



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF
KENYA AT NAIROBI
CAUSE 162 OF 2016

JOSEPH MATUU MUTINDA.....CLAIMANT

VERSUS

GOVERNMENT OF MAKUENI COUNTY1ST RESPONDENT

THE INTERDEPARTMENTAL

ADVISORY COMMITTEE2ND RESPONDENT

RULING

1. By a notice of motion dated 25th January, 2016 the claimant moved the court seeking order *inter alia* that;

- i. That pending the hearing and determination of this application *inter partes* this court do issue a temporary injunction against the 1st and 2nd respondents against termination and/or dismissal of the claimant from his employment.
- ii. That pending the hearing and determination of this claim, a mandatory injunction do issue against the 1st and 2nd respondents against termination and/or dismissal of the claimant from his employment without following the law and their terms and condition of employment.
- iii. That a mandatory order do issue against the 1st and 2nd respondents for reinstatement of the claimant to his employment with full salary and benefits pending the hearing and determination of this claim *inter partes*.

2. The application was supported by the affidavit of the claimant who deponed on the main that;

- i. That I was appointed by the Makueni County Public Service as the Chief Officer in the department of Lands, Urban Planning and Environment Management with effect 7/3/2014.
- ii. That I was dismissed summarily without justifiable cause on 22.12.2015.
- iii. That I was never given a chance to explain my case as required under the law. The decision to dismiss me was actuated by malice as I had been suspended for over a year.
- iv. That my dismissal followed a deliberation by the Interdepartmental Advisory Committee via

Min 1/22/12/2015 before which committee I never summoned to appear.

3. The respondent opposed the application and filed a replying affidavit through one Joshua Wambua who deponed in the main that;

i. That contrary to the claimant's allegations Paragraph 3 of the supporting affidavit, the claimant was legally dismissed for gross misconduct, abuse of office, gross violation of the constitution and statutes under power and authority bestowed by Law which are all justifiable causes that warranted the summary dismissal.

ii. That on the 16th June, 2014, the claimant falsified imprest claims where he presented an imprest claim amounting to Kenya shillings Eight Hundred and Eighty Seven thousand (Kshs 887,000/-) by submitting a breakdown of expenses different from the one he submitted to the ECM Finance. This impropriety has not been explained.

iii. That on 2nd October, 2014 the claimant irregularly collected imprest amounting to Kshs 76,000/- issued to one Gideon Makasi and further in November 2014, the claimant collected a total of Kshs 94,000/- being imprest issued to one Mercy Mutie.

iv. That the claimant irregularly collected the aforesaid imprest issued to other officers by coercing the cashier to give him the cash and/or following the said officers to the cash office and taking the cash immediately from the officer upon collection, resulting in funds for projects not being readily available.

v. That the claimant also falsified allowance returns on diverse dates between the months of June and December, 2014 by irregularly collecting staff per diems for surveyors undertaking fieldwork in Kevanda and Makindu Town. The claimant then paid the staff less than what was due but made returns as if full allowances had been paid.

vi. That the claimant solicited and/or received monies irregularly from clients for approval of development plans, and this was reported to the office by two clients, China Road & Bridge Corporation for their Makindu suite office and one Johnstone Mwololo.

vii. That on 14th October, 2015, the Head of County Treasury made a report on unsurrendered imprest amounts by the claimant amounting to Kshs 1,045,620/-

viii. That on 18th June, 2014, the claimant was issued with an imprest of Kshs 500,000/- using imprest warrant number 2012701 meant for survey of Kalamba fruit processing plant site. The officers alleged to have been paid the allowances denied having received the cash.

ix. That on 13th June, 2014, the claimant was issued with an imprest of Kshs 23,200/- using imprest warrant number 2012817 meant for attendance of objection cases at Kasikeu Adjudication section.

x. That the 1st respondent, vide a letter dated 16th October, 2015 issued the claimant with a notice to surrender imprest, having established that the claimant had colossal sums of money unsurrendered to the 1st respondent in form of imprests issued to him. His response and all the issues were unsatisfactory and insufficient to support a surrender of imprest as per the Government Fiscal Standard, hence the imprest sum remain unsurrendered.

xi. That contrary to the averments in paragraph 4 of the supporting affidavit, the claimant was afforded a chance to be heard on explanation as to the charges of misappropriation of the respondent's funds and falsification of documents related to account imprests as required by the law.

xii. That further to Paragraph 20 above, the claimant responded to the allegation of misconduct vide a letter dated 9th November, 2015, a material fact he has concealed in his application with a purpose to mislead this honourable court.

xiii. That contrary to the averments in paragraph 5 of the supporting affidavit, a Special Disciplinary & Advisory Committee was formed by the Governor to look into complaints against some senior staff members in the county, who included the claimant. The Governor has power to appoint committees to advise him on any matter hence the formation of the aforesaid committee herein was within the Governor's powers.

xiv. That the aforesaid committee embarked on their assignment and got seized of the issues after the officers, who included the claimant, responded to the show cause letters written to them by the Acting County Secretary.

xv. That the committee deliberated on the issues before it and made a report and recommendations to the Governor.

xvi. That the committee found that the claimant was a person of questionable integrity and advised the Governor that action be taken against the officer in line with the Ethics and Economic Crimes Act among other legal provisions.

xvii. That contrary to the averments in Paragraph 6 of the supporting affidavit, the Governor wrote the dismissal letter as the Chief Executive Officer of the County Government in line with provisions of the County Government Act, 2012 Section 30 (3) and Article 179 (4) of the constitution of Kenya, 2010 and as the appointing authority.

xviii. That further to paragraph 24 above, I am advised by my Advocates on record which advise I verily believe to be true correct that according to Section 45 of the County Government Act the County Public Service Board only sources and recommends county chief officers but the Governor has powers to nominate and appoint county chief officers.

xiv. That I am further advised by my Advocates on record which advise I verily believe to be true that according to Section 59 1(a)-(c) of The County Government Act 2012, the County Public Service Board does not exercise powers over Chief Officers.

xx. That in response to paragraphs 7 & 8 of the supporting affidavit, the investigations carried out by the Interdepartmental Advisory Committee were very elaborate and extensive going beyond the Minimum Rules of Natural Justice and the findings and recommendations arrived at by the Committee were well established and were part of what the committee was instructed to do.

xxi. That in respect to paragraph 9 of the supporting affidavit, the respondents did not break any law nor violate the claimant's constitutional rights or act contrary to the principles of Natural Justice as alleged by the claimant herein as the claimant was given an opportunity to be heard a right he was not even entitled to in the circumstances of the case.

4. In his submissions in support of the application Mrs Mutua for the claimant submitted that the claimant was irregularly and unprocedurally removed from office. According to counsel, under section 45(2) of the County Government Act, the office of a County Chief Officer is an office in the County Public Service and only County Public Service Board could terminate the claimant's services. According to counsel, the Governor and the Interdepartmental Advisory Committee had no power to terminate the claimant's services. Counsel further cited section 59(1) (c) of the County Government Act which she submitted conferred on County Public Service Board power to exercise disciplinary control over persons holding or acting in offices as provided in the Act. To support this argument counsel cited the case of **Monica Cyombua Gitari & another Vs Embu County Government [2015] eKLR**.

5. On the issue of due process, counsel submitted that it was clear from the evidence on record that

although the applicant received several letters containing varied accusations, he responded to them all. However, it was clear that the claimant was not given a chance to face his accusers. He was not accorded an opportunity to cross-examine the persons who made the allegations against him. Counsel therefore contended that the applicant had met the threshold for grant of injunctions as set out in the case of *Giella Vs Cassman Brown*.

6. Mr Nyamu for the respondent on the other hand submitted that the claimant was afforded an opportunity to be heard on the explanation as to the charges of misappropriation of respondent's funds and falsification of documents related to account imprests. Further the claimant responded to the allegations of misconduct through a letter dated 9th November, 2015 a material fact the claimant concealed in his application with the purpose of misleading the court.

7. According to counsel, the applicant was seeking to interfere with employer's powers. In support of this submission, counsel relied on the case of **Geoffrey Mworira Vs Water Resources Management Authority & 2 Others [2015] eKLR** where the court stated that the principles were clear that the court will sparingly interfere in the employer's entitlement to perform any human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy or any other human resource function.

8. Mr Nyamu further submitted under article 179(4) of the Constitution, the Governor is the Chief Executive Officer of the county so that in exercise of the general powers as the Chief Executive of the County, the Governor was entitled to terminate the claimant's employment.

9. This being an interlocutory application, the concern of the court is therefore to establish if the applicant has demonstrated a *prima facie* case with probability of success and further if successful at the final hearing, damages cannot adequately recompense the applicant.

10. Being an employment dispute, the court must further decide where the balance of convenience lies. That is to say whether it would be convenient to keep the applicant in employment pending the determination of this dispute or uphold the employer's action of separation from employment contract.

11. The orders sought in the application before me include an order for reinstatement pending the outcome of the main claim. An order for interlocutory reinstatement to employment is similar to an order of interlocutory mandatory injunction. It seeks to interdict a decision by an employer to separate from an employment contract with an employee. Although it can be granted, it is one that should be made sparingly and in exceptional cases.

12. The applicant before me was accused of financial impropriety. He does not seem to strongly contest the accusations against him, all he seems to contest and question is the process followed by the respondent in handling the matter and the power of the Governor to terminate his services. These are issues that can only be delved into in detail at the full trial. At this point the respondent has *prima facie* demonstrated that it had reasonable grounds to dismiss the claimant. These grounds are contested by the claimant. The court will have the chance to hear fully why he contends the reason for his dismissal and if successful, the court does have power to order for this reinstatement.

13. The court therefore after carefully considering the application, the grounds thereof and affidavit in support as well as the respondent's response, is of the view that it is not a proper case to grant the orders sought. The application is therefore dismissed with the direction that the remedies sought by the applicant can be granted after full trial on merits.

14. It is so ordered.

Dated at Nairobi this 3rd day of March, 2017

Abuodha J. N.

Judge

Delivered this 3rd day of March, 2017

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge