



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**JUDICIAL REVIEW NO. 13 OF 2017**

**(Formerly High Court Judicial Review No. 297 of 2017**

**(Before Hon. Justice Hellen S. Wasilwa on 29<sup>th</sup> June, 2017)**

**DR. BERNARD SOWEK.....1<sup>ST</sup> APPLICANT**

**REPUBLIC.....2<sup>ND</sup> APPLICANT**

**- VERSUS-**

**THE COUNTY SECRETARY AND**

**HEAD OF PUBLIC SERVICE, BOMET COUNTY.....1<sup>ST</sup> RESPONDENT**

**THE GOVERNOR, BOMET COUNTRY.....2<sup>ND</sup> RESPONDENT**

**EX-PARTE**

**DR. BERNARD SOWEK.....APPLICANT**

**RULING**

1. Before the Court is an Application via Chamber Summons dated 7<sup>th</sup> June 2017 where the Applicant prays for orders:

*1. That the leave granted on the 12<sup>th</sup> of June 2017 operate as stay of the decision of the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to send the Applicant on suspension, pending the hearing of this application inter-parties.*

2. The application is supported by the annexed affidavit of Dr. Benard Sowek as well as on grounds set out in the Statutory Statement and upon any other grounds to be adduced in the hearing thereof.

3. The Applicant in this matter is the Chief Officer Medical Services where he supervises all official distribution of drugs across Bomet County which he diligently delivered evidenced in the fact that the County continued to enjoy supply of drugs during the nationwide strike when other hospitals closed.

4. The 2<sup>nd</sup> Respondent in a bid to win back his political seat, used county officers to campaign for him

which was a violation of their constitutional right to freely support any party, and it is when the Applicant did not campaign but instead dedicate himself on his duties that he experienced friction with the governor who then vowed to relieve him of his duties.

5. He was served with a letter via the County Secretary and Head of County Public Service Mr. Jonathan Soi suspending him with immediate effect alleging absenteeism on diverse dates which allegations have not been proved.

6. He avers that it was also alleged that on the 26<sup>th</sup> of May 2016 in a public gathering in Chepalungu Sub County he openly declared defection to another political party which he is informed amounts to gross misconduct and contrary to the Public Service Code and Regulations and Public Officers Act.

7. He avers that he was not accorded a chance to be heard as stipulated in the constitution following the grievous allegations they were raising.

8. He avers that he has written to the Respondents to rescind their decision but to no avail, and that it will be in the interest of justice if the order was quashed and he was reinstated.

9. The Respondents have filed a Replying Affidavit dated 23<sup>rd</sup> June 2017 deponed to by Dr. Kiplangat Sigi the County Executive Committee Member, Health for the County of Bomet.

10. He avers that Section 16 of the Public Officers Ethics Act 2003 and Order 24 of the Public Officers Code of Regulation provides for political neutrality whereby a public officer is prohibited from acting in such a manner as to further the interest of a political party or indicate support for or opposition to any political party or candidate in an election. That Section 16 further provides that a public officer such as the Applicant must not engage in political activity that may compromise or be seen to compromise the political neutrality of his office.

11. That the 1<sup>st</sup> Respondent was made aware through ex-parte Applicant's immediate supervisor AG CEC Medical Services that:

*a. On diverse dates the Ex-Parte Applicant absented himself from duty without permission or lawful excuse.*

*b. On or about 26<sup>th</sup> May 2017 in a public event the Ex-Parte Applicant publicly engaged himself in partisan politics by declaring defection to another political party.*

12. That the Ex-Parte applicant is charged with absconding duty without proper or lawful excuse. There are well laid procedure on seeking leave of absence and being a senior officer, the Ex-Parte Applicant is well aware of them or ought to know that the same amounts to gross misconduct.

13. That the 1<sup>st</sup> Respondent in proper exercise of its function of disciplinary control under Section 59(1) (c) of the County Government Act 2012, proceeded to suspend the Ex- Parte Applicant through a letter informing him of the two disciplinary charges against him and giving him 21 days in which to give his representation in writing as investigations are being carried out. The applicant was to receive no salary but was entitled to house allowance and medial cover.

14. That the application before court is premature and unfounded, and that this is a clear disciplinary process to charges against the Ex-Parte Applicant and it should be treated as any other employee would be without preference.

15. That the Applicant having expressed political affiliation is trying to score political capital in this suit which the court cannot reasonably deal with.

16. That the Governor is not involved in the discipline of members of the county public service and his

campaign are not subject of deliberations, the suspension is solely based on a report received by the ex-parte applicant's immediate supervisor and the County Public Service Board.

17. The Applicant has been granted an opportunity to provide representation in 21 days from 5<sup>th</sup> June 2017 but is yet to do the same. He is yet to appeal before the Board for formal disciplinary proceedings.

18. That this honourable court should properly exercise its jurisdiction and decline to interfere with a disciplinary process already commenced by the Bomet County Government Public Service Board, further investigations are still on going and the Ex-Parte Applicant has been asked to given written response.

19. That Courts will sparingly interfere with the entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy or any other human resource function and to interfere the Ex-Parte Applicant must demonstrate that the Respondents are:

*a. In contravention of the provision of constitution or legislation or*

*b. In breach of the agreement between the parties; or*

*c. In a manner that is manifestly unfair in the circumstances of the case; or*

*d. The internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with and ventilate his case through the employers' internal process.*

20. That the Ex-Parte Applicant has not adduced adequate grounds for the leave to serve as stay and the application is misconceived, lacks merit and is designed to mislead the Court.

21. The order that leave operates as stay is discretionary and the same is not obtainable in this matter and would amount to this Court taking away the powers of the Bomet Public Service Board form undertaking disciplinary control. The 1<sup>st</sup> Respondent has not exercised his powers oppressively or breached any laws, and in the balance of convenience, this Honourable Court ought to hold that the role of disciplinary control cannot be interfered with in absence of proper proof of breach of procedure law or otherwise.

22. That as a matter of right the Respondent has already made the decision to suspend an employee and the suspension is already taking place, interference would mean interference in Human Resource functions.

23. In their submissions, the Ex-Parte Applicants rely on their pleadings adding that the leave should operate as stay and relying on Lady Justice Joyce N. Khaminwa vs. Judicial Service Commission & Anther [2014] eKLR where it was stated that:

*“The law relating to Judicial Review has now reached a stage where it can be said with confidence that if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter in which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power.....” and the court ought to grant stay to act as leave and in that same case they submit that in Paragraph 21 it was stated:*

*“...in the case of John vs. Rees [1970] CH 345 at 402 in the exercise of the discretion on whether or not to grant stay, the court takes into account the needs of good administration.”*

*What comes out clearly from the foregoing is that the grant of leave to commence judicial review proceedings is neither a mere formality nor a practice of magic. It is not to be granted as a matter of course. Delay is one of the factors which a Court often considers in deciding whether or not to grant leave. The Applicant for leave is under an obligation to show the Court that he or*

***she has a prima facie arguable case for grant of leave. Therefore whereas he is not required at that stage to go into depth of the application, he has to show that he has not come to Court after an inordinate delay and that the application is not frivolous, malicious and futile...”***

24. They submit that there was no delay in coming to Court and that if stay is not granted the application will be rendered nugatory.

25. The Respondents oppose the application and rely fully on their Replying Affidavit.

26. They submit that the matter should not be before the Court as it is strictly a disciplinary process taken in accordance with the Public Service Commission HR Policies. The show cause letter is very clear and the Applicant as an officer of the County and is governed by the law according to the Ethics Act dealing with political neutrality. There is no evidence that he was forced to support the political party and there are only certain situations where the Court can interfere with disciplinary action and this is not one of them as the internal process is ongoing.

27. In Response the Ex-Parte Applicant reiterates that the Respondent is in breach of the Constitution, he was suspended without a hearing. The allegations have not been proved and this is an injustice. The Respondents has stated the instances where the court can interfere as where they are:

***a. In contravention of the provision of constitution or legislation or***

***b. In breach of the agreement between the parties; or***

***c. In a manner that is manifestly unfair in the circumstance of the case; or***

***d. The internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the ventilate his case through the employers internal process.***

28. They submit that there is management injustice and it is proper for the Court to interfere, moreover the Applicant was a Chief Officer dealing with various functions. The allegations leveled against him should be put to scrutiny as he continues to discharge his duties. They ask the court to allow the prayers.

29. Having considered the submissions of both parties, I am alive to the fact that Court should never interfere with the Parties' Internal disciplinary processes' unless they are manifestly flawed and not to stop them but to ensure they are on course following laid down procedures. If the Courts were not to be alive to this fact, then there would be undue interference by the Courts of internal disciplinary processes.

30. In this case, the Applicant was served with a suspension letter dated 5/6/2017. The reasons for the suspension were laid out and he was asked to respond to the allegations in writing within 21 days.

31. On 8<sup>th</sup> June, 2017, the Applicant sought refuge before this Court by filing the application before Court. He has not taken any steps to reply to the suspension letter and now seeks to have the leave sought to file the application before Court to operate as stay.

32. The Respondents have deponed that this Court should not grant the stay sought because they have acted within the law and the Court should not interfere with the parties' internal disciplinary processes.

33. It is true as stated above that Court should never interfere with internal disciplinary processes unless the process is in contravention of the constitution or legislation or is in breach of the parties' agreement/contract and the HR Policies and Manual of the parties or the process is manifestly unfair in the circumstances of the case.

34. The process so far initiated was commenced with a suspension letter. The Applicant has been asked to respond. He has not. There is no indication that the employer - the Respondent hearing in proceedings in

a manner that would make it impossible to deal with this case.

35. The Applicant has also not pointed out the breach or flouting of the Constitution or the law or even polices by the Respondent herein.

36. It is therefore this Court's position and finding that it will not interfere with the internal disciplinary process so far initiated. The stay prayed for will not be granted. I will urge the Applicant to proceed and respond as requested in the suspension letter.

37. He is however at liberty to apply if there is any indication of the trumping down of any law or the Constitution and the HR Polies as the case may be during the pendency of the disciplinary processes.

38. Costs in the cause.

Read in open Court this **29<sup>th</sup> day of June, 2017.**

**Further Orders**

The 21 days within which Applicant to respond is now extended by this Court and will now run from today.

**Further orders**

Mention on 11/7/2017 before Kericho ELRC Court.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mutahi for Applicant – Present

Manyange for Respondent