



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 18 OF 2016**

**DR. EVANS MUMO MWANGANGI.....CLAIMANT**

**VS**

**KITUI COUNTY PUBLIC SERVICE BOARD.....1ST RESPONDENT**

**COUNTY SECRETARY**

**COUNTY GOVERNMENT OF KITUI.....2ND RESPONDENT**

**RULING**

1. This ruling proceeds from the Claimant's Notice of Motion dated 7th January and filed in Court on 12th January 2016. The application, which is supported by the Claimant's affidavit sworn on 7th January 2016 and further affidavit sworn on 14th March 2016, seeks the following orders:

- a) That the Court be pleased to issue an order restraining the 1st and 2nd Respondents, their agents, servants and anybody claiming through them from harassing, intimidating, threatening, investigating, dismissing, interdicting, discussing, passing a decision and in any other way interfering with the Claimant's employment until the hearing and determination of the suit herein;
- b) That the Court be pleased to suspend the interdiction of the Claimant pending the hearing and determination of the suit herein;
- c) That the Court be pleased to order the Respondents to pay to the Claimant his full salary and allowances pending the hearing and determination of the suit herein;
- d) That the Court be pleased to order the Respondents to pay to the Claimant the withheld wages from the date of interdiction;
- e) That the costs of the application be provided for.

2. The application is based on the following grounds:

- a) That the 2nd Respondent interdicted the Claimant through a flawed process which has infringed on the Claimant's rights;
- b) That the interdiction is actuated by malice and is based on unfounded and unsubstantiated allegations;

- c) That the said interdiction is in contravention of the provisions of the Constitution, Employment Act, Labour Relations Act and County Governments Act;
- d) That the Claimant has been interdicted without a clear reason and without being given an opportunity to be heard;
- e) That the 2nd Respondent has irregularly placed the Claimant under interdiction since the month of June 2015 for no valid reason and has further subjected the Claimant to incessant disciplinary committees without communicating their findings;
- f) That the 2nd Respondent purported to exercise duties statutorily reserved for the 1st Respondent without written delegated authority as required by law;
- g) That the Claimant was not notified of his right to have a person of his choice present which was an infringement of his rights;
- h) That the 1st and 2nd Respondents have failed to resolve the issues within reasonable time despite having put the Claimant through an array of different committee hearings;
- i) That in the course of the disciplinary process, the Claimant has been victimised and made to appear before different committees, in addition to submitting several written submissions;
- j) That the Claimant's letters raising issues on the matter at hand have no not elicited any response;
- k) That by his letter dated 21st September 2015, the 2nd Respondent notified the Claimant that a final determination on his case could not be made until a ruling by the court was delivered;
- l) That this had the effect of placing the Claimant on an indefinite interdiction;
- m) That the 1st Respondent has, contrary to the law and policy withheld the Claimant's allowances which has prejudiced the Claimant and infringed on his rights to earn a living and fair remuneration;
- n) That by letter dated 10th December 2015, the 2nd Respondent summoned the Claimant to appear before yet another committee which was unfair as the first two committees had not communicated their findings;
- o) That by the said letter, the Claimant was interdicted again for a transaction that had taken place when he was away from office serving his first interdiction;
- p) That the delay in determining the disciplinary issues affecting the Claimant are highly prejudicial and infringe on the Claimant's constitutional right to fair administrative action.

3. The Respondents' response is contained in a replying affidavit and a further affidavit sworn by Alexander Kimanzi on 5th February 2016 and 12th May 2016 respectively. He depones that the Claimant has pending disciplinary cases under investigation by the County's internal mechanisms. In addition, fresh allegations that the Claimant had influenced the payment of Kshs. 5 Million to a company known as Pharmatis Laboratories Limited allegedly for the supply and delivery of anti-snake venom.

4. Kimanzi adds that the Governor had appointed and gazetted a committee to investigate the allegations against the Claimant. He further states that the Claimant's claim is premature and not ripe for litigation as the constitutional and legal process is underway. He also believes that the reliefs sought are in the nature of judicial review which this Court has no jurisdiction to grant.

5. In the submissions filed on behalf of the Respondents on 16th May 2016, it is submitted that the orders sought by the Claimant cannot be granted without the Court subsuming the functions of the Respondents

or without determining the issue with finality. It is the Respondents' position that the Court cannot interfere with the disciplinary process at this state whether it be illegal or not

6. The facts in this case are not in dispute. What is in contest is whether this Court can interfere with the ongoing disciplinary proceedings against the Claimant. In his further affidavit sworn on 14th March 2016, the Claimant states that what is in issue is the illegality, procedural unfairness and irregularity of the disciplinary process commenced against him. He also cites the non remittance of his allowances as an issue. He further takes the view that he can only be disciplined by the County Public Service Board which is his appointing authority and the disciplinary committees appointed by the Governor are therefore irregular.

7. In the further affidavit sworn by Kimanzi on 12th May 2016, he states that the Claimant's interdiction was to insulate the investigations from compromise by the Claimant.

8. In *Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 Others [2014] eKLR Mbaru J* held that the Court should not interfere with an ongoing internal disciplinary process except in exceptional circumstances. This is good law. However, in restraining itself from such interference, the Court does not render itself a hapless bystander as injustice is meted out against an employee. The restraint exercised by the Court is premised on the cardinal principle that the employer will act lawfully and reasonably.

9. The Claimant was interdicted by the 2nd Respondent by letter dated 26th June 2015 on the following allegations:

- a) That the Claimant was involved in a physical fight with one David Mutua Silu;
- b) That the Claimant physically assaulted and injured one John Mutua Mulwa; and
- c) That the Claimant gave an interview to the media about a fight between himself and one John Mutua Mwalya.

10. By the time the Claimant was being interdicted, the incidences had been reported to the Police and criminal proceedings commenced against Silu and Mulwa. In addition, the Claimant states that the allegation that he had given an interview to the media on a fight between himself and Mwalya was not supported by any evidence.

11. It is the Claimant's case that prior to being interdicted, he was not given an opportunity to be heard.

12. It was submitted on behalf of the Claimant that there was no contractual nor statutory foundation for the interdiction. I agree. As held by **Radido J** in *Kenya Plantation & Agricultural Workers Union [2015] eKLR* unilateral suspension of an employee by an employer would constitute breach of contract.

13. There is also the question whether the persons involved in the disciplinary process actually had the power to do so. The Court was referred to Section 86(1) of the County Governments Act, 2012 which provides as follows:

**86.(1) The County Public Service Board may delegate, in writing, any of its functions to any one or more of its members and the county secretary, county chief officer, sub-county or Ward administrator, village administrator, city or municipal manager and town administrators.**

14. The Claimant submits that only the County Public Service Board could lawfully discipline him unless it delegated this authority in writing. This is the correct position. Disciplinary powers that are vested in a statutory body must be exercised by that body except in cases where there is lawful delegation to some other body or person(s). The Court did not find any instrument delegating the power of the County Public Service Board to either the Governor or the County Secretary. It follows therefore that in initiating a disciplinary process against the Claimant, the Governor and the County Secretary overstepped their

mandate. Logically, the committees appointed by the Governor had no mandate to sit over the Claimant's case.

15. At the time of hearing this application, the Claimant had been on suspension for a year. That is far too long. Disciplinary case should be handled expeditiously to allow the parties to move on. As held by this Court in *Rebecca Ann Maina & 2 Others v Jomo Kenyatta University of Agriculture and Technology [2015] eKLR* a prolonged disciplinary process is much like as the sword of Damocles hanging over the head of an employee or the tongue of an unforgiving spouse. This amounts to an unfair labour practice and must be decisively discouraged.

16. Moreover, the Claimant was not only kept away from work but his emoluments were reduced. Unlike suspension which is a neutral action taken to allow unfettered investigation, interdiction is a disciplinary action that must be taken in the context of due process as set out in Section 41 of the Employment Act, 2007. This is more so in situations where an interdiction is so prolonged that it acquires the character of a final disciplinary action. I have examined the steps taken towards the Claimant's interdiction and find that they fall short of the procedural fairness requirements set out in law.

17. For the foregoing reasons I make the following orders:

- a) The Claimant's interdiction is hereby quashed;
- b) The Claimant is reinstated to his position without any loss of pay or benefits;
- c) The Respondents will pay the costs of this application.

18. These are the orders of the Court.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 27TH DAY OF MAY 2016**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Gumbo appearing with Mr. Wanjala for the Claimant

Mr. Ndubi for the Respondents