

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT KISUMU

PETITION NO. 22 OF 2016

AND

PETITION NO. 23 OF 2016

(CONSOLIDATED)

(Before Hon. Lady Justice Maureen Onyango)

CHRISPIN OTIENO PUDO.....1ST PETITIONER

MARY ANNE AKOTH.....2ND PETITIONER

JENIPHER AKOTH MUYOYO.....3RD PETITIONER

ERICK OTIENO ONYANGO.....4TH PETITIONER

SAMSON CHILO OMONDI.....5TH PETITIONER

SIMON ONDOI.....6TH PETITIONER

FRANCIS OCHIENG.....7TH PETITIONER

VERSUS

KISUMU COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT

KISUMU COUNTY GOVERNMENT.....2ND RESPONDENT

JUDGMENT

This Judgment is consolidated for Petition Number ELRC 22 of 2016 filed by **CHRISPINE OTIENO PUDO, MARY ANNE AKOTH, JENIPHER AKOTH MUYOYO, ERICK OTIENO ONYANGO** and **SAMSON CHILO OMONDI** as 1st to 5th petitioners respectively against **KISUMU COUNTY PUBLIC SERVICE BOARD** and **KISUMU COUNTY GOVERNMENT**, and Petition Number 23 of 2016 filed by **SIMON ONDOI** and **FRANCIS OCHIENG** against **KISUMU COUNTY PUBLIC SERVICE BOARD** and **KISUMU COUNTY GOVERNMENT**. The two petitions were consolidated as they arose out of the same facts and the prayers sought are identical.

In both petitions the petitioners filed a notice of motion, a petition and a joint affidavit of the petitioners. In view of the prayers sought in the notice of motion being similar to those sought in the petition, parties agreed to consolidate the petitions with the motions and were heard on 25th July 2016. Mr. Nyamweya instructed by N.E. Mogusu & Associates appeared for the petitioners while Mr. Amondi instructed by Amondi & Company Advocates appeared for the Respondents.

The Motion

In the two motions the petitioners seek the following orders:-

- “1. This application be certified as urgent and service thereof on the Respondents be dispensed with in the first instance.*
- 2. Pending the hearing and determination of this application inter-partes, a conservatory order do issue staying, the operationalization of the letter of suspension issued by the Respondents dated 27th May 2016 and restraining the Respondents by themselves, agents or assigns or their sympathizers from executing their decision vide the said letter, particularly restrain the Respondents from interfering with the petitioners' duties a the 2nd Respondent.*
- 3. Pending the hearing and determination of the petition herein, a conservatory order do issue staying the operationalization of the letter of suspension issued by the Respondents dated 27th May 2016 and restraining the Respondents by themselves, agents or assigns or their sympathizers from executing their decision vide the said letter, particularly restrain the Respondents from interfering with the petitioners' duties at the 2nd Respondent.*
- 4. Costs be in the cause.”*

In the petition, the petitioners pray for the following remedies:-

- “1. A declaration that the Respondents have violated the petitioners' rights contemplated at articles 27, 41, 47 and 51.*
- 2. A declaration that the Respondent's letter of suspension dated 27th May 2016 is null, void and an illegality.*
- 3. Exemplary Damages and costs of and incidental to this suit.”*

Affidavits

In the affidavit in support of the motion and petition the petitioners state that they are all employees of the 2nd Respondent having transited from the defunct Kisumu Municipal Council. That on 27th May 2016 they were issued with show cause letters by the 2nd Respondent requiring them to answer allegations of misappropriation of funds from **MEK SACCO SOCIETY LIMITED** where they were officials. They state that the show cause letters notified them of their suspension from performing their official duties and that during that period of suspension they would be on ¼ salary. The petitioners state that they responded to the show cause letters as required.

The petitioners question the legality of the suspension on grounds that **MEK SACCO SOCIETY** is a private members society and the disputes relating to leadership of the society were pending in other courts.

The petitioners aver that they were suspended without investigations being carried out and before they were given an opportunity to be heard. They further allege that the grounds for suspension are outside the jurisdiction of the Respondents as only the Co-operative Tribunal and the courts can determine the issues. It is their contention that the Respondents have denied them rights to fair hearing and fair administrative action and have acted without procedural fairness thus infringing and violating their rights under Article 27, 41, 47 and 51.

The Petitioners filed a joint supplementary affidavit in which they depone further that the Respondents did not comply with the **KISUMU COUNTY PUBLIC SERVICE HUMAN RESOURCE POLICY AND PROCEDURE MANUAL** and especially the Code of Conduct and disciplinary procedures. They state further that the inquiry report acted upon by the Respondents to suspend them is the subject of **JUDICIAL REVIEW APPLICATION NO. 11 OF 2015** pending in the High Court whose outcome the Respondents should wait for before taking action against the petitioners.

Respondent's Replying Affidavit

The Respondents oppose both the notice of motion and the petition and filed a replying affidavit sworn by **BEATRICE AMOLLO**, the Human Resource Manager on 25th July 2016. She depones that **MEK SOCIETY LTD** draws its membership from the employees of the 2nd Respondent who is contractually bound to deduct and remit to the society funds from the salary accounts of the members through check-off system. She states that the society was riddled with mismanagement and financial impropriety which caused the Commissioner of Co-operative Development to appoint a team to conduct an inquiry into the conduct of past and present Management Committee members of **MEK SACCO SOCIETY LIMITED** and prepare a report pursuant thereto. The report recommended that the Petitioners be barred from holding or being appointed or elected to elective positions in co-operative societies in Kenya by virtue of Section 28(4)(k) of the Co-operative Societies Act. The report further recommended that the petitioners be surcharged a total of Shs.17,000,000 by the 2nd Respondent. She depones that there is no Court Order barring the Respondents from implementing the inquiry report.

Ms. Amollo further depones that the Respondents are bound under Articles 235(c) to exercise disciplinary control over the persons serving therein, that Article 232 sets out values of public service and that Section 35(c) of Public Officers Ethics Act provides for investigation of misconduct, misappropriation and mismanagement by the Directorate of Co-operative Development. She further depones that the Respondents are duty bound under Section 36(a) of the Public Officers, Ethics Act to initiate appropriate disciplinary action against the petitioners.

Ms. Amollo depones that the Petitioners' responses to the notices to show cause did not rebut the findings in the inquiry report or demonstrate that there is any stay of implementation of the report.

Petitioners Submissions

Mr. Nyamweya for the petitioners submitted that the petitioners are concerned about the last paragraph of the letter of notice to show cause which states that they will be entitled to one-quarter of their salaries. That this is an infringement of Article 27 and 41 of the Constitution as well as Article 47 on fair administrative action. He submitted that under the Human Resource Policy there is no provision for mixing show cause and suspension. He submitted that before suspension there must be a charge of a criminal offence or an investigation leading to prosecution must have been commenced.

Mr. Nyamweya submitted that in the instant case the Petitioners have not been charged and there is no investigation of a criminal nature which is pending and the suspension is therefore unprocedural and unfair. He submitted that under Article 232 there is accountability for disciplinary action. He submitted that under Public Officers Ethics Act there should be an investigation awaited by a committee of the Respondents as provided under Section 35 and 36. He submitted that the Respondents were duty bound to commence an investigation and if they did not have jurisdiction, refer the dispute to a relevant authority for investigation. He submits that the show cause letters should have informed the petitioners of action to be taken but should not suspend them.

Mr. Nyamweya submitted that the authority that should investigate fraud is the police. He submitted that the expectations of the petitioners was that the Respondents would ask them to react to the reports and the Respondents should have annexed the report. That this should have been done before commencing disciplinary action. He submitted that the Respondents should have been instructed by the Society which has not given any instructions to the Respondents. He submitted that the Petitioners have been denied the right to a hearing. He urged the Court to find the suspensions null and void for being unprocedural and to grant the orders in the application and the petition.

Respondents Submissions

Mr. Amondi for the Respondents submitted that the petitioners are all employees of the Respondents and former officials of **MEK SACCO LTD**. That following complaints by members of **MEK SACCO LTD** an investigation was initiated that culminated into a report dated 30th November 2015. Among the

findings was that the petitioners were engaged in financial impropriety. That the report recommends that the 2nd Respondent implements its recommendations. Mr. Amondi submitted that the Respondent is duty bound under Article 232 to exercise disciplinary control over the petitioners. That it is in this context that disciplinary action was taken against the petitioners by the 2nd Respondent.

Mr. Amondi submitted that the report of the Commissioner of Co-operative Development is made under the Public Officers Ethics Act as the appropriate body to carry out investigations. That once recommendations were made the 2nd Respondent was expected to take the necessary action using its Human Resources Procedure Manual. He submitted that under Section 11.21.1(m) of the manual offences for which the petitioners were found culpable are prescribed, and the punishment is prescribed under 11(22). That the punishment is surcharge simultaneously with termination of employment. He submitted that the 2nd Respondent issued notices to show cause pursuant to the provisions of the HR Manual. He submitted that the petitioners did not respond to the substantive issues in their responses to the notices to show cause.

Mr. Amondi submitted that the disciplinary process commenced against the petitioners was in compliance with the disciplinary process, proper and merited.

Determination

The facts giving rise to the two petitions for determination are not in dispute. All the petitioners are employees of the Respondents having transited from the defunct Kisumu Municipal Council. The petitioners were officials in **MEK SACCO SOCIETY LIMITED** whose membership is drawn from the employees of the 2nd Respondent.

On 14th September 2015 the Commissioner for Co-operative Development made an inquiry order appointing a team to inquire into the By-laws, workings and financial conditions and the conduct of the past and present Management Committee and officers of **MEK SACCO SOCIETY LIMITED**. According to the Background Information in the report, **MEK SACCO** has been experiencing cash flow problems over the years due to irregular and unpredictable remittances from the defunct Kisumu Municipal Council. The society has also suffered mismanagement by successive committee members and staff as evidenced from several inspection reports. The latest inspection report was initiated in February 2015 and highlighted cases of embezzlement of funds. The report recommended for institution of an inquiry to look into the financial affairs of the society. The **SACCO** is currently under an interim committee following the removal of the former Management Committee by the members at a Special General Meeting held on 11th July 2015. The reasons given for their removal were: gross mismanagement of the society's funds and especially the use of forty five million loan from Co-operative Bank, refusal to supply Supervisory Committee with accountable documents and poor service delivery to members.

The Inquiry Order is published in Gazette Notice No. 7595 of the Kenya Gazette of 9th October 2015. Among the recommendations of the Inquiry Report are that:-

- 1. The society officers mentioned in appendix 6 to be surcharged with Kshs.784,530 being illegal deposits refund made to non-existent members as per Section 73(2) of the Co-operative Societies Act. The same officers are hereby barred from holding appointed and elective positions in co-operatives in Kenya as per Section 28(4)(k) of Co-operative Societies Act.***
- 2. The society officers mentioned in appendix 6 (Chairman, Vice Chairman, Treasurer and CEO) are hereby surcharged with Kshs.16,000,000 being the amount of money fraudulently siphoned from the society through a secret account as per Section 73(2) of Co-operative Societies Act.***
- 3. The society's Officers mentioned in appendix 6 are hereby charged with an amount of Kshs.430,000, irregular payments on account of Special General Expenses;***

4. All officers mentioned in appendix 6 are hereby barred from holding appointed and elective positions in co-operatives in KENYA AS PER Section 28(4)(k) of Co-operative Societies Act. As a result of this the management committee stands dissolved and fresh elections should be conducted with immediate effect;

5. The above recommendations are to be implemented by the Society with immediate effect under supervision of Kisumu County Government with quarterly reports being submitted to the Commissioner for Co-operative development.

Upon receipt of the inquiry report, the Chief Officer–Industrialization and Enterprise Development, Kisumu County Government, wrote to the County Secretary to institute surcharge on the twelve (12) former executive members of **MEK SACCO SOCIETY LTD** (among them the petitioners) and to consider any other administrative action in accordance with relevant laws and guidelines governing the management of public offices.

It is pursuant to the said letter that the County Secretary wrote the notices to show cause that are the subject of the two petitions herein to the petitioners. The notices required the recipients to show cause why disciplinary action should not be taken against them and why they should not be surcharged. All the petitioners responded to the show cause letters which also suspended them from duty on ¼ salary.

The responses though not uniform, are similar. All the petitioners denied knowledge of the inquiry report and stated that the issue is the subject of Co-operative Tribunal Case No. 587 of 2016 and Civil Appeal No. 47 of 2016. They all further stated that they did not wish to comment on the issue as such comment would prejudice their case. The documents attached to the responses are the cover page of the record of appeal in Appeal No. 47 of 2016, an appeal from the Ruling of the High Court delivered on 20th April 2016 and an order of the Co-operative Tribunal in Case No. 587 of 2015 between **FRANCIS OCHIENG & 2 OTHERS V EDWIN KISIA & OTHERS**. The “others” are not disclosed. Suffice to mention that Francis Ochieng is the 7th Petitioner herein. The subject of the appeal and the ruling or the circumstances giving rise thereto are not explained by the petitioners.

The issues for determination are therefore whether the suspension and withholding of part of the salary of the petitioners as communicated in the notice to show cause letters are a violation of the rights and fundamental freedoms of the petitioners as alleged in the petition.

The Law

Article 27 provides for equality before the law and freedom from discrimination.

Article 41 provides for fair labour practices.

Article 47 provides for Fair Administrative Action.

Article 51 provides for rights of persons who are in custody.

Sections 35 and 36 of the Public Officer Ethics Act which the parties have referred to provide as follows:

35. (1) The responsible Commission for a public officer may investigate to determine whether the public officer has contravened the Code of Conduct and Ethics.

(2) An investigation may be made on the Commission’s own initiative or pursuant to a complaint by any person.

(3) The Commission may refer a matter to another appropriate body for investigation and that body shall investigate the matter within a reasonable time and submit a report to the Commission on its findings.

(4) An investigation may be conducted even if the subject of the investigation has ceased to be a public officer.

36. (1) If an investigation discloses that the public officer has contravened the Code of Conduct and Ethics, the responsible Commission shall, within the time period prescribed by subsection (2)-

(a) take the appropriate disciplinary action; or

(b) if the responsible Commission does not have the power to take the appropriate disciplinary action, refer the matter to a body or person who does have that power.

(2) The time period referred to in subsection (1) is-

(a) within thirty days after the completion of the investigation; or

(b) if another body investigated the matter under section 35 (3), within thirty days after the responsible Commission receives the report of that body.

(3) The responsible Commission shall inform the public officer concerned of any action it takes or intends to take under subsection (1) either before it takes the action or within thirty days after it does so.

(4) Subsection (3) does not affect any legal requirement to inform a public officer earlier than is required under that subsection.

(5) The regulations made under section 42 may govern what disciplinary action is appropriate for the purposes of subsection (1).

In the case of the Respondents the responsible Commission under Section 35 is the Commissioner of Co-operative Development. The 1st and 2nd Respondents are the implementation authority envisaged under Section 36.

Both the Commissioner for Co-operative Development and the SACCO cannot either make recoveries from the petitioners' salaries on account of the surcharge or take disciplinary action against the petitioners as they are not the employer of the petitioners.

The action taken against the petitioners that is the subject of their complaint herein is the suspension by the Respondents. According to the Petitioners they should have been heard before the suspension. They further aver that the grounds for the suspension are not valid.

The County Public Service Human Resource Policy and Procedure Manual provides for suspension at paragraph 20.4 as follows -

20.4 Suspension

20.4.1 Where an employee has been charged with a criminal offence other than a traffic offence or investigations have commenced, the employee shall be suspended from exercise of his duties by the Officer Responsible for Public Service pending determination of the case.

20.4.2 Suspension shall not exceed six (6) months, within which investigations are completed and action determined, unless investigations involve other organizations that are outside the control of the county government.

20.4.3 The Board shall have the discretion to finalize such a case administratively, separate from the court process, if it is of the view that the offence amounts to gross misconduct and injurious to its interest

or image.

20.4.4 While on suspension, an employee will be entitled to one quarter of his basic salary and will receive house allowance and medical benefits.

In the present case an investigation was carried out through an inquiry under the Co-operative Societies Act which found that the petitioners had each misappropriated funds of **MEK SACCO SOCIETIES LIMITED** in the following amounts -

NO	NAMES	DEPARTMENT	AMOUNT (KSHS)
1.	SAMSON OMONDI CHILO	Engineering Department/Electricals Kisumu City	4,110,412
2.	CHRISPIN OTIENO PUDO	Treasury/Ahero	4,140,412
3.	FRANCIS OCHIENG OSURE	Treasury/Town Parking	4,110,412
4.	MARGARET AWUOR ODHIAMBO	Department of Social Services (Rotary Youth Training Centre)	110,412
5.	JACKTON OCHECHE	Education, Culture and Social Services (Liquor)	110,412
6.	MARY ANNE AKOTH	MEO/Ojolla Zone Education	110,412
7.	ERICK ONYANGO OTIENO	Treasury/Town Parking	110,412
8.	PETER OGADA	Nyakach Sub-County	110,412
9.	JENIFFER MUYOYO	Health/Nyahera Health Centre	110,412
10.	JOSEPH OLUM	Treasury/Nyakach Sub-County	110,412
11.	SIMON ONDOI	DSS (Rotary Youth Training Centre) Kisumu City	15,000
12.	SIMON OTIENO ADEDE	CEO – MEK (not a County Employee)	4,110,412
	TOTAL		17,259,532

The Report directs that its recommendations be implemented by the SACCO Society under the supervision of the 2nd Respondent.

Under Article 235(1) of the Constitution a County is responsible for exercising disciplinary control over and removing persons holding or acting in offices within its public service.

Based on the foregoing I find that the Respondents had authority both under Article 235 of the Constitution and Section 36 of the Public Officers Ethics Act to suspend the petitioners and to require them to show cause why disciplinary action should not be taken against them.

On whether suspension was the appropriate action, I find that the Respondents had by suspending and

requiring the petitioners to respond to the show cause letters, acted within the provisions of Clause 20.4 of the County Public Service Human Resource Policy and Procedure Manual. As provided therein, suspension is an interim measure expected to last not longer than 6 months, or longer if other organizations are involved, within which period investigations should be finalized and final determination made on whether the employee is to be relieved of his duties or the suspension lifted and salary held during suspension released to the employee.

Since suspension is an interim measure to facilitate investigations, an employee can only be given an opportunity to respond to the charges against him once the process has commenced through the suspension. It is therefore illogical for the petitioners to allege that they have been punished without a hearing when no punishment has been meted against them and action taken to suspend them is as envisaged under the Respondent's Human Resource Policy and Procedure Manual.

From the foregoing I do not find any proof of breach of Article 27 of the Constitution whose relevance has not been explained by the petitioners. I further find no breaches of Articles 41, 47 or 51 of the Constitution. On the contrary I find that action taken by the Respondents in suspending the petitioners and requiring them to show cause why disciplinary action should not be taken against them pursuant to the breaches unearthed by the Inquiry under the Co-operative Act was in accordance with the Public Officers Ethics Act and in compliance with the Respondent's Human Resource Policy and Procedures Manual.

The result is that I find the petition without merit and dismiss the same. Each party shall bear its costs of the petition.

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

MAUREEN ONYANGO

JUDGE