REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2032 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 25th July, 2017)

YATICH KANGUNGO …..…….…….…….....…CLAIMANT

VERSUS

THE BOARD OF DIRECTORS, KENYA AIRPORTS AUTHORITY.....1ST RESPONDENT

MINISTRY OF INFRASTRUCTURE AND TRANSPORT ……...……..2ND RESPONDENT

THE HON. ATTORNEY GENERAL…...…….....……..3RD RESPONDENT

RULING

1. Before the Court is a Notice of Motion Application dated 6th June 2017 brought Under Article 10, 19, 25(a), 27, 28, 41, 50 and 259 of the Constitution of Kenya 2010, Section 4 of the Prevention of Torture Act 2017, Section 3, 4 and 5 of the Contempt of Court Act and all other enabling provisions of the law for Orders:

> ***1. That the Application be and is hereby certified as urgent and apt for hearing in the first instance.***
>
> ***2. That in the interim the Honourable Court be and is hereby pleased to suspend and or invalidate the 1st Respondents suspension letter dated 6th June 2017 pending the hearing and determination of this application and suit.***
>
> ***3. That the Respondents be and are hereby restrained by themselves, their servants and or agents from ostracizing discriminating or tormenting the Claimant herein till the hearing and determination of this application and suit.***
>
> ***4. That the Claimant resumes back to his employment duty station of employment forthwith pending the hearing and determination of this application and suit.***
>
> ***5. That the Honourable Court be and is hereby pleased to commit the members of the disciplinary of the Board of Directors of the 1st Respondent to Civil Jail for 6 months for being in contempt of Court.***

6. That costs be provided.

7. That this Honourable Court be pleased to issue any order it deems just and fair in the circumstances.

2. The Application is grounded on the supporting Affidavit of Yatich Kangugo on the following grounds and other reasons to be adduced at the hearing thereof;

a. That the 1st Respondent has been harassing and bullying the Claimant with the sole intention of frustrating justice.

b. That the 1st Respondent has unlawfully and without any justifiable reason suspended the Claimant from duty.

c. That the Claimant is now a victim of an unfair and biased disciplinary process.

d. That this Honourable Court is being taken for granted, abused and treated with disdain.

e. That the 1st Respondent has continued to subject the Claimant to illegal disciplinary proceedings with the full knowledge that the issues are related to this matter which is alive and well pending full hearing and determination.

f. That the Claimant's fair labour practices as guaranteed by the Constitution have been violated and infringed at the whim and caprice of the Respondents.

g. That the Claimant Constitutionally guaranteed right to fair hearing have been violated and continue to be so violated.

h. That the Constitutional rights of the Claimant are under serious threat of violation.

i. That the Respondents risk relegating the Constitution to a worthless document.

3. The application is supported by the annexed affidavit of Yatich Kagungo who avers that the application was encouraged by the show cause letters he has been receiving which is tantamount to conduct that amounts for contempt of Court which should not be tolerated by the Court.

4. He avers that this move is one that aims to frustrate and intimidate him to a point of voluntary resignation.

5. The Respondents have filed a Replying Affidavit dated 9th June 2017 deponed to by Katherine Kisila, the Corporation Secretary of the 1st Respondent where she avers that she works very closely with the Managing Director especially on legal matters and advised him that as a corporation they cannot work in manners that will undermine the Court process.

6. That it was the Claimant who is hiding behind the Court case and the interim orders of reinstatement to make mischief while on duty, and is under the mistaken belief that owing to the Court process he is under no obligation to obey lawful instructions and is immuned to any disciplinary process.

7. They aver that on the 6th of October 2016 they were served with a Court order dated the 4th of October 2016 which directed the corporation to suspend the implementation of a letter separating the Claimant from the Corporation. This they state, they accommodated despite the challenges and an employee had to be redeployed to accommodate the Claimant in his previous capacity, and after consultation with the acting Managing Director and acting Manager Human Resource Development via letter dated 12th October 2016 the Corporation reinstated the Claimant to the position of Airport Manager, Moi International Airport. He was to report on the 1st of November 2016.

8. They aver that in a response letter dated 31st October 2016 the Claimant's Advocates showed lack of willingness to corporate with the Corporation and stated in part:-

> ***"the contents of the letter have been noted but we wish to remind you that our client is still an employee of your client, Kenya Airports Authority and therefore instructions to report to work should come directly from your client not yourselves. Let your client give instructions directly to our client on modalities of reporting to work and where to report. We have therefore advised our client to ignore your letter dated 25th October 2016 until when your clients will issue proper instructions to ours".***

9. They aver that they did not find irregularity in them having communicated to the Claimant through his Advocate since the matter was related to compliance with a Court order, but they wrote directly to the Claimant reiterating that he had been reinstated. He eventually reported on the 7th of November 2016.

10. They aver that despite his reporting, he has barely been in office as he has sought and obtained leave for more days than he is entitled to, and has on various occasions delegated his duties to juniors including serious ones like attending meetings with Board of Directors of the Corporation. He has failed to attend management meetings held on the 1st December 2016, 6th December 2016 and 7th December 2016, which resulted in a letter dated 8th December 2016 where he was asked to explain reasons for his non-attendance. He did response in a letter dated 15th December 2016.

11. She avers that between 30th November 2016 and 7th February 2016 he dealt with the corporation land being LR NO MV/VI/4114/VI/3853, 3854, 3855, 3857, 3858, 3860, 3861, 3861, 3904, 3905 and 3906 in irregular manner. On the 30th of November 2016 and 7th February 2017 he convened meetings between himself and third parties where it was agreed that the Corporation was to take coordinates within the airport, and participate in a survey in relation to land belonging to the Corporation without approval.

12. She avers that the 11th of January 2017 the Claimant without involvement of the Corporation surveyor, authorized the District Surveyor to point out beacons delineating the boundary between the Corporation and M/s East African Gas Company, and that on the 17th of January 2017, without authority of the Corporation and in the company of third parties he visited the site of the beacons and inspected them.

13. He facilitated and cooperated in the preparation of the survey report presented to him on the 24th of January 2017 and in letter addressed to M/s Macharia Ng'aru & Wetangula Advocates he acted without authority without consulting the Corporation or Managing Director by admitting liability by stating as follows:-

> ***"We have now had the benefit of perusing the Mombasa District Surveyors Ground Report dated 23rd January 2017 which confirm that indeed we have encroached on your clients land. The Authority has every intention to remedy this without resorting to "precipitate action" as threatened in your letter of 24th January 2017.***
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> ***Moi International Airport in a high security installation as such, the Security Fence and the Watchtower cannot be removed without proper planning and execution. The Authority which is a state corporation is also constrained by budgetary constraints that do not anticipate that the Authority had encroached on your client land.***
>
> ***We therefore implore you and your client to afford us a little time to consult with KAA Managing Director on how best to effect the removal of our security fence and the watchtower from your client's land."***

14. She avers that the Claimant has been dishonest in that he has applied for leave on the pretext that he was to attend Court session when the matter was not scheduled for mention or hearing on the 28th of

November 2016, 2nd December 2016 and time between 24th February 2017 to 9th March 2017.

15. She avers that without informing the Managing Director, the Claimant took leave to participate in Political Party Nominations for the position of Member of the National Assembly Baringo North Constituency 2017, and by virtue of the Public Officer Ethics Act and HR Manual he had an obligation to inform the Managing Director.

16. As a result of the above mentioned misconduct which are all post the reinstatement Order, the Claimant was issued with a notice to show cause dated 17th May 2017 why disciplinary action should be taken against him. They aver that they were entitled to take such decision and to summarily dismiss him as he refused to participate in disciplinary proceedings which were slated for the 6th of June 2017 and went on despite of his non-appearance.

17. She avers that the Court order does not grant the Claimant the right to disobey the lawful instructions and to act in any manner that he wishes toward his employer. The order does not insulate the Claimant from liability for a misconduct committed while in employment or from disciplinary process if the issues arose after the order of reinstatement.

18. In response to the Replying Affidavit, the Claimant has filed two further Affidavits dated 13th June 2017 and 21st June 2017 where he avers that the Corporation suffered no difficulty and challenge in redeployment of Eng. Mwangi who had previously been appointed to act as the Airport Manager Moi International Airport. He avers that letters reinstating him should have come directly to him.

19. He avers that he asked for leave immediately upon his reinstatement so as to finalize on little things he has engaged himself with during his separation with his employer. He also needed time off to meet with his advocate before Court session and never at any point proceeded on leave without approval and that he is entitled to be in Court during all proceedings.

20. He avers that he reasonably delegated roles to Eng. Mwangi on the specific task of completing the budgeted process and had not fully familiarized myself with the whole process and that he delegated Management Meetings as he was preparing himself to attend Court on the 2nd December 2016 thus making it difficult for him to attend the meeting. That he also missed the subsequent meeting of the 6th of December 2016 when he was also in Court.

21. That he had not gone for leave in 18 months that he had served as the Acting Managing Director and was entitled to those days.

22. That he engaged with Easy African Gas Company which matter he was privy to from his days as Acting Managing Director and informed the Managing Director of the proceedings and requested the services of the Corporation Surveyor. When the request was not responded to, he took initiative and conducted an investigation, agreeing with the findings and copying the same to the Managing Director.

23. He avers that he enjoys political rights and that his position in authority does not serve as a reasonable and justifiable limitation to this tight.

24. The 2nd and 3rd Respondents have filed Grounds of Opposition dated 13th June 2017 via the Attorney General.

25. They state that the Application is incompetent, misconceived, bad in law and a waste of the Courts time.

26. They state that the Respondent's action of suspending the Claimant and the disciplinary procedures commenced thereafter are totally in line with Article 35, 41, 47, and 50 of the Constitution of Kenya 2010 and is meant to circumvent the due process in law.

27. They state that the application contravenes Section 41(1) and (2) of the Employment Act 2007 which allows the Employer to commence disciplinary processes against an employee so long as they adhere to due process.

28. That the ruling by Justice Wasilwa delivered on the 31st of May 2017 ordering the reinstatement of the Claimant does not in any way prohibit the Employer from carrying our disciplinary action against the Claimant so long as they are totally new grounds.

29. That the allegations compelling the Claimants suspension after irregularly dealing with the Corporation land are totally different from the ones earlier canvassed by the parties before the judge and further subjecting of the ruling delivered on the 31st of May 2017.

30. That the Court lacks jurisdiction to hear and determine the matter in light of the provisions of law mentioned above and that the employer has the right to discipline the employee provided that the adheres to the riles of natural justice.

31. They ask the Court to dismiss the application with costs.

32. In response to the Grounds of Opposition, the Claimant has filed a Further Affidavit dated 20th June 2017. He reiterates that the disciplinary action taken against him is directly related to this matter as it reflects the ultimate desire of the agents of the Respondent to hound him out of office.

33. He avers that the court has jurisdiction to listen to the matter, flowing from the Constitution, and that the Court is empowered to safeguard the bill of rights which are a fundamental value and cornerstone of the Constitution. He asks that the Court ignore the Grounds of Opposition and grants the application and prayed.

34. The Applicant has filed written submission dated 30th June 2017 in support of their Application dated 6th June 2017 where he asks the Court to be guided by the principles in the well settled case of **Giella Vs. Cassman Brown (1973) EA358.**

35. To this end, he submits that their motion relies on Article 23 as read together with Article 165 and 22 of the Constitution. They submit that Article 22 (2) provides all persons with the right and freedom to enjoy rights granted under the bill of rights, and that the threats and harassment he has experienced entitling him to reliefs highlighted under Article 23 of the Constitution.

36. He submits that while the Employer reserves the right to punish his employee or commence new disciplinary proceedings, they cannot re-engineer and recreate disciplinary concerns in an attempt to make them look fresh.

37. He submits that the Respondent had continued to make it difficult for him to conduct his duties evidenced by the fact that he was at one time unaware of the meetings he was to attend as the messages of the said meetings were only sent to Eng. Mwangi, passwords have been changed without his knowledge, he is constantly being supervised by junior officers and there has been deliberate attempts to keep him anxious through the constant show cause letters.

38. He submits that this amounts to mental/physiological torture going against Article 25(a) of the Constitution and Section 4 of the Prevention of Torture Act.

39. He submits that he will suffer irreparable harm as mental torture cannot be quantified in damages.

40. The claimant submits that the balance of convenience in the matter tilts in his favor as failing to grant the order would make the earlier reinstatement order worthless and there may be conclusion that the Court has failed to protect an honest litigant clamoring for fairness and justice.

41. They submit that while an employer has the right to discipline an employee, they can only do so within the law. That an employee is always entitled to a fair hearing, moreover, the separation letter dated 6th September 2016 did not bare reasons for separation as required by law and it can easily be concluded that the suit herein is likely to succeed.

42. They submit that the engagement with the surveyor was only to protect the Authority from legal action and his taking initiative to deal the matter was to do just that.

43. He submits that this should not warrant disciplinary action as he made efforts to reach the Managing Director which efforts proved futile. He reiterates that he has political rights enshrined under Article 38 and that he therefore could participate in the nomination process on his leave days.

44. He prays that the court grants the Application as prayed.

45. The 1st Respondents have filed submissions dated 28th June 2017 where they state that as the orders sought are injunctive ones, the court ought to be guided by the principles in the well settled case of **Giella vs. Cassman Brown (1973) EA358.**

46. They submit that the application before the Court has been premised on allegations of a harassment by the Respondent of the Claimant. They submit that in consideration of whether the Claimant has established a prima facie case, the Court should consider if the orders of 4th October 2016 retraining the implementation of the 1st Respondent's letter of separation pending hearing and determination of the application restrained all other disciplinary action.

47. They submit that the issues in this matter have no relationship with the ones already litigated in Court and cannot have been restrained by the order.

48. To this end, the rely on **Aviation and Allied Workers Union vs. Kenya Airways Limited [2013] eKLR** where Justice Mbaru held that:

> ***"the facts before court as of 6th December 2011 for the issuance of these orders related to the application dated 2nd December 2011, and I find that the Restraint on the Respondent was with regard to the show cause letter and proceedings then and not futuristic as the second notice to show cause of 17th January 2012 had not yet been issued. The allegations in this second notice to show cause letter had not yet been formulated. The court restrained the Respondent from '… continuing with disciplinary proceedings' and stay of '….disciplinary panel constituted' as of 6th December 2011.***
>
> ***There was no way that the court could issue blanket interim orders in anticipation of other acts not complained of at this time. Even if this was meant to be so, the same would have been a misapplication of very principle of granting interim orders with a view of allowing parties to attend hearing upon good notification of what was against them and in consonance with fair labor practices."***

49. They urge the Court to find and hold as was held in the cited case.

50. As to whether the respondent as an employer could commence new disciplinary proceeding against the Claimant for any other misconduct, they cite the same case **(Aviation and Allied Workers Union)** which stated:

> ***"While making this finding, the Court notes that when the Court orders dated 6th December 2011 were issued, the Grievant were still in employment pending the application for interim orders before the court and administrative disciplinary proceedings before the Respondents. Being so employed and required to undertake such duties as allocated by the employer, such duties were to be undertaken with due diligence and in compliance with laid down requirements.***

Nothing prevented the grievant from performing their duties. If any other subsequent misconduct or other allegation arose, nothing prevented the respondent as the employer from addressing them.

I therefore find the show cause letter issued to Perpetua Mponjiwa on the 17th January 2102 as forming a distinct and different disciplinary proceedings that required a response from her. This was not in the same series as the earlier allegations subject of the Claimant's application dated 23rd December 2011. These were separate and distinct issues. If dissatisfied with the employer decision thereon, there is a review or appeal mechanism available to the Claimant."

51. They ask the Court to hold that subsequent proceedings were lawful and the applicants have failed to prove a prima facie case of frustration of justice.

52. The 1st Respondent submits that the Claimant will not suffer irreparable damage that cannot be compensated as the Employment Act 2007 in Section 49 adequately provides for compensation if the dismissal is found to be unjustified.

53. To this end, they rely on **Miguna Miguna vs. Permanent Secretary, Office of the Prime Minister & Another [2011]Eklr** where the Court in dismissing an application for injunctory orders by the applicant held that:

"On the other hand, if upon finalization of the investigation it is found that there are sufficient grounds to terminate the Applicant's services, he will be entitled to all his terminal benefits."

54. They further add that the Claimant has already quantified damages to be paid to him in the event the Court finds that the separation was unfair.

55. They cite the case of **Coast Broadways Ltd vs. Zacharia Wakhungu Barasa T/A Siuma Traders & 2 others [2004] EklR** Where the Honorable Court held as follows:

"On the second principle that the Applicant is likely to suffer irreparable loss which cannot be compensated by damages. I think I do not need to reproduce the provision of Order XXI rule 69. It is clear that an award of damages will be sufficient. The Applicant even has the values of the motor vehicle in mind when the Plaintiff alleges that they were sold at an under value the Plaintiffs claim can be quantified and be compensated by an award of damages."

56. They ask that the Court recognizes the fact that he has quantified damages and has therefore failed the second part of the **Giella** case.

57. They submit that the balance of convenience tilts in the favour of the 1st Respondent for the following reasons.

58. That the Court in exercising the jurisdiction to intervene in administrative disciplinary action must proceed with caution so as to protect the employer's right as was held in Aviation and Allied Workers Case.

59. Secondly, that the traditional common law position that Courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. This they submit was held in the appeal case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] EklR.**

60. Thirdly, the nature of the complaints against the employee, as the Claimant has already accepted liability to third parties.They submit that the balance of convenience is in their favour.

61. The 1st Respondent conclude by submitting that the application is based on the allegation that the 1st

Respondent violated orders issued by the Court. They reiterate that this is not the position and that the court should dismiss the application and vacate the interim orders issued on the 13th of June 2017.

62. I have considered the averments and submissions of the parties herein. In determining whether to grant or not to grant the orders sought, this Court is guided by the well-established principles in the celebrated case of **Giella vs. Casman Brown.** The principles are that before Court can grant orders as sought, the Court has to consider:-

1. Whether the Applicant has established a prima facie case with a probability of success.

2. Whether the Applicant will suffer irreparable damage which cannot adequately be compensated in damages.

3. Where there is doubt the Court to decide the matter on a balance of convenience.

63. In deciding the presence or otherwise of the standard settled in **Giella** case I have relooked at orders granted in the initial application dated 3.10.2016. The Court gave orders following this application and delivered a Ruling on 3/5/2017 reinstating the Applicant herein to his substantive position formerly held before he was appointed as Ag. Managing Director. These orders were to remain in force until the entire claim is heard and determined.

64. The main claim filed on 3/10/2016, the Claimant averred a myriad of issues amongst them a violation of his fundamental human rights and fundamental freedoms including right to fair administrative action, right to fair trial, right to presumption of innocence to be informed of charges in sufficient detail, freedom from discrimination amongst others. All these averments are premised on actions that arose prior to the filing of this claim on 3/10/2016.

65. The Court however has to determine whether the orders of 4th October 2016 restraining the implementation of the 1st Respondent's letter of separation pending the hearing and determination of the case in any way extend to futuristic events in relation to discipline of the Claimant Applicant.

66. My answer to this question is NO. This Court cannot and never gave a bracket order restraining the Respondent from disciplining the Claimant. Indeed this Court has stated and restated that Courts will normally not interfere with the employers' internal disciplinary processes unless the process is manifestly flawed and in breach of the parties own laid down HR Rules and the Law and the Constitution. Indeed the Court will also not hesitate to stop a disciplinary process which is a renamed or re-baptized previous disciplinary process disguised as a fresh process.

67. I have looked at the new disciplinary processes which the 1st Respondent are now desirous of instituting against the Applicant. Respondent served the Claimant on 17.5.2017 with a show cause letter and another on 2.6.2017 requiring the Applicant to show cause why disciplinary action should not be taken against him. The letter sets down a myriad of reasons which the Applicant was to explain. They relate to events occurring between November 2016 to May 2017.

68. The Applicant was also summoned to appear for disciplinary hearing on 6.6.2017. He filed this application thereafter.

69. It is noteworthy that the Court order of 3.5.2017 reinstated the Claimant to his former position but did not restrain the Respondent from instituting disciplinary action against him in event of any misconduct.

70. The letter of separation from the Respondent to Claimant dated 16.9.2016 does not state reasons for the termination. It is not therefore clear whether the reason/s are related to the reasons now placed in the show cause letter or not. If they are, then it would mean that the Respondent are trying to implement what they should have implemented before the separation.

71. The Claimant has sought orders for reinstatement in his main claim and allowing the Respondents to proceed with any disciplinary proceedings at this stage would defeat the entire claim and render it useless if at all the proceedings conducted render him terminated again. The Respondent still have time and resources to institute disciplinary proceedings against the Claimant at the determination of this case if the issues relate to fresh misconduct not the subject of this claim.

72. Without having to speculate whether the new process is a baptism of the old process, the balance of convenience tilts in favour of the Applicant not to institute any disciplinary action against him on matters pending before Court until this claim is heard and determined. It is therefore my finding that the orders sought by the Applicant are merited and therefore the Respondents are restrained from continuing with any intended disciplinary process against the Respondent on matters occurring before 3.5.2017 when the ruling of this Court was made.

73. In order to ensure quick dispensation of justice, I also direct that the main cause be set down for hearing on priority basis.

74. Costs in the cause.

Read in open Court this **25th day of July, 2017**.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Karanja holding brief for Omari for Applicant – Present

Rono for 1st Respondent – Present

No appearance for 2nd and 3rd Respondents