



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

MISCELLANEOUS CAUSE NO. 124 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 9th February, 2016)

VIKASH BHAGANIPETITIONER

VERSUS

DHL GLOBAL FORWARDING.....1ST RESPONDENT

JACK MWAURA2ND RESPONDENT

FAISOL AHMED3RD RESPONDENT

STEPHEN OCHOKA WANYAMA4TH RESPONDENT

BENEDICT LUMASIA5TH RESPONDENT

ALFRED MWEMA6TH RESPONDENT

DEKOK OJWANG7TH RESPONDENT

HUMPHREY MUFUPI.....8TH RESPONDENT

SAMMY PWAKALI9TH RESPONDENT

DASTINE SERVICES10TH RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS11TH RESPONDENT

RULING

1. The Application before Court is one dated 4/12/2015 brought under Certificate of Urgency. The Application is brought vide a Notice of Motion brought under Section 1 (a) & (b), of the Civil Procedure Act, Order 53 of the Civil Procedure Rules, Section 35 – 51 of the Employment Act Laws of Kenya Section 51 of the Constitution of Kenya and all other enabling provisions of the law.
2. The Applicant seeks orders:
 1. ***THAT, the matter herein be heard exparte and the service be dispensed with at the first***

instance.

2. ***THAT, this Honourable High Court hereby stays the 1st Respondent administrative or other disciplinary action against the Petitioner pending the hearing and determination of this Application.***
 3. ***THAT, this Honourable High Court hereby stays the 1st Respondent administrative or other disciplinary action against the Petitioner pending the hearing and determination of the petition herein.***
 4. ***THAT, the High Court hereby stays the Criminal Case number 3257 of 2015 pending the hearing and determination of this application.***
 5. ***THAT, the costs be in the cause.***
3. The Application is founded on the following grounds:
- i. ***The Petitioner Applicant has been arraigned in Court on extremely flimsy and unfounded allegations which have not been investigated.***
 - ii. ***The Respondents have colluded to frustrate the professional career of the Petitioner.***
 - iii. ***The matters herein are employment matters but the constitutional fundamental rights are in question.***
 - iv. ***Immediately after the arraignment in Court, the 1st Petitioner has through its officers the 2nd and 3rd Respondents invited the Petitioner/Applicants to give testimonies relating to the offences in Court.***
 - v. ***The invitation by the 1st Respondent is callous and mischievous as the employee is expected to cooperate with the 1st Respondent through an irregular otherwise unfair procedure.***
 - vi. ***The above procedures are not approved by the Employment and Labour Laws.***
 - vii. ***It is prudent that the Honourable Court intervenes to forestall any other further injustices based on hearsay conjecture and mistreatment by the Respondents.***
 - viii. ***The employment and Labour Court has complete jurisdiction to hear the issues contained.***
4. The Application is also supported by the annexed affidavit of Vikash Bhagani, the Applicant herein.
 5. The Applicant has submitted that his client was arrested on 27/10/2015 by the Kenya Police on directions of the Director of Public Prosecutions the 11th Respondent herein. That thereafter, the 1st Respondent wrote a letter suspending the Claimant from work dated 29th October 2015, the day the Applicant was arraigned in Court. The Applicant submits that the reason for suspending him was arraignment in Court.
 6. The Applicant contends that the arraignment in Court should not have been the cause of his suspension but that he should first have been made to appear before a panel and be subjected to a hearing. He therefore feels that the process instigated against him is against the Labour Laws.
 7. The Applicant further submits that the procedure instituted against him is unprocedural and infringes on his labour rights protected under the Bill of Rights which this Court should protect.
 8. The Respondents opposed this application. They agree that this Court has Constitutional Powers

- to interpret rights arising from employer/employee relations. But they argue that the Petitioner was arrested upon instruction of the Director of Public Prosecutions and not 1st Respondent. That this was on discovery of a criminal offence committed within 1st Respondents premises.
9. They submit that the Police did their own investigations and arrested 6th and 7th Respondents but the employer acted and suspended the Applicant and 2 others to pave way for investigations. That on 16/11/2015, they were issued with Notice to show cause and the Applicant responded on 23/11/2015 stating that he would chose to keep quiet as the matter is with the Police.
 10. The employer then fixed a disciplinary hearing on 3/12/2015 where the Applicant appeared with his Advocate and also opted not to say anything.
 11. The Respondents aver that what remains is communication of decision of the hearing and on 4/12/2015 the Applicant rushed to Court asking Court to stop an administrative process that is already completed. They therefore aver that the Applicant still has time to ventilate his case in Court but the employer should exercise his rights and Court will determine whether the right process was followed or not.
 12. The Applicant insists that the Applicant was not given reasonable time to ventilate his case and therefore orders sought should be granted.
 13. I have considered the submissions of both parties. The only issue to determine is whether this Court can stop an employer from proceeding with administrative action against an employee? It is true that the threshold of any disciplinary procedure is as set out under Section 41 of Employment Act 2007.
 14. Case law has already established when Courts can interfere with internal disciplinary procedures. **(See Rebecca Maina and 2 Others vs. Jomo Kenyatta University of Agriculture and Technology (J. Ndolo) case No. 1789/2013).**
 15. It is already established that internal disciplinary proceedings are non-judicial in nature and Courts will only interfere where the process is flawed. The process must be clear and above board to enable the employee presents his case. The employee must be given an opportunity to responded to allegations made against him and charges must be clear and the employee must be accorded sufficient time to prepare. Article 50(5) of the Constitution of Kenya becomes handy in the circumstances.
 16. In the case then when the process is marred with irregularities, the Court will interfere only to ensure the correct process is followed.
 17. I have looked at the current process initiated against the Applicant. He was suspended on 29/10/2015 and thereafter served with a show cause letter dated 16/11/2015. The Applicant has stated that he was not given adequate time to prepare and present his case having been summoned on 1/12/2015 to appear for hearing on 3/12/2015. It is true that this is not adequate time to present his case as envisaged under Article 50 of the Constitution.
 18. Whereas this Court will not police an employer in their internal disciplinary mechanism, this Court has a duty to ensure that the process is fair.
 19. In the circumstances, I will direct that the disciplinary process already started be discontinued but can be initiated afresh according to the law with the Applicant being clearly informed of the charges against him and being accorded adequate time and opportunity to present his case.

Read in open Court this 9th day of February, 2016

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Petitioner

No appearance for Respondents