



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE NO. 232 OF 2017

LIVINGSTONE KIPTOO TANUI

CLAIMANT

v

COUNTY PUBLIC SERVICE BOARD, ELGEYO

MARAKWET COUNTY GOVERNMENT 1ST RESPONDENT

COUNTY GOVERNMENT OF ELGEYO

MARAKWET

2ND RESPONDENT

RULING

1. Livingstone Kiptoo Tanui (applicant) instituted legal proceedings against the County Public Service Board, County of Elgeyo Marakwet (1st Respondent) and the County Government of Elgeyo Marakwet (2nd Respondent) on 29 August 2017 alleging breach of contract by unlawful/unprocedural suspension.
2. The applicant at all material times served as the County Payroll Manager with the Respondents having been appointed to the position from 1 February 2014.
3. Filed together with the Memorandum of Claim was a motion seeking
 1. **THAT** this honourable court be pleased to make an order directing the respondent to unconditionally lift the suspension of the claimant from employment and order for his immediate reinstatement pending the interparties hearing and determination of this application.
 2. **THAT** this honourable court be pleased to make an order directing the respondent to unconditionally lift the suspension of the claimant from employment and order for his immediate reinstatement pending the hearing and determination of the claim herein.
 3. **THAT** upon grant of prayer 2 above, this honourable court do hereby make an order for the payment by the Respondents the claimant's withheld emoluments during the period of his suspension.
 4. **THAT** pending the hearing and determination of this application and claim this honourable court do make an order of injunction restraining the Respondent either by themselves, employees, servants and/or agents from terminating the employment of the claimant.
5. The costs of this application be in the cause.
4. Upon service of the application, the Respondent filed 2 replying affidavits together with annexures to

the application on 26 September 2017.

5. When the application came up for hearing on 28 September 2017, the applicant sought an adjournment on the ground that the replying affidavits were lengthy and had been served upon him only 2 days earlier.

6. The Court declined to grant the adjournment because the legal issue raised was straightforward. The facts as presented, in the view of the Court were not really in dispute to warrant filing of further affidavits.

7. The parties consequently made oral submissions which the Court has duly considered together with the material placed before it.

8. The substratum of the applicant's application and cause of action is a *suspension* through a letter dated 15 February 2017.

9. The applicant contended that the *suspension* was unlawful and unprocedural because he was not accorded an opportunity to make representations before the suspension and that the suspension did not adhere to the provisions of the Human Resources Policies and Procedures manual for the public service, and the applicable statutory framework.

10. The Respondents on their part contended that the applicant was *suspended* on ground of public interest to allow for investigations into alleged irregularities in the payroll, which allegations amounted to offences warranting disciplinary action in terms of the Public Service Commission Discipline Manual and the applicable statutes.

11. According to the Respondents, the *suspension* of the applicant was therefore lawful and a preventive measure available to it as an administrative tool.

12. The law on *suspension* of an employee, as enunciated in various decisions of this Court has always been that the *suspension* must have either a contractual or statutory basis (see *Kenya Plantation and Agricultural Workers Union v Finlays Horticulture Kenya Ltd* (2015) eKLR).

13. Without the contractual authority, unilateral suspension by the employer with or without pay would constitute breach of contract (see *McKenzie v Smith* (1976) IRLR 345).

14. In the instant case, the Court has looked at the contractual and statutory framework governing the relationship between the parties and more specifically the *Discipline Manual for the Public Service* issued by the Public Service Commission of Kenya in May 2016 and the *Human Resource Policies and Procedures Manual for the Public Service* issued by the Public Service Commission of Kenya in May 2016, relied on by both parties.

15. The Court will assume that both documents are applicable to the present case as none of the parties suggested otherwise (the country has now a two tier public service, at the national level under direct control of the Public Service Commission of Kenya, and at the devolved level under the control of various county public service boards).

16. Under Part Four Clause 4.3 of the *Discipline Manual for the Public Service*, a public officer can be *suspended* if he has been *convicted of a serious criminal offence* or if he is *found culpable of a gross misconduct which can lead to dismissal*.

17. On the face of the provision, the *suspension* envisaged is a product of some complete process, either a conviction or decision that the public officer is culpable of gross misconduct.

18. That scenario is not presented in the case at hand and therefore cannot support the applicant's *suspension*.

19. Similarly, under the *Human Resource Policies and Procedures Manual for the Public Service*, section K, clause K.7, *suspension* is envisaged *where disciplinary proceedings have been commenced against a public officer and the authorised officer is of the opinion that the officer ought to be dismissed; where a public officer has been convicted of a serious criminal offence or where an offence, in the view of the authorised Officer constitutes gross misconduct.*

20. In the instant case, the applicant was *suspended* pending investigations, whose outcome was unknown at the time.

21. In such circumstances, it may not be said that the conditions precedent as contemplated by the *Human Resource Policies and Procedures Manual for the Public Service* had been met.

22. After perusing the two documents relied on by both parties, it appears to the Court that the avenue open to the Respondents was to *interdict* the applicant on half salary in terms of section K clause K.6 of the *Human Resource Policies and Procedures Manual for the Public Service* or under Part Four Clause 4.3 of the *Discipline Manual for the Public Service*.

23. The Respondents appeared to have misapprehended the circumstances warranting *interdiction* and *suspension* thus putting the applicant at a disadvantage.

24. Considering that a public officer under *suspension* does not receive any salary while the one under *interdiction* is entitled to half salary, the applicant was clearly placed under a disadvantage.

25. The disadvantage suffered by the applicant (remuneration) can easily be corrected as the disadvantage is capable of precise computation.

26. The Court will therefore allow the application but in an amended form as follows

(i) The suspension through letter dated 15 February 2017 is lifted.

(ii) The applicant be paid remuneration he would have earned up to the date of this ruling.

27. However, and for clarity and because the applicant is scheduled to appear before the Respondents' Disciplinary Committee on 5 October 2017, the Court will not grant any order stopping the disciplinary process as it is not mandatory that a public officer facing disciplinary action be *interdicted* or *suspended*. The process can be undertaken while the officer is still on the job, but at the discretion of the authorised officer.

28. Before concluding, the Court wishes to thank the counsels involved for making very able submissions at very short notice despite indicating earlier that they were not ready to proceed with the motion.

29. The upshot being that the motion dated 21 August 2017 is allowed as set out in paragraph 26 above. Costs to abide the Cause.

Delivered, dated and signed in Eldoret on this 29th day of September 2017.

Radido Stephen

Judge

Appearances

For applicant Ms. Kesei instructed by Onyinkwa & Co. Advocates

For Respondents Mr. Tororei instructed by Tororei & Co. Advocates

