



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 419 OF 2017 CONSOLIDATED WITH CAUSES 420 OF 2017 AND 421 OF 2017

PAUL MWENDE THIRIKA.....1ST CLAIMANT

PETER MWENDE MBAE.....2ND CLAIMANT

PETER MBURU MUNIU.....3RD CLAIMANT

VERSUS

THARAKA NITHI COUNTY ASSEMBLY SERVICE BOARD.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 15th December, 2017)

RULING

The claimants filed on 01.11.2017 their respective applications by way of notices of motion under Article 41(1) of the Constitution of Kenya, Sections 1A & 3A of the Civil Procedure Act, Section 12 and 20 of the Industrial Court Act and Rule 16 of the Industrial Court Rules and all enabling provisions of Act. The prayer is for orders that pending the hearing and determination of the claim herein, the court be pleased to arrest or stay the decision by the respondent to send the applicants on compulsory leave effective 30.10.2017; and for costs of the application to be borne by the respondent. The application was supported with the respective supporting affidavits by each of the claimants. The applications were filed through Warutere & Company Advocates.

Each of the claimants is employed by the respondent. The 1st claimant is an administrative officer, the 2nd claimant as an internal auditor, and the 3rd claimant as the principal financial officer. Each claimant received the internal memorandum signed by the Assembly Clerk for Tharaka Nithi County Assembly titled “**Compulsory Leave**”. The memorandum conveyed that under minute 8/10/2017 of the respondent’s meeting held on 23.10.2017, it was resolved that each of the claimants proceed on compulsory 30 days leave pending external audit. The leave was effective 30.10.2017. The claimants seek orders to stay or suspend the compulsory leave upon the following grounds:

- a) The claimants were not issued with a show-cause notice or were not given an opportunity to be heard prior to issuance of the compulsory 30 days’ leave.
- b) The compulsory leave is a witch hunt that if not arrested will lead to unfair termination of the claimants’ employment with the respondent.
- c) The reasons for sending the claimants on compulsory leave were not communicated.
- d) The compulsory leave is proceeding unlawfully in contravention of the principles of natural

justice and the decision was unprocedural and without due process.

The respondent opposed the applications by filing on 09.11.2017 the replying affidavit of its secretary and Clerk to the Assembly one Martin Kimani Kariuki. The respondent appointed Murango Mwenda & Company Advocate to act in the suit. The respondent's case is that the respondent held the meeting of 23.10.2017 and deliberated on matters touching on cash flow and fiscal management of the County Assembly of Tharaka Nithi. The deliberations were centred upon the report by the Ethics and Anti-Corruption Commission released in November, 2016 on corruption risk management into systems, policies, procedures and practices at the Assembly and the Audit Report for the fiscal years 2013/ 2014, 2014/2015, and 2015/2016. The reports were known to the applicants but overtime the applicants had failed to act to rectify the errors in systems. Thus the board had decided to place the applicants on compulsory leave pending forensic investigations on the issues raised in the said reports. The compulsory leave was meant to pave way for the investigations and upon conclusion of the investigations the claimants would be called upon to answer the relevant questions. The compulsory leave was not adverse because during the leave the claimants would be on full pay and a show-cause notice will issue prior to any disciplinary action. If the orders sought are made, it will become difficult for the respondent to undertake any meaningful investigations. The applications should therefore be dismissed because they are not merited.

The **1st issue** for determination is whether the compulsory leave for 30 days was lawful and in accordance with due process. The applicants submit it was not as it was mysterious, without notice, without reason and is calculated to eventually lead to their dismissal. The submission for the respondent is that section 27 of the County Assembly Service Act, 2017 entitles the respondent to undertake such steps of disciplinary control. Further, the compulsory leave was an interlocutory step prior to investigations that may lead to the substantive disciplinary process under which a show-cause notice and hearing will be afforded to the claimants.

Section 27 of the County Assembly Service Act, 2017 on disciplinary control of officers provides thus:

- 1) The Board shall exercise disciplinary control over the officers in the Service.**
- 2) The Board may terminate the employment of an employee of the Service in accordance with the provisions of this Act and the Regulations made thereunder.**
- 3) The provisions of Article 236 of the Constitution shall apply in relation to the exercise of the powers conferred on the Board under this Act.**

Section 28 of the Act establishes a Management Committee to advise the Board on matters relating to its functions and powers as conferred in section 11 and 12 of the Act. Section 29 of the Act then empowers the Board to establish the Staff Advisory Committee to advise the Board on the human resource functions.

Section 45 of the Act empowers the Board to make regulations for the better carrying out of its functions as provided under the Act. The regulations must cover any matter that requires regulation including measures for the discipline of employees.

The court has considered the material on record. There is no evidence that there exist regulations by the respondent providing for compulsory leave prior to commencement of investigations that may lead to initiation of disciplinary action against its staff. There is no evidence that the respondent has made regulations that govern disciplinary measures against its staff and as envisaged in section 27 as read with section 45 of the Act. Further, it has not been established or suggested for the respondent that the Management Committee or the Staff Advisory Committee as envisaged under the Act had been established and they had performed their due statutory role prior to making of the offensive decision of compulsory leave for 30 days. Thus, the court returns that the respondent's decision emplacing the applicants on a 30 days' compulsory leave has been shown to have been free from the procedural and regulatory chains or safeguards as provided for in the County Assembly Service Act, 2017. The

compulsory leave would therefore be proceeding in clear contravention of the protection of public officers as provided for in section 236 of the Constitution and which is expressly referred to in the cited section 27 of the County Assembly Service Act, 2017.

To answer the 1st issue for determination, the court returns that the compulsory leave for 30 days was proceeding unlawfully and in breach of due process.

While making that finding, the court considers that it will be in the interests of justice, pending the hearing and determination of the suit, for the respondent to file the regulations and instruments appointing the Management Committee and the Staff Advisory Committee as provided for under the Act.

The 2nd issue for determination is whether the applicants are entitled to the remedies as prayed for. In such cases seeking to interfere with the employer's powers, the court follows the opinion in the ruling in Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others [2015]eKLR thus, "The principles are clear.

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

In the present case, the applicants have established that the respondent is proceeding in clear contravention of the cited provisions of the County Assembly Service Act, 2017. Accordingly, the applicants are entitled as prayed for.

In conclusion, the applications filed herein for the claimants are allowed with orders:

- 1) That pending the hearing and determination of the claim herein, the implementation of the decision by the respondent to send the applicants on compulsory leave effective 30.10.2017 and as conveyed in the internal memorandum dated 24.10.2017 Ref. No. TNCA/ADM/2/VOL.1/32 is hereby arrested, stayed, or suspended; and for that purpose the respondent by itself, its officers, its members, or its agents shall allow the applicants to continued at work and assigned duties unless otherwise not so in accordance with law and the contract of employment.
- 2) That pending the hearing and determination of the suit, the respondent shall file in court the regulations and instruments appointing the Management Committee and the Staff Advisory Committee as provided for under the County Assembly Service Act, 2017, and, for avoidance of doubt, the respondent may not proceed with disciplinary process against any of its staff unless such regulations are promulgated and such instruments of appointments are issued, and, published and publicised as appropriate.
- 3) The respondent to pay the applicants' costs of the application.

Signed, dated and delivered in court at Nyeri this Friday, 15th December, 2017.

BYRAM ONGAYA

JUDGE