplinary process set out in The County Governments of Kenya Scheme of Service and Terms and Conditions of Service (2014).

For the Respondents Mr. Biko submitted that the application is incompetent, that the petitioners admit that the Respondents have a right to discipline them yet they seek to stop the disciplinary action. He submitted that the applicants have come to court prematurely as the disciplinary process has not been concluded. Mr. Biko submitted that no prima facie case has been established to warrant the orders sought by the applicants.

Mr. Biko further submitted that in the application there is a mix up of interdiction and dismissal. Mr. Biko

submitted that the applicants have not shown that there is any threat of imminent dismissal, that the action taken is a human resource function and that what the applicants should have been seeking is a revocation of the letters of interdiction.

Mr. Biko submitted that the letters of interdiction have given grounds for interdiction contrary to the allegations of the applicants. He submitted that no evidence has been proffered to support the allegation that the applicants have been locked out of office or that the Respondents have not complied with the prescribed disciplinary procedure. He submitted that for the court to grant the orders sought there must be cogent, concise and clear evidence that exceptional circumstances exist to justify the court's intervention. Mr. Biko referred the court to the decision of the court in the case of **Joseph Mutuura Mberia & Another v The Council of Jomo Kenyatta University of Agriculture and Technology [2013]eKLR** in which the court stated that employers have a right to discipline their employees and the courts will not intervene in the process unless the court establishes that such administrative disciplinary proceedings are commenced with ulterior motives or are as a process shrouded with illegalities, or in compelling or extraordinary urgent circumstances.

The Respondent further relied on the case of **Geoffrey Mworira v Water Resources Management authority & 2 others [2015]eKLR** in which the court stated:-

*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.*

Mr. Biko submitted that this application is speculative and should be dismissed.

In a brief rejoinder Mr. Indimuli submitted that the Petitioners are not opposing the disciplinary mandate of the employer to discipline employees, but stated that the mandate should not be exercised capriciously. He submitted that before disciplinary process is undertaken or employees are suspended or interdicted the employer must establish the offence. That in this case the cart was put before the horse as the applicants were interdicted without concrete reasons or reasons that are particularised.

## **Determination**

I have considered the application and the grounds in support thereof as well as the affidavit and annexure thereto. I have also considered the Respondent's grounds of opposition and the submissions made by counsel for the parties.

In determining the application I have to first consider if the applicants have made out a prima facie case to warrant the granting of the orders sought which are preservative in nature. Secondly, I must consider whether the applicants will suffer irreparable harm if the orders sought are not granted.

The petitioners commenced this suit by way of a petition in which they seek substantially different orders from those in the application being -

- a. A declaration do issue that the suspension and the intended dismissal of the petitioners from the employment of the County Assembly of Trans Nzoia as communicated in the 3rd respondent's letters dated 2nd September, 2016, is unconstitutional and unlawful on account of violation **Articles 10, 41, 47 and 236** of the Constitution of Kenya and provision of the Employment Act.
- b. An Order of Certiorari do issue to bring into this Honourable Court the decision of the Respondents contained in the letters dated 2nd September, 2016 to indefinitely suspend the

petitioners from their respective duties as employees of the 2nd respondent County Assembly of Trans Nzoia for purposes of being quashed for being in contravention of **Articles 10, 41, 47 and 236** of the Constitution of Kenya and the Employment Act.

c. A declaration do issue to declare that, the Petitioners remain the lawful holders of their respective positions of employment with the 2nd respondent County Assembly of Trans Nzoia and their indefinite lock out from their work place is unlawful.

d. The Honourable Court do find and uphold that the actions, conduct, decisions and omissions of the respondents in respect of the suspension of the Petitioners from their duties as employees of the 2nd respondent County Assembly of Trans Nzoia and their intended dismissal and immediate replacements based on improper motives, Constitute conduct that violates articles 10, 41, 47 and 236 of the Constitution of Kenya.

e. An order of injunction do issue to restrain the Respondents jointly and each of them from in anyway victimizing the petitioners or proceedings with any disciplinary action or proceedings against the petitioners or by way of demotion or dismissal of the petitioners from their respective positions of employment with the 2nd respondent of County Assembly of Trans Nzoia based on the letters of suspension date 2nd September, 2016 or otherwise.

d. Costs of this petition be provided for.

As pointed out by the Respondent's counsel, the petitioners appear to be in a confusion between suspension, interdiction and dismissal. While the petition seeks orders with respect to interdiction the application seeks orders with respect to dismissal. An application seeking interim preservative orders must refer to the preservation of orders sought in the parent suit because the interim orders are intended to preserve the subject matter thereof pending the final determination of the parent suit. In the present case I am being asked to issue preservative orders with respect to dismissal yet the parent suit does not seek prayers with respect to dismissal. The orders sought can therefore not preserve the subject matter in the parent suit. To this extent therefore, there is a fundamental defect that in my opinion is fatal to the application.

Besides the foregoing, the applicants seek orders restraining the Respondents from taking disciplinary action of dismissal of the petitioners from employment, or in any other manner victimising the petitioners. The letters of interdiction annexed to the affidavit filed with the application do not refer to dismissal. The letters state that the purpose of the interdiction is to facilitate investigations on the alleged misconduct.

The disciplinary procedure as set out in the County Assemblies Scheme of Service and Terms and Conditions of service provides as follows with respect to discipline;

- *Disciplinary action taken must be processed through the County assembly Advisory Committee.*
- *All acts of misconduct by officers shall be dealt with as soon as possible after the time of their occurrence.*
- *If criminal proceedings are instituted against a staff or where a staff has been acquitted of a criminal charge in a Court of Law, the Clerk/CASB shall not, however, be prevented from dismissing him or otherwise punishing the officer on any other charge arising out of his conduct in the matter.*
- *Where the Clerk considers it necessary to institute disciplinary proceedings against a staff to whom this regulation applies on the grounds of misconduct which, if proved would, in his opinion, justify any of the punishments, he/she shall, after preliminary investigation and consultation as to the terms of the charge as he/she considered necessary, forward to the*

*staff a statement of charges framed against him/her together with a brief statement of the allegations, on which each charge is based, and shall invite the staff to state in writing, should he so desire, before a day to be specified, any grounds on which he/she relies to exculpate himself/herself.*

- If an officer does not furnish a reply to a charge or charges forwarded under above paragraph with the period specified, or if in the opinion of Clerk, he/she fails to exculpate himself, the Clerk shall forward to CASB copies of the statement of the charge, or charges, the staff's reply if any, the Advisory committee's resolution and the CEO's comments thereon.*
- If, on consideration of the statement of the charge or charges, the reply, if any, of the staff, Advisory Committee's resolution and the comments of the Clerk, the Board is of the opinion that no further investigation is necessary, it shall forthwith decide on the punishment, if any, which should be inflicted on the officer, or whether he should be retired in public interest.*

According to the provisions set out above, the Respondents had just commenced the disciplinary process when the applicants rushed to court. They had only been informed of the charges that they were being investigated for. They had not even been asked to show cause or defend themselves as the Respondents had only just commenced investigations on charges which are rightfully referred to in the letters of interdiction as "alleged misconduct".

The discipline of employees is a managerial prerogative of employers. The courts will not interfere in the process unless the employee can show that the process has been undertaken without regard to the procedure set out in the terms and conditions of service or in the law. This has been stated in many decisions of the courts including the cases of "JOSEPH MUTUURA MBERIA" and "GEOFFREY MWORIA" (supra) that counsel for the Respondents referred the court to.

The complaint of the applicants as stated in their affidavit is that the allegations the 2nd respondent made against them were never clearly outlined in the letters of interdiction and are therefore spurious in that the time or date(s) when the alleged act of misconduct was committed was not disclosed; that the class, nature, or type of the alleged confidential information they are accused of releasing and the particulars of the matters complained of in the petition pending in court in which the alleged information is said to relate were not disclosed or supplied to the applicants; that in the said letters of interdiction the applicants have not been informed of the action contemplated to be taken against them and they have not been called upon to respond to the charges levelled against them; that they have outrightly been denied an opportunity of being heard contrary to principles of natural justice and the requirement for a standard letter of interdiction. They annexed a copy of a sample letter of interdiction contained in the terms and conditions of service.

The applicants' further complain that the said letters of interdiction were never copied to the 4th respondent or to the Human Resource Department, and were not channelled through the petitioners' immediate supervisors. They state that the last paragraph of the said letters of interdiction provide that while on interdiction they are not supposed to leave their duty stations without express permission yet on the 6th day of September, 2016, contrary to the applicants' expectations and without prior written communication they were on verbal instructions of the 1st respondent all blocked from entering the premises of the 2nd respondent and while at the gate were ordered to stay away from the premises of the 2nd respondent indefinitely.

It is the opinion of the court that the complaints by the applicants are premature as the case was in the early stages of investigations when this suit was brought to court. The complaint that the letters are not copied to the Human Resource Department or channelled through the immediate supervisors of the Respondents are not valid as the terms and conditions of service do not provide for the same.

The complaints by the applicants stem from a misapprehension of the very meaning of interdiction. When under interdiction, an officer is removed from exercising the functions of his office. The letter of

interdiction clearly states so, but also advises the applicants not to leave the duty station without express permission of their immediate supervisors. A duty station and an office do not mean the same thing and there is no contradiction in the letters of interdiction as alleged by the applicants. The letters direct that they stay at their duty stations but do not exercise the functions of their offices. This means they should be available during working hours should they be required, but they are not to perform any functions of their offices and therefore should not report to the office for duty.

For the foregoing reasons, I find that the applicants have failed to prove that the Respondents have infringed on any of their fundamental rights or failed to comply with any statutory or prescribed disciplinary procedure with the result that I decline to grant the orders sought and dismiss the application. There shall be no orders for costs.

**DATED, SIGNED AND DELIVERED THIS 19TH DAY OF JANUARY, 2017**

**MAUREEN ONYANGO**

**JUDGE**