



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 820 OF 2017
ANTHONY OCHIENGCLAIMANT
-VERSUS-
KENYA REVENUE AUTHORITYRESPONDENT

Mr. Daniel Kithome for claimant/applicant

Mr. Chabala for respondent

RULING

1. The claimant/applicant by a notice of motion filed on 4th May 2017 seeks the following orders;-
 - (i) That there be an injunction against the respondent restraining them from conducting disciplinary proceedings against the applicant;
 - (ii) That the respondent immediately reinstates the claimant to work;
 - (iii) That suspension of the claimant by the respondent for a period above six months and the attendant delay in taking administrative action is illegal, null and void.
2. The application is supported on grounds set out on the face of the application as follows;
3. That applicant was employed by the respondent under the respondent's customs department on 8th September 2011 where he worked diligently until 16th October, 2013 when he received a letter of suspension grounded on various unfounded allegations.
4. The applicant was employed by the respondent on permanent and pensionable terms from 10th July 2011 as a Revenue Officer II and deployed to the Customs Department. He worked hard and diligently and rose to the rank of supervisor in November 2015.
5. The applicant was suspended from duty vide letter dated 8th February 2016 ref: conf/8266 which was sent to him via his official KRA email address known as lotus which I saw on 12th February 2016 at 5p.m. The letter of suspension was grounded on various unfounded allegations.
6. That the applicant ably defended himself against each and every allegation vide a letter dated 24th

February 2016. He was charged at the Milimani Chief Magistrate's Court with the offence of making a false document in criminal case no. 257/2016 and was acquitted of all the six counts by the honourable court.

7. That the prosecution through KRA applied to the High Court Criminal Division for a revision of the ruling of the **Honourable Magistrate vide Nairobi High Court Criminal Revision No. 415 of 2016**, which application was heard and dismissed by the High Court on 11th April 2017 as lacking in merit.

8. That the respondent is about to conduct disciplinary proceedings against the claimant and ought to be restrained by the Honourable court as the issues have already been determined by the court during criminal proceedings and revision.

9. That on 7th March 2017, the claimant's advocate wrote to the Deputy Commissioner Human Resources reminding him that the claimant's case had been concluded and that he was acquitted of all the charges framed against him and therefore the said suspension should be lifted. Again he has never received any response to date.

10. That again through his advocate wrote a letter dated 13th April 2017, to the Deputy Commissioner human resources KRA requesting them to lift the suspension. Again the claimant never received any response.

11. That the applicant has been suspended and has been denied his entire salary since February 2016, neither has he been given any response to the letters he wrote requesting that his suspension be lifted. He has been to the KRA offices several times where his efforts have been frustrated as he has always been told the concerned authorities are in a meeting yet he could see them in their offices. Another excuse given was that his file was with the Commissioner General.

12. That the applicant is convinced that he will not get any reprieve by way of amicable settlement soon, and thus the approach to this Honourable Court.

13. The application is further supported by the applicant's sworn affidavit. The applicant has also filed written submissions in further support of the application.

Response

14. The application is opposed vide a replying affidavit of Grace Mwangi, a manager in the Employee Relations Unit.

15. The respondent admits all particulars of employment and that the applicant was suspended from duty pending conduct of disciplinary action against him for alleged fraudulent activities by a letter dated 8th February 2010. The applicant responded to the allegations by a letter dated 24th February 2016.

16. It is also admitted that the claimant was charged in Milimani Chief Magistrate Criminal Case No. 257 of 2006 with the offence of making a false document.

17. That following the criminal charges, the claimant was suspended from duty pursuant to KRA Code of Conduct Section 8.3.4.

18. In terms of section 8.4.2., thereof, suspension is without a salary during the time of suspension except house allowance until the issue leading to suspension has been determined.

19. It is not denied that the claimant was acquitted of the criminal charge by the Chief Magistrate Court and a subsequent review to the High Court by the respondent was dismissed.

20. The respondent does not depose what steps have been taken by the respondent to finalise the

disciplinary process since the claimant was suspended.

Determination

21. This suit was filed on 4th May 2017, more than one year and three (3) months from the date the claimant was suspended without pay.

22. The purported disciplinary process has not been concluded and there are no facts deposed to as to why the process has not been proceeded with since the suspension without pay on 8th February 2016.

23. In **Industrial Court cause No. 1200 of 2012 between professor Critle Naituli Vs. University Council Multi Media University College and Another** the court in refusing to grant an interim injunction to stop a disciplinary process stated;

“the Employment Act, does not intend that courts take away managerial prerogatives from employers. To give the interim order would have the effect of stifling the management prerogative in staff administration. It would mean employer does not have any more say in the contract of employment it has authored.”

24. However, in **Evelyne Anyango Obondo V. Kenya Revenue Authority 92017) eKLR**, the court in dealing with a case in which the applicant was suspended for a period of over six months pending disciplinary hearing stated thus;

“30. Delay in disciplinary action may be condoned upto six (6) months. However, a period of over three (3) years is unacceptable and an abuse of the entire process and amounts to unfair labour practice.

31. This court has time and again stated that it will not interfere with internal Disciplinary Process of the parties where the process is fair. However, the court would meddle where the process is unfair and out of course and geared towards breaching of the law and even the rights of the parties. This is the case in this case. I therefore find that the process in place is flawed and obviously offends proper labour process and therefore, I halt the process immediately.”

25. The claimant/applicant has been in suspension for about one year and three months. The claimant has been tried a criminal court and has been acquitted of the alleged offence leading to disciplinary process and suspension. An attempt to have the decision of magistrate’s court reviewed was also dismissed by the High Court.

26. The claimant continues to suffer deprivation of his salary. He is a family man who has been subjected to immense financial embarrassment.

27. The respondent is in violation of its own disciplinary procedure, fair labour practice and its conduct is a manifest denial of justice.

28. It is without hesitation that this court finds this disciplinary process unduly oppressive and an abuse of the rule of natural justice and stops the same immediately.

29. The court directs that the claimant/applicant resumes duty unconditionally and be paid all arrear salaries and allowances from the time of suspension.

30. The respondent, having failed to conclude this matter fairly within a period of over one year is precluded from revisiting the same.

Dated, signed and delivered at Nairobi this 15th day of September 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE