



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2142 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 2nd February, 2017)

PHELGONA AUMA ONYANGO.....CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

RULING

1. The Application before Court is one dated 14/10/2016 and filed by the Applicant Claimant herein under Certificate of Urgency on 18/10/2016. The Application was brought through a Notice of Motion brought under the provisions of Section 1A, 1B, 3A (Cap 21 of the Laws of Kenya), Section 12 Employment and Labour Relations Court Act, Order 51 Rule 1 and all other enabling provisions of the Law.

2. The Applicant seeks orders as follows:

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 interdiction 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.***

3. The Application is based on the following grounds and supported by the annexed affidavit of Phelgona Ouma Onyango the Applicant herein.

4. In her affidavit, the Claimant Applicant has averred that she was employed by the Respondent as a Preventive Guard II until 10th October 2011 when she was interdicted on various unfounded allegations. That she defended herself against each and every allegation and later appeared before the disciplinary committee on 19th November 2015. That to date the Respondent is yet to communicate the decision of the said disciplinary committee.

5. The Respondent has also declined to supply her with the documents relied on in relation to her case.

6. She avers that the interdiction having dragged for long contravenes her rights as provided for under Article 47 of the Constitution of Kenya and goes against the provision of the Employment Act 2007, Kenya Revenue Authority's Employee Code of Conduct, Access to Information Act, Fair Administrative Action Act and other labour related Laws of Kenya.

7. She avers that the said interdiction also goes against Amb. Francis K. Muthaura's (PS, Secretary to Cabinet and Head of Public Service of 24th May 2010 circular giving guidelines on how to ensure administrative action in dealing with suspected cases of corruption.

8. The Applicant avers that despite demand and intention to sue having been effected, the Respondent has declined to make good the claim.

9. The Respondents opposed this Application and filed their Grounds of Opposition dated 31.10.2016 on 1.11.2016.

10. The Respondents aver that the Claimant seeks to prosecute its claim at an interim stage. They also aver that the Application is misconceived as the Claimant has not been dismissed to warrant reinstatement.

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

12. It is their contention that there is a prima facie sufficient ground on the suspension letter for the Respondent to exercise right of disciplinary action against the Claimant and that no exceptional circumstances have been demonstrated to warrant an order for reinstatement.

13. They contend that the hearing would be rendered nugatory if the order for reinstatement is granted.

14. I have considered the Application and averments of both parties. The issue to determine is whether the Application before Court is premature and renders the entire claim a nugatory and if not, whether the disciplinary process offends the rights of the Applicant under the Constitution as pleaded.

15. From the averments of the Applicant, the interdiction was effected on 10th October 2011 vide the letter dated 10.10.2011. The Claimant was expected to respond to allegations leveled against her within 14 days which she did vide her letter dated 1.12.2011 and another of 27.10.2011.

16. She further wrote a letter dated 1.12.2011 appealing against the disciplinary process against her but it appears the appeal was not granted and the process went on. Investigations were done and a report made in that respect. After all the waiting, she was finally invited to a disciplinary hearing on 19.11.2015 which she attended. Since then, there has been no further action by the Respondents.

17. From this process, it is clear that the envisaged disciplinary process has been on since 2011 October 10th when she was interdicted. This is over 5 years of waiting.

18. This offends fair administrative action as envisaged under the Constitution envisaged under Article 47 of Constitution which states 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”.

19. The right of Claimant Applicant to have information as envisaged under Article 35 of Constitution is also infringed upon.

20. Article 50(1) of the Constitution also envisages any trial or hearing to be fair and under Article 50(2) (e) to be concluded without any unreasonable delay.

21. The Respondent have failed in all the above.

22. Courts will not interfere with internal disciplinary processes between an employer and employee unless the process is obviously flawed and in breach of proper rules of procedure as seen herein.

23. The order of this Court will not determine the entire claim but given the circumstances prevailing, this Court finds that the action of the Respondent is inordinately flawed and delayed and it amounts to an unfair labour practice. I therefore order that the unfair disciplinary process be and is hereby halted forthwith.

24. The Applicant should resume duty immediately without any conditions and be paid all withheld salaries and allowances from the time of interdiction.

25. The Respondents are enjoined from reopening the disciplinary process on the same issues having delayed to resolve the matter for the last 5 years.

26. The main suit may be set down for hearing to determine any pending issues.

27. Costs in the cause.

Read in open Court this 2nd day of February, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odhiambo for the Claimant

Chabala for the Respondent