



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 369 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JOAB MAKOKHA ARUBA.....CLAIMANT

Versus

KITALE YOUTH POLYTECHNIC.....RESPONDENT

RULING

By his application made vide notice of motion dated 5th October, 2015 the applicant Joab Makokha Aruba seeks the following orders from his employer Kitale Youth Polytechnic:-

- 1. THAT this Application be certified urgent and be heard exparte in the first instance.*
- 2. THAT service of this Application upon the Respondent be dispended with.*
- 3. THAT pending hearing and determination of this Application, this Honourable Court be pleased to issue order lifting my suspension allowing me to resume my duties.*
- 4. THAT pending hearing and determination of this Application, this Honourable Court be pleased to order the Respondent to pay my wages as it falls due and in arrears with effect from 4th May, 2015 when I was suspended to date.*
- 5. THAT this honourable Court be pleased to set down this application for inter parties hearing on priority basis.*
- 6. THAT costs of this Application be in the cause.*

The application is made under certificate of urgency and is anchored on section 12 of the Employment and Labour Relations Court Act, the Employment Act, the Labour Relations Act and the Constitution as well as all other enabling provisions of the Law. It is supported by the grounds on the face of the motion and the affidavit of the applicant sworn on 5th October, 2015.

The Respondent filed a replying affidavit of **JUSTUS MANYONGE SIMIYU**, the Project Manager of the Respondent who is also the Chief Executive Officer of the Respondent sworn on 17th December, 2015. The application was argued in court one 9th March, 2016. The Claimant appeared in person while the Respondent was represented by Mr. Okile instructed by M/s Okile & Company, Advocates.

Background

The applicant/Claimant is the bursar/Accounts clerk of the Respondent, having been appointed by letter dated 11th June, 2010. He was suspended by letter of suspension dated 4th May, 2015 from duty for the following reasons:-

- 1. Not reporting to the manager though you were warned in the letter dated 20/11/2014.*
- 2. Making important decisions without informing and consulting the manager.*
- 3. Not doing your work as advised and directed by the manager.*
- 4. Not reporting and being on duty as required.*
- 5. Trying to sabotage the work of the Manager.*

He is aggrieved by the letter for reasons that the letter of suspension does not state how long he was to be on suspension and thus the suspension was indefinite. He further states that there was no proof the allegations and that he was not given an opportunity to defend himself before the suspension.

The applicant stated at the hearing that his suspension was unlawful as the board was not involved, that it was a witch hunt as it was based on a warning letter dated 20th November, 2014 on a completely different issue. He stated that from the date of his suspension in May, 2015 to October, 2015 when he filed this suit the Respondent did absolutely nothing about his case and did not even respond to his letter asking about the status of his case. He further states that he was supposed to be paid half salary during suspension which has not been done consistently putting him into a lot of financial uncertainty as he cannot plan.

He prays that the orders sought be granted.

For the Respondent it was stated by Mr. Okile and in the Replying affidavit that the suspension was lawful and proper on grounds of misconduct and insubordination. It was further stated that the Claimant had been warned and that it is not true he had not been given an opportunity to be heard. The Respondent referred to minutes of a Board of Management meeting held on 22nd October, 2014 at which the Claimant's working relationship with the project manager was discussed.

Mr. Okile submitted that the Claimant was invited to appear before the Board of Management on 17th November, 2015 but replied stating he was attending an interview in Lodwa. He submitted that the conduct of the Claimant was wanting. He was hostile and the Respondent was apprehensive that should he be allowed to resume duty he will sabotage operations.

Mr. Okile submitted that the Respondent had been acting in good faith and has paid the claimant half salary during the period of suspension. He submitted that it is the claimant who had delayed the resolution of his case.

Mr. Okile submitted that the Claimant was uncooperative and had refused to avail documents required for audit and was instead behaving as if he is being persecuted by the Respondent. Mr. Okile submitted that a person who comes to this court must come with clean hands. He urged the court to dismiss the application.

Determination

I have considered the application by the Claimant together with his supporting affidavit. I have also considered the Replying affidavit, the further replying affidavit and the oral submissions of both parties. The issues for determination is whether the claimant is entitled to the lifting of his suspension and to payment of withheld wages.

The law that governs employment is the Employment Act. The Act does not make any provision for suspension. The Act however provides at section 12 as well as section 26 for employers to have their own terms and conditions of employment including disciplinary process. Matters that are not provided for in the Act may therefore be provided for in either the letter of appointment or some rules or regulations providing for terms and conditions of employment, or in collective bargaining agreements negotiated with a trade union. Where such terms and conditions of service provide for suspension, the terms would also provide for the circumstances when an employer may suspend an employee, the duration of the suspension and the payments due to an employee during such suspension.

It therefore follows that an employer cannot resort to suspension where it is not provided for. Neither the Claimant, nor the Respondent have referred me to any terms and conditions of service covering the Claimant which provide for suspension.

This being the case, the suspension of the Claimant is unlawful. I therefore order for the immediate lifting of the suspension of the Claimant and the release of all salary withheld during and as a consequence of the unlawful suspension.

Ruling Dated, Signed and Delivered this 16th day of June, 2016

MAUREEN ONYANGO

JUDGE