



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 2141 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 13th February, 2017)

EVELYNE ANYANGO OBONDO.....CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

1. Before the Court is a Notice of Motion application dated 14th October 2016 where the Applicant seeks for orders:

- 1. That this Application be certified urgent and the same be heard ex-parte in the first instance.***
- 2. That the Respondent immediately reinstates the Claimant to work.***
- 3. That the suspension of the Claimant by the Respondent for a period above six months and the attendant delay in taking immediate administrative action is illegal, null and void.***
- 4. That the costs of the application be in cause.***

2. The application is based on the affidavit of Evelynne Anyango Obondo and other grounds to be adduced at the hearing.

3. The Respondent has filed grounds of opposition where they state that the application is misconceived as the Claimant has not been dismissed to warrant reinstatement under Section 12 (3) of the Industrial Court Act.

4. They state that the determination as to the legality or otherwise of the delay in taking administrative action can be explained by the way of evidence during the hearing upon presentation of facts.

5. Further, they state that there is prima facie sufficient ground on the suspension letter for the Respondent to exercise a right to disciplinary action against the Claimant.

6. They state that the Claimant has not demonstrated that she will suffer irreparable harm if the

application is not granted, and that no exceptional circumstances have been demonstrated to warrant an order of reinstatement.

7. The Applicant submits that they were employed by the Respondent under the Respondent's Customs Department on the 8th of September 2011 where she worked diligently until 16th October 2013 when she received a letter of suspension grounded on various unfounded allegations.

8. The Claimant submits that she ably defended herself against each and every allegation vide a letter dated 28th October 2013 and later appeared before the disciplinary committee on the 19th of November 2015. However, the Respondent is yet to communicate the decision of the committee. She has also not been supplied with documents relied on in relation to her case.

9. The Claimant submits that the suspension has been dragged on for too long contravening her rights as provided under Article 47 of the Constitution of Kenya, and the Employment Act 2007, as well as the KRA's employees Code of Conduct, Access to Information Act, Fair Administrative Action Act, and other labour laws of Kenya.

10. They submit that the suspension goes against Ambassador Francis K. Muthaura (Permanent Secretary); Secretary to the Cabinet and Head of Public Service as at 24th May 2010 when the circular was issued providing guidelines on handling cases of public officers who are suspected for involvement in corrupt practices.

11. They refer to the case of **Dennis Moturi Anyoka v Kenya Revenue Authority & 2 Others [2015] eKLR** where the Petitioner was placed under interdiction by the Respondent for a period above the one prescribed by the law. The Respondent failed to conclude disciplinary inquiry and/or proceedings 2 years after their commencement. The Court held that given the timeline of 6 months, a delay of an excess of three months or at most 6 more months would be acceptable but to extend proceedings for over 2 years is unreasonable and procedurally unfair and the Respondent cannot be excused for their ineptitude.

12. Further the Claimant has been suspended since 16th October 2013, it is now over 3 years since the date of suspension. If it were a little over 6 months, this would be a bit explainable and or reasonable. They submit that 3 years is ridiculous so to speak and an utter abuse of the rights of the Claimant.

13. They refer the Honorable Court to the KRA Employee Handbook (1st Edition) which provides under Article 18.2.1 that cases of interdiction and/or suspension are determined within six months as much as may be possible, and interdicted staff who are reinstated after exoneration shall be paid their withheld emoluments. They seek that the application be allowed with costs.

14. The Respondent submits that the Applicant was accused of gross misconduct which was:

a. Failure to verify nature and description of goods being loaded into container Number MEDU1507543 and as a result there was illegal exportation of ivory loaded into the container.

b. Keyed in the wrong message in the Simba System that she had supervised the loading of 102 bags of crushed plastic flakes.

c. Failure to indicate in the Simba system that the container should be scanned/verified.

d. Failure to seal the subject container with a customs seal and subsequent failure to indicate in the Simba System, the reasons thereof.

e. Failure to capture the registration number of the truck ferrying the container in her stuffing message.

15. The Respondents submit that the Applicant's actions contravened the Code of Conduct part 6.1.7;

6.2.5.2; 6.2.5.4; and 6.2.5.6. They submit that the disciplinary hearing on the 19th of November 2015, made a recommendation that she be retired in the Authority's interest, and that the Claimant filed the suit seeking reinstatement.

16. They submit that the remedy is not a temporary one and not provisional; it should not be granted until full hearing by the employer.

17. They cite the case **Industrial Court Case Number 1200 of 2012 between Professor Gitile Naituli vs. University Council Multimedia University College and Another**, where the Court refused to issue a temporary injunction restraining the employer from interference with the employee's peaceful performance of his duties pending the hearing of the main claim. It stated that:

“The Employment Act does not intend that the courts take away managerial prerogatives form employers. To give interim orders would have the effect of stifling the management prerogative in staff administration. It would mean the employer does not have any more say in the contract of employment it has authored. This would be contrary to the intention of the Employment Act, which seeks to merely protect the weaker of the bargaining partners, not deprive the employer the power to run its business altogether. “

18. They submit that the Court should exercise caution and draw a distinction between workplace disciplinary process and the judicial process. The matter can only be determined after a full hearing.

19. The Respondents submit that the question as to lawful termination cannot be canvassed now and should be addressed at the hearing with full evidence presented. They state that they should be given the opportunity to do so and that the Court does have the option of compensation should termination be found unfair.

20. They submit that they have attached several investigative reports that demonstrate the culpability of the Claimant.

21. They cite the case of **Alfred Nyungu Kimungui vs. Bomas of Kenya [2013]eKLR**.

22. As to the infringement of the Applicant's rights as guaranteed under Article 47, the Respondent states that they exercised power to discipline the Claimant as derived from the contract of employment. They further submit that it is Article 41 on the right to fair administrative action and not 47 that is the proper area of applicable law.

23. They cite Radido J in **Edwin Nyamanga vs. Silver Holdings Ltd. [2014] eKLR** where he stated that:

“The Court is of the view that the issue of the interplay between an employers' decision to terminate the services of an employee ought to be resolved on the basis of Article 41 of the Constitution and the primary employment/Labour Relation Act and not Article 47 of the Constitution.

The Court therefore declines to concede to the submission by the Claimant that his Article rights were implicated or violated.

Bearing the foregoing discussion in mind, the court reaches the conclusion that the termination of the Claimant was substantially in compliance with procedural fairness, further that the Respondent has proved the reason(s) for the termination and that those reasons were valid and fair”.

24. They state that the application is without merit and that the same should be dismissed with costs.

25. Having considered the submissions of both parties, this Court notes that this process of discipline was commenced in year 2013, 16th October. Todate the process has not been concluded.

26. The Applicant has submitted infringement of her rights under the Constitution.

27. Under Article 47 of the Constitution administrative action should be fair and expeditious. Article 47 provides as follows:

- 1. "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**
- 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**
- 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall:-**
 - a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and**
 - b) promote efficient administration".**

28. Article 35 of the Constitution also provides as follows:

- 1) "Every citizen has the right of access to:**
 - a) information held by the State; and**
 - b) information held by another person and required for the exercise or protection of any right or fundamental freedom.**
- 2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.**
- 3) The State shall publish and publicise any important information affecting the nation".**

29. The Applicant has been subjected to administrative process that is neither fair nor expeditious. She has not been given any information concerning the outcome of the disciplinary process since 2013. It is therefore apparent that her rights under Article 47 and 35 of the Constitution have been infringed.

30. Delay in disciplinary action may be condoned upto 6 months. However a period of over 3 years is unacceptable and an abuse of the entire process and amounts to unfair labour practice.

31. This Court has time and again stated that it will not interfere with internal disciplinary processes of the parties where the process is fair. However, the Court would meddle where the process is unfair and out of course and geared towards breaching of the law and even the rights of the parties. This is the case in this case. I therefore find that the process in place is flawed and obviously offends proper labour process and therefore I halt the process immediately.

32. I direct that the Applicant resumes duty without any condition and be paid all withheld salaries and allowances from the time of suspension.

33. The Respondents are forbidden from re-opening this flawed process on the same matter which they have failed to resolve in the last 3 years.

34. The main suit may now be set down for hearing and determination of any pending issues.

35. Costs in the cause.

Read in open Court this 13th day of February, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odhambo for the Claimant - Present

Chapala for the Respondent - Present