



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 508 OF 2016

DR. JOSEPH M. KIVILUCLAIMANT

VERSUS

KENYA NATIONAL EXAMINATION COUNCIL.....RESPONDENT

RULING

1. The claimant by a Notice of Motion dated 31st March, 2016 seeks numerous orders the main of which are:-

a. That pending the hearing and determination of the claim herein, an order of temporary injunction do issue restraining the Respondent whether by itself, its agents, employees, servants and/or assigns, from implementing or purporting to implement the decision of the Board of the Respondent vide its letter dated 29th March, 2016 to indefinitely suspend the claimant/applicant as the Chief Executive Officer of the Respondent.

b. That pending the hearing and determination of the claim herein, an order to temporary injunction do issue restraining the respondent whether by itself, its agents, employees, servants and/or assigns, from obstructing or purporting to obstruct the claimant/applicant from accessing his office within the respondent's offices and/or performing his duties as the Chief Executive Officer of the Kenya National Examination Council.

c. That pending the hearing and determination of the claim herein, an order of temporary injunction do issue restraining the respondent whether by itself, its agents, employees, servants and/or assigns, from conducting any recruitment and/or in any way affecting any substantive replacement in respect of the claimant/applicant's position as the Chief Executive Officer, Kenya National Examination Council.

d. That pending the hearing and determination of the claim herein, an order of temporary injunction do issue restraining the respondent whether by itself, its agents, employees, servants and/or assigns from withholding the claimant/applicant's salary and/or emoluments.

e. That pending the hearing and determination of the claim, an order of stay do issue against the respondent's decision to suspend the claimant/applicant as the Chief Executive Officer of the respondent.

2. The application was based on several grounds the most important of which are:-

a. That the claimant was appointed by the respondent to serve as a Chief Executive Officer in October, 2014.

b. That by letter dated 29th March, 2016 of the respondent herein communicated its decision to suspend the claimant from his position as the Chief Executive Officer of the respondent indefinitely and with immediate effect.

c. That the aforesaid suspension letter was issued unprocedurally, and in contravention of the respondent's Human Resource Policies, Procedures and Terms and Conditions of Service Manual, the Employment Act, 2007, the Kenya National Examination Council Act, No. 29 of 2012 of the Laws of Kenya and the same is an infringement of the claimant's rights under the Constitution, particularly Articles 41 and 47 of the Constitution, 2010.

d. That the respondent's Board decision to suspend the claimant/applicant from his position as the Chief Executive Officer of the Respondent is clearly in contravention of clause 12.32.1 of the KNEC Human Resource Manual as suspension presupposes a situation where an employee has been charged with a criminal offence or grave offence.

e. That the respondent's decision to arbitrarily suspend the claimant/applicant from his position as the Chief Executive Officer is clearly in contravention of the claimant/applicant's constitutional right to fair labour practices as provided for under article 41 of the constitution, 2010.

f. That the claimant/applicant has neither been charged with a criminal offence or grave offence, nor has he been given a show cause letter by the respondent alleging any malpractice on the part of the claimant/applicant.

g. That it is incumbent upon the respondent to issue a warning letter and/or a show cause letter to an employee alleged to have committed any offence under clause 12.30 of the respondent's Human Resource Policies, Procedures and Terms and Conditions of Service Manual.

h. That the respondent has not constituted a Disciplinary Committee to look into allegations against the claimant/applicant if any, and the claimant/applicant was never called to appear before any such disciplinary committee as required.

i. That the claimant/applicant was issued with the letter of suspension allegedly based on the decision of "the Board" a body which is unknown and non-existent in the Kenya National Examination Council Act, 2012 which established the Respondent.

j. That the suspension of the claimant/applicant from his position without any entitlement to any salary is unfair, unjust and in contravention of the claimant/applicant's rights under Article 41 of the Constitution, 2010 bearing in mind that the claimant has not been charged with any criminal offence or grave offence nor has he been given an opportunity to be heard.

3. The application was further supported by the affidavit of Dr. Joseph Kivilu the claimant, who deponed on the main that:-

a. That he was appointed by the respondent as the Chief Executive Officer in October, 2014.

b. That being the Chief Executive Officer of the respondent he was the custodian of its key assets, examinations certificates and examination results date which are extremely sensitive.

c. That he had always served diligently and with dedication at all times while in exercise of his mandate as the Chief Executive Officer of the respondent herein.

d. That he received a suspension letter from the respondent's Board dated 29th March, 2016, which letter is to the effect that he had been indefinitely suspended from his position as the Chief

Executive Officer of the respondent with immediate effect.

e. That prior to the issuance of the aforesaid suspension letter, he had not been made aware of any allegations of misconduct in his capacity as the Chief Executive Officer of the respondent as no allegations had been leveled by anyone, and/or a show cause letter issued to him as required under the Respondent's Human Resource Policies, Procedures and Terms and Conditions of Service Manual.

f. That he was advised by his Advocates Messrs Nyamu & Nyamu Advocates, which advise he verily believe to be true that the aforesaid suspension letter has been given unprocedurally, an in contravention of the Respondent's Human Resource Policies, Procedures and Terms and Conditions of Service Manual, the Employment Act, 2007, the Kenya National Examination Council Act, No. 29 of 2012 of the Laws of Kenya and is an infringement of his rights under the Constitution particularly Articles 41 and 47 of the Constitution, 2010.

g. That the Respondent's Board decision to suspend him from his position as the Chief Executive Officer of the respondent clearly in contravention of Clause 12.32. 1 of the KNEC Human Resource Policies, Procedures and Terms and Conditions of Service Manual, as suspension presupposes a situation where an employee has been charged with a criminal offence or grave offence.

h. That he had neither been charged with a criminal offence or grave offence, nor had he been given a show cause letter by the respondent alleging any malpractice and/or alleged misconduct on his part.

i. That the respondent's decision to arbitrarily suspend him from his position as Chief Executive Officer is clearly in contravention of his Constitutional right to fair labour practices as provided for under Article 41 of the Constitution 2010.

j. That suspension from his position as Chief Executive Officer of the respondent without an entitlement to any salary is unfair, unjust and in contravention of his rights under Article 41 of the Constitution, 2010 bearing in mind that he had never been charged with any criminal offence or grave offence and/or given an opportunity to defend himself against any allegations of misconduct.

k. That the decision to suspend him was solely based on media reports as clearly indicated in the letter of suspension dated 29th March, 2016 and no nexus has been demonstrated between alleged examination leakages and himself.

- That the respondent did not constitute a Disciplinary Committee to look into allegations against him if any, and he had not been called to appear before any such disciplinary committee as required under the respondents Human Resource Policies, Procedures and Terms and Conditions of Service Manual, and the law and the letter of suspension does not make any specific particularized accusation against him.

4. The respondent through Prof. George Omole Magoha opposed the application through replying affidavit in which he deposes on the main that:-

a. That by a letter dated 27th November 2014 the claimant was appointed by the Council of the Respondent as the Chief Executive of the Respondent with responsibilities inter alia of:-

4.1 Efficient administration and management of examination and other business of the respondent.

4.2 Establishing and maintaining channels of effective communication between the management and the council as well as between different levels of management.

4.3 Overseeing and ensuring implementation of the respondent's financial, operating goals and corporate plans, policies and programmes.

4.4 Ensuring continuous improvements in the quality and value of services and products provided by the respondent.

4.5 Ensuring that security and confidentiality in the respondent's operations are maintained.

4.6 Ensuring compliance with Kenya National Examinations Act No. 29 of 2012 (hereafter referred to as the Act which he is informed by the Advocate on Record Geoffrey Obura (hereafter referred to as the Advocate on Record) which information he verily believe to be true is the law under which the claimant was appointed and which law the claimant was also bound to observe.

b. That he is informed by the Advocate on Record which information he verily believe to be true that under the Act the claimant was:-

5.1 Responsible for the day to day management of the respondent.

5.2. Responsible for the affairs and transactions of the Respondent, the exercise, discharge and performance of the Respondent's objectives and functions and its general administration.

c. That he was further informed by the Advocate on Record which information he verily believe to be true that if there could be evidence or likelihood of failure on the part of the claimant in the performance of his duties under the Act the respondent as his employer had every right to investigate the circumstances of such failure and if found culpable the claimant can be removed from his office.

d. That he was advised by the Advocate on record which advise he verily believe to be true that before removing the claimant from the office he:-

(i) Could be suspended from office by the respondent's Council/Board.

ii. Should have been informed in writing of reasons for the intended removal

iii. Should have been given an opportunity to put in a defence against any such allegations.

e. That contrary to the averments of the claimant in the pleadings that he had served the respondent diligently and with dedication at all times the Council/Board of the respondent had reason to consider the claimant's service wanting as the respondent's operations had been increasingly plagued by persistent inefficiency associated with poor governance and exam leakage much to the dismay and chagrin of stakeholders and members of the public.

f. That on 24th March 2016 the Government in an effort to contain the deteriorating situation dissolved the council of the respondent and appointed new council members so as to save the institution from going into disarray.

g. That upon being appointed the new council had the responsibility of determining the suitability or otherwise of the claimant as the Chief Executive of the respondent.

h. That in its meeting held on 29th March 2016 the Council of the respondent resolved to suspend the claimant from duties to allow for further investigations into the operations of the respondent and fulfilment of disciplinary procedures.

i. That he was advised by the Advocate on record which advice he verily believe to be true that the

claimant's suspension and subsequent issuance with a show cause letter are in accordance with the law and the claimant's contract of employment.

j. That he was further advised by the Advocate on Record which advice he verily believe to be true that the claimant's suspension and subsequent issuance with a show cause letter are in accordance with the law and the claimant's contract of employment.

k. That he was further advised by the advocate on record which advice he verily believe to be true that the claimant's suspension is not in violation of the 5th edition of Human Resource Polices, Procedures and Terms and Conditions of Service Manual which became effective on 1st January 2016.

- That the extracts of the manual annexed to the claimant's pleading are from the 3rd edition manual which is no longer applicable to the respondent's staff members.

i. That he was advised by the Advocate on record which advise he verily believe to be true that the claimant did not have to be charged with criminal offence before being suspended.

- That the decision to suspend the claimant was not only based on media reports but as the minutes of the council meeting which recommended his suspension suggests it was also based on various investigation reports.
- That he was advised by the Advocate on record which advice he verily believe to be true that the claimant having been issued with a show cause letter has been given the opportunity to defend himself against the allegations cited in the show cause letter and the process in progress does not violate the claimant's constitutional rights or any other provisions of written laws.

5. In his submissions in support of the application, Mr. Nyamu for the applicant submitted that the applicant had demonstrated that he had a prima facie case with probability of success as required **Giella vs. Cassman Brown & Co. Ltd.** Counsel further relied on the case of **Mrao Limited v. First American Bank of Kenya.** According to Counsel, the respondents failed to observe their Human Resource Manual, Employment Laws of Kenya, the Kenya National Examinations Council Act and the Constitution particularly article 41 and 47.

6. It was Counsel's contention that the respondent had not established or demonstrated that the claimant has ever been unable to perform his assigned functions as the Chief Executive Officer arising out of physical or mental incapacity, gross misconduct, bankruptcy or incompetence as set out under section 16(1) (2) the Kenya National Examinations Council Act. Mr. Nyamu further submitted that the claimant has not been charged with any criminal offence as mentioned under clause 12.32 of the Respondent's Human Resource Manual (KNEC Human Resource Policies, Procedures and Terms and Conditions of Service manual 3rd Edition). The respondent could therefore not premise their decision to suspend on this clause.

7. It was Mr. Nyamu's contention that the respondent's main reason for suspending the claimant was to investigate the claimant over his role in the malpractice and examination leakages which was unreasonable since the said leakage had been extensively investigated by the CID and respondent's monitoring team and findings contained in the security reports and the CID found nothing worth charging the claimant over.

8. On the accusation over poor governance, Counsel submitted that this dated back prior to the claimant's appointment in 2014 and since his appointment he has made tremendous improvement on those matters of governance and efficiency internally.

9. Regarding the applicable human resource manual, counsel submitted that the 5th edition Human Resource Manual did not exist and that the applicable one was the 3rd edition. Citing the case of

Fredrick Saundu Amolo vs. The Principal Namanga Mixed Day Secondary School & 2 Others, he submitted that an employee should not be suspended unless there are prima facie grounds for believing that the employee has committed serious misconduct. Counsel further relied on the case of **Mogotho v. Premier of the North West Province & Another (2009) 4 BLLR** and submitted that suspension is equivalent to an arrest, and should therefore be used only when there is a reasonable apprehension that the employee will interfere with investigations or pose some other threats.

10. On the question of irreparable harm, counsel submitted that the respondent has withheld the claimant's salary and emoluments, the respondent has further denied the claimant access to his office and appointed an officer to occupy the position hitherto held by the claimant in acting capacity.

11. The claimant therefore has been exposed to embarrassment distress and harm to his reputation from the respondent's inference that he is guilty. The claimant will further suffer grave miscarriage of justice and violation of his constitutional and statutory rights and where there is such violation, irreparable harm is a foregone conclusion.

12. On the issue of balance of convenience, counsel submitted that it tilted in favour of the applicant since the claimants statutory and constitutional rights had been violated.

13. Mr. Obura for the respondent on his part submitted that during the claimant's tenure the rot in the respondent was a matter of public notoriety. This led to the overhaul of the Board. The new Board was tasked with the reorganization of the respondent. According to counsel, paragraphs 8 and 9 of the claimant's further affidavit acknowledged malpractice in the management of examinations. The new Board therefore resorted to section 16(1) (2) of the KNEC Act and suspended the claimant.

14. The suspension according to counsel, was to allow for investigations over the claimants role or otherwise in the malpractice. The claimant was to be contacted thereafter since the suspension was not indefinite. It was Mr. Obura's submission that section 16(2) of the Kenya National Examination Council Act allowed suspension and upon suspension, the Chief Executive Officer is asked to show cause. The Chief Executive Officer is further informed of the reasons for his intended removal and allowed an opportunity, to put in a defence. According to Counsel, the claimant was issued with a show cause letter within five days of suspension. The show cause letter enumerated accusations against the claimant.

15. Counsel further submitted section 16(2) of the Kenya National Examination Council Act was similar to section 41 of the Employment Act which mirrored well with article 41(1) of the Constitution. Counsel therefore submitted that there was no prima facie case established to necessitate the grant of injunction.

16. Concerning the applicable Human Resource Manual, he submitted that the one relied on by the claimant was a 3rd edition one which allowed for suspension after a criminal charge. The 5th edition which was the current one permitted suspension when removal is contemplated.

17. On the issue of irreparable damages, counsel submitted that the claimant would not suffer any irreparable harm since an employee on suspension though is not entitled to salary, can be granted alimentary allowance under clause 12.9.3 of the Human Resource Manual. Further a suspended employee is entitled to full house allowance and further even if a dismissal were to occur such employee would be paid the salary withheld during suspension. According to Counsel therefore, there was no justification for injunction. The balance of convenience lay on not granting the orders sought for to do otherwise would be against public interest.

18. This is an interlocutory application or injunction and the applicable principles can now be safely said to have been settled in the often quoted case of **Giella v. Cassman Brown**. With regard to employment cases, this Court has held in the case of **Dr. Kinyua v. Nyayo Tea Zone Development Corporation & three others** that in addition to the general principles for grant of injunction, the applicant must demonstrate that on the evidence, the respondent has not shown that the claimant has no reasonable prospect of succeeding at the trial to be granted a final injunction order and that sufficient relevant confidence subsists between the employer and the employee.

19. The applicant herein has complained that his suspension violated the Kenya National Examination Council Act, the respondent's applicable Human Resource Manual, the Employment Act and the Constitution.

20. The claimant's suspension letter read as follows:-

Dr. Joseph M. Kivilu

Chief Executive Officer

Kenya National Examinations Council

P. O. Box 73598-00200

NAIROBI

SUBJECT: SUSPENSION LETTER

At its meeting held on 29th March, 2016 the Board resolved to suspend you from your position as the Chief Executive Officer of the Kenya National Examinations Council (KNEC) with immediate effect. This decision is premised on the KNEC Act, Section 16 (1) and (2) and the KNEC Human Resource Policy and Procedures Manual.

This follows the decision to investigate your role or otherwise in the malpractice and examinations leakages as widely reported.

Further information will be communicated to you in due course. In the event, please make arrangements to hand over any Council property under your custody to the Human Resource Management Office.

George A. O. Magoha (Prof)

CHAIRPERSON, KNEC BOARD

21. Section 16 (1) and (2) of the Kenya National Examination Council Act referred to in the suspension letter reads as follows:-

16(1) the executive officer may be removed from office by the council for:-

- a. ...(not relevant)
- b. Gross misconduct
- c. ...(not relevant)
- d. Incompetence

22. 16 (2), before removal under subsection (1) the Chief Executive Officer:-

- a. May be suspended from office by the council
- b. Shall be informed in writing of the reasons for the intended removal; and
- c. Shall be given an opportunity to put in a defence against any such allegations.

23. The respondent recently became the focus of adverse publicity over the management and administration of national examinations for schools. This led to the reconstitution of the respondent's Board as one of the measures to arrest the rapid slide to the path disrepute which the respondent was headed to. The applicant herein being the Chief Executive Officer during the period these adverse events are alleged to have occurred naturally becomes under scrutiny. What he did to control or mitigate the issue of maladministration in the national examinations is of concern to the reconstituted Board of the

respondent for which he has been called upon to explain through the show cause letter. It is noteworthy that the respondent is a public body discharging a critical role in the country's education system through administration of national examinations for schools.

24. The integrity of this process is vital therefore the applicant as the Chief Executive Officer of the respondent becomes the centre of attention when an issue that adversely touches on the process emerges. He naturally becomes a target for interrogation and investigation. Section 16(1) and (2) of the Kenya National Examinations Council Act cited above permits the Council to suspend the Chief Executive Officer from office when his removal is being considered. There is therefore nothing unconstitutional about the suspension as claimed by the applicant herein.

25. In the application before the Court the applicant seeks an order to stop the suspension and the inquiry.

26. This Court undoubtedly has jurisdiction to interdict any unfair conduct including disciplinary action. However such intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Judge to exercise such power having regard to the facts of each case. Among the factors to be considered would in my view be whether refusal to intervene would lead to grave injustice or whether justice can be attained by other means.

27. The allegations affecting the applicant are serious and of public interest. They need to be inquired into. The applicant must be called upon to explain and exonerate himself. To throw a fiat of injunction would unduly interfere with the Boards disciplinary powers by cushioning the applicant from any interrogation or investigation. This would not be right. The applicant will have an opportunity to clear his name during the process and if successful the suspension will be lifted and he resumes duties. The Court is not persuaded that the respondent has breached any law or violated the applicant's constitutional right by making him a subject of interrogation and investigation over the pilferage of national examinations for schools.

38. In conclusion, applying the parameters in **Giella v. Cassman Brown** case expounded further in the **American Cynamid v. Ethicon**; the Court finds and holds that the applicant has not demonstrated that he has a prima facie case with probability of success and that if he ultimately succeeds in his claim, damages would not adequately compensate him. The application is therefore dismissed with costs.

39. It is so ordered.

Dated at Nairobi this 24th day of June 2016

Abuodha Jorum Nelson

Judge

Delivered this 24th day of July 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge