



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NUMBER 1820 OF 2015

DUNCAN MUISYO.....CLAIMANT

VERSUS

CABINET SECRETARY MINISTRY OF HEALTH.....1ST RESPONDENT

THE REGISTRAR NURSING COUNCIL OF KENYA...2ND RESPONDENT

THE NURSING COUNCIL OF KENYA.....3RD RESPONDENT

THE HON. ATTORNEY GENERAL.....4TH RESPONDENT

RULING

1. By an application dated 9th October, 2015 the claimant sought the following interlocutory orders:-
 - a. That pending the hearing and determination of the Application inter-partes, this Honourable Court be pleased to make an order suspending the directive given to the applicant by the 1st and 2nd respondents to step aside as contained in the letters dated 16/9/2015 and 18/9/2015 and instead, direct that the applicant resume his official duties and earns his full salary without loss of any benefits pending the hearing and determination of this application inter-partes.
 - b. That pending the hearing and determination of this Application inter-partes, this Honourable Court be pleased to make an order suspending the directive given to the applicant by the 1st respondents to step aside and instead, direct that the applicant resume his official duties and earns his full salary without loss of any benefits pending the hearing and determination of this application interpartes.
2. The application was supported by the affidavit of the claimant who deponed on the main that:-
 - a. That in the month of December, 2014, he proceeded for leave which was to end on 23rd February, 2015. Upon resuming duties thereafter, on diverse dates of February, 2015 he was called by Ethics and Anti-Corruption Commission whose offices are situated at Integrity Centre, Nairobi and was questioned about suspected financial mis-appropriations within the Nursing Council.
 - b. That he wrote a statement and did shed light on the issues raised then he was let free without any charges being preferred against him. On 7th May, 2015 the Ethics and Anti-Corruption

Commission made a report to the Registrar Nursing Council (the 2nd respondent) in which said report, there was no any wrong doing or misappropriation of funds confirmed against the applicant.

c. That despite that he was not found guilty of any wrongdoing or misappropriation of funds by the Ethics and Anti-Corruption Commission, on 22nd June, 2015 and 2nd respondent purported to stop him from reporting back to duty from leave, directing him to await the Registrar official communication.

d. That his position as head of Department finance is very important because he had been an agent of Barclays Bank Limited and Co-operative bank of Kenya Limited from the year 2004 to date, wherein he inquired about all transactions handled by the Nursing Council of Kenya and get regular reports which are important for the purposes of financial reporting and control. As long as he was kept out of office and based on the vested interest in his job position from within the Nursing Council and the Ministry of Health, dubious and illegal transactions would be carried out there unnoticed after which the 1st and 2nd respondents would turn to blame him for the mess and malign his name.

e. That despite being cleared by the Ethics and Anti-Corruption Commission, as well as the Board of the Nursing Council, the 1st and 2nd respondents had illegally, unlawfully and without any ground at all purported to suspend him for an indefinite period of time from his employment contrary to the law and norms of justice, thereby exposing him to mental torture, loss of proper earnings and his very source of livelihood, thereby exposing him to suffering and prejudice.

3. The second respondent through Edna Tallam Kimaiyo deponed in reply as follows:-

a. That she was aware that on 21st January 2015 the applicant herein was called from his annual leave and directed to resume his duties.

b. That she was aware that on 20th February 2015 the claimant herein was requested to provide certain pertinent information to facilitate investigations commenced by the Ethics & Anti-Corruption Commission.

c. That she was aware that the applicant was sent on a compulsory leave on 24th February 2015.

d. That she was aware that the applicant herein wrote an incomplete handing over report on 17th April 2015.

e. That she was aware that on 26th June 2015 the acting Deputy Registrar Sarah Burje wrote a letter to the applicant purporting to absolve him from any wrong doing and which information was attributed to the board.

f. That she was aware that on 6th July 2015 Mr. Kinuthia Wamwangi a member of the board distanced himself from the actions of the Acting Registrar.

g. That she was aware that on 8th July 2015 the applicant herein was asked to provide financial reports and documents and which request he declined to honour.

h. That she was aware that on 16th September 2015 the Cabinet Secretary of health gave a directive that the applicant steps aside from the services of NCK until the investigations are completed.

i. That she was aware that on 26th October 2015 the Ethics and Anticorruption Commission wrote that they shall inform her about culpability of any person or otherwise after the offices of the Director of Public Prosecution makes the final decision.

j. That the applicant herein remains an employee of the Nursing council of Kenya with full benefits pending the final decision from the Director of Public Prosecution.

k. That in the premises its in the interests of the 3rd respondent and indeed public good that the applicant herein complies with the directive to step aside until investigations are complete.

4. In his oral submission before Court, Mr. Jaoko for the claimant submitted that the letter from Ethics and Anti-Corruption Commission marked as exhibit D2 did not accuse the claimant of any wrongdoing. Further in their letter dated 26th June, 2015 the 3rd respondent in their Board meeting cleared the claimant and asked him to report to duty. According to Counsel therefore the letter dated 16th September, 2015 issued by the Cabinet Secretary asking the claimant to step aside read together with the one dated 18th September, 2015 constituted malice and witch hunt.

5. According to Mr. Jaoko, there was no legal ground to suspend the applicant from duties. The claimant was an agent for Barclays Bank and Cooperative Bank who required into certain transaction. These transactions according to the applicant were illegal and intended to create a mess and accuse the applicant. Counsel further submitted that the affidavits by the 2nd respondent were intended to mislead the Court and that the show cause letter dated 4th February, 2015 was produced for the first time in Court and was never received by the claimant.

6. Mr. Jaoko took issue with Ethics and Anti-Corruption Commission's letter dated 26th October, 2015 seeking to review its earlier recommendations and described it as under hand and witch hunt. Counsel wondered why the change of position yet Ethics and Anti-Corruption Commission had earlier cleared the claimant of any wrong doing.

7. Mr. Wangai for the respondents on his part submitted that the prayers in the application except for prayer 4 were spent. According to Counsel, the claimant was asking the Court to issue an order suspending a directive yet the claimant was not under suspension. There was no suspension letter produced in Court. According to Counsel, granting prayer 4 would be tantamount to determining the suit. He submitted that the claimant was and still remained an employee of the respondent drawing salary and benefits.

8. Counsel further submitted that annexures 107 in the 2nd respondent's affidavit relate to complaints against the claimant and requests by Ethics and Anti-Corruption Commission to provide financial statement which he failed to do. The annexures according to Mr. Wangai demonstrate failure by the claimant to cooperate making it necessary for him to be asked to step aside.

9. Regarding the letter clearing the claimant of wrongdoing written by Acting Deputy Registrar, Counsel submitted that this letter was contested by a Board member and in any event was later retracted. Concerning the two letters from Ethics and Anti-Corruption Commission, he submitted that the first letter talked of referral of the inquiry file to Office of the Director of Public Prosecution for advice and recommendation and that Ethics and Anti-Corruption Commission recommenced further investigations after recommendations of the Office of Director of Public Prosecution.

10. Mr. Wangai further submitted that the respondent insisted that the investigations be completed before clearing the claimant and further it was important and in the interest of the 2nd respondent that issues of financial impropriety be investigated.

11. Mr. Jaoko in rejoinder wondered what the respondents were doing from June to August before rejecting the letter. This according to Jaoko could only be interpreted as mischief.

12. This is an interlocutory application seeking interlocutory relief. The concern of the Court is therefore whether the applicant has prima facie case with probability of success and further if damages would not be adequate compensation should the applicant be successful in the ultimate. If not sure, the Court will decide the issue on a balance of convenience.

13. The claimant seeks in the main suit a declaration that the directive by 1st and 2nd respondent that he steps aside pending investigation are null and void. The claimant further seeks a declaration that the claimant continues to serve in his job position until his term expires.

14. The main thrust of the applicant's complaint is that he was asked to step aside after he had earlier been cleared of any wrong doing by the Ethics and Anti-Corruption Commission and the 2nd respondents Acting Deputy Director. The applicant read mischief in this and complains of a calculated move to replace him.

15. Investigation into allegations of financial impropriety by competent authorities cannot be interfered with by the Court unless it can be shown beyond peradventure that such investigation is actuated by malice, unnecessary and driven by ulterior motives.

16. They are intended to achieve integrity and good governance hence no person ought to stand in the way of such investigators unless they have something to hide. The investigations if conducted properly and professionally end up revealing the truth and exonerating in a proper case, a person initially thought to be guilty of impropriety.

17. The EACC in their letter dated 7th May, 2015, in addition to making recommendations to the 2nd respondent on areas they require to improve to ensure adequate controls and accountability over funds, stated that they would forward the inquiry file to the Office of the Director of Public Prosecution as required by law for review and advice. In their letter dated 26th October, 2015 Ethics and Anti-Corruption Commission informed the 2nd respondent that upon review, the Office of the Director of Public Prosecution returned the file with the directive that further investigations be conducted.

18. Whilst the applicant reads malice and witch-hunt in the resumed investigations, he never or inadequately responded to allegations of non-cooperation evidenced by letters and correspondence to him to avail documents and records in his possession to assist with the investigations which were annexed to the affidavit of Edna Tallam Kimaiyo.

19. In the circumstance, the Court is not persuaded that the applicant has met the prerequisites for interlocutory relief of the nature sought pending the hearing of the main claim.

20. The application is therefore dismissed with costs.

21. It is so ordered.

Dated at Nairobi this 17th day of June 2016

Abuodha Jorum Nelson

Judge

Delivered this 17th day of June 2016

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha Jorum Nelson

Judge