

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

SUIT NO. 1876 OF 2017

PATRICK ROTICH KIPKEMOI..... CLAIMANT

VERSUS

KENYA REVENUE AUTHORITY..... RESPONDENT

RULING

1. The Claimant/Applicant seeks immediate reinstatement to work pending the hearing and determination of the Claimant's application and suit as well as orders holding that the suspension of the Claimant for a period beyond 6 months and the attendant delay in taking administrative action is illegal null and void. The Claimant relies on grounds on the face of the motion as well as the affidavit sworn on 19th September 2017 in support of the motion. The Claimant asserts that he was suspended on 18th October 2013 and defended himself ably regarding the accusations levelled against him and appeared before the disciplinary committee on 24th November 2015 and he is yet to receive the decision of the disciplinary committee. He also was not supplied with the documents relied on in the disciplinary process against him.

2. The Respondent filed grounds of opposition on 17th October 2017 and in the grounds states that the application is premature as the Respondent's disciplinary process has not been concluded. It is the Respondent's position that the Claimant has not been terminated and thus cannot be reinstated. It was urged that there is *prima facie* sufficient grounds for the disciplinary process which will be best explained by way of oral evidence during the hearing upon presentation of facts. The Respondent asserts that there is no exceptional circumstance demonstrated to warrant the order of reinstatement as he has only been suspended and that the hearing of the claim will be rendered nugatory if the order for reinstatement is granted.

3. The parties filed submissions to support their positions and the Respondent filed their submissions on 8th November 2017 while the Claimant filed his submissions on 9th November 2017. In the submissions, the Claimant submitted that the investigations by the Respondent's Manager Port Operations and the police exonerated him yet his disciplinary case has dragged on for years. He submits that the Respondent has declined to supply him with the documents relied on in relation to this case. He cites the case of **Anthony Ochieng v Kenya Revenue Authority [2017] eKLR** where Nduma J. found that the conduct of the Respondent to be against its own disciplinary procedure and a manifest denial of justice. Reliance was also placed on the case of **Evelyn AAnyango Obondo v Kenya Revenue Authority [2017] eKLR** where Wasilwa J. held that a delay of 6 months in disciplinary process may be condoned but a delay of over 3 years is unacceptable, an abuse of the entire process and amounts to unfair labour practices. The Claimant/Applicant also cited the case of **Phelgona Auma Onyango v Kenya Revenue Authority [2017] eKLR** where Wasilwa J. held that the order of the court would not determine the entire claim and found the conduct of the Respondent in the disciplinary process entirely flawed. He referenced the KRA Employee Handbook under article 18.2.1 which provides that cases of interdiction and/or suspension are to be determined within 6 months as much as may be possible.

4. The Respondent submitted that the Court should not be hoodwinked to descend into the arena of disciplinary process now ongoing which was a managerial function. The Respondent submitted that the Claimant was issued with a suspension and show cause letter simultaneously on 18th October 2013 and that he appeared before the disciplinary committee of the Respondent for hearing on 24th November 2015. The Respondent relied on the case of **Professor Gitile J. Naituli v Multi Media University College & Another [2013] eKLR** where Nduma J. held that the Employment Act does not intend that courts take away managerial prerogatives from employers and that to grant the interim order would have the effect of stifling the management prerogative in staff administration. The Respondent also placed reliance on the case of **Loice Mutai v Kenya Revenue Authority [2017] eKLR** where Ndolo J. held that a reinstatement is a summative remedy to be granted after hearing the full case of the parties and only in exceptional circumstances. The case of **Alfred Nyungu Kimungui v Bomas of Kenya [2013] eKLR** where Rika J. cited the Prof. Gitile case with approval, was also cited in support of the Respondent's position. The Respondent submitted that when the disciplinary process was initiated it was not performing an administrative function to which Article 47 of the Constitution may apply but a contractual function. The Respondent relied on the case of **Edwin Nyamanga v Silver Holdings Ltd [2014] eKLR** where Radido J. held that the interplay between an employer's decision to terminate the services of an employee ought to be resolved on the basis of Article 41 of the Constitution and the primary employment/labour relation statutes such as the Employment Act, Labour Institutions Act and Labour Relations Act and not Article 47 of the Constitution.

5. The Constitution of Kenya provides for fair administrative action. Under Article 47, the Constitution we enacted and adopted for ourselves in 2010 it is stated that:-

47. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

Acting fairly is concomitant with acting within the rules of natural justice. In their book **Administrative Law 10th Edition by H. W. R. Wade & C. F. Forsyth** state at page 416 that

But it is now clearly settled, as is indeed self-evident, that there is no difference between natural justice and "acting fairly" but that

they are alternative names for a single but flexible doctrine whose content may vary according to the nature of the power and the circumstances of the case.

The Claimant asserts that the treatment meted out by the Respondent has been anything but expeditious, efficient, lawful, reasonable and procedurally fair. Suspension for the past 4 years and an unending wait for the determination of the administrative action that is ongoing is anything but fair, expeditious, reasonable or procedurally fair. I find this delay in fair administrative action to be unlawful and as per the legal reasoning of **Wade & Forsyth** above, anything but just. The series of cases cited by the Claimant in his support all point to the delay in the administrative action the Respondent has engaged in contrary to Article 18.2.1 of the Respondent's staff handbook. The failure to conclude a disciplinary process beyond 6 months is unconscionable and smacks of administrative incompetence. The case cited by the Respondent in which Radido J. eloquently dissected the two articles – 41 and 47 is distinguishable from the present one. In that case my learned brother was dealing with a dismissal and the Claimant sought to create a nexus between Article 47 and his dismissal only for the Court to correctly point out that in dismissal Article 41 and the Employment statutes interplay to determine the fairness or otherwise of the act of dismissal.

Can I lawfully 'reinstatement' the Claimant at this point? In my view, the delay in conclusion of the disciplinary process is sufficient basis to order a return to work which can be construed as a 'reinstatement' though in essence it is merely permitting the Claimant to resume work. I order that the Claimant resumes work as he succeeds in his application which is granted with costs.

It is so ordered.

Dated and delivered at Nairobi this 14th day of December 2017

Nzioki wa Makau

JUDGE