



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION NO. 24 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

MUSA OGARO OSORO.....CLAIMANT

Versus

1. WILFRED N. GUTWA.....1ST RESPONDENT

2. DIRECTOR FOR HUMAN RESOURCE

KISII COUNTY ASSEMBLY.....2ND RESPONDENT

3. THE COUNTY PUBLIC SERVICE

BOARD-KISII COUNTY.....3RD RESPONDENT

4. THE COUNTY GOVERNMENT OF KISII4TH RESPONDENT

J U D G E M E N T

The Petition herein was filed together with a motion under certificate of urgency on 19th October, 2015 wherein the petitioner sought interim preservation orders pending the hearing of the application and the petition. The court however declined to grant the interim orders and fixed the application for *inter partes* on 26th November, 2015. When the application came up for hearing on 25th February 2016 the Petitioner abandoned the application and parties agreed to proceed with the petition by way of written submissions on the petition.

Facts

The petitioner is an employee of the 4th Respondent having been appointed to the position of Accountant 1 by letter of offer of appointment dated 30th January, 2014. On 1st October, 2015 he was suspended from duty by a letter signed by Wilfred N. Gutwa, the 1st Respondent. The reasons for suspension were that;

"1. As a former employee of Wakenya Pamoja Sacco your services were terminated on grounds that you had stolen Kshs.300,000 and absconded duty which is a criminal offence. The matter was reported to police/CID and it is still with Nyamira Magistrate Court under CF No.124/13.

2. You also have an outstanding loan balance with Wakenya Pamoja Sacco of Kshs.901,497.94 which despite various demand notices to pay you have not bothered to do so."

It is the petitioner's case that the suspension is illegal as the 1st and 2nd Respondents usurped the powers and duties of the 3rd Respondent without the mandatory resolution of the 3rd Respondent and that he was sent on suspension before ascertaining whether the allegations made against him were correct and without affording him a hearing. He submitted that Nyamira CM CR No.124 of 2013 was concluded following his discharge on 29th April, 2015. He avers that Wakenya Pamoja Sacco Society Limited was motivated by malice as it had failed to persuade him to withdraw Nairobi Cause No.237 of 2013 in which he sued the Sacco Society for unlawful termination.

He seeks the following prayers:-

1. Declaration be issued to the effect that the Petitioner is entitled to protection under the Constitution.
2. Declaration that the actions and/or omissions of the 1st and 2nd Respondents herein purporting to send the Petitioner on unpaid indefinite suspension from duty vide the letter dated **1st day of October, 2015**, while acting on malicious letter dated the **26th day of February 2015**, from one **Fred Miruka, of Waken ya Pamoja Sacco Society Ltd**, is illegal, invalid, null and void and/or no legal effect.
3. Declaration that the 1st and 2nd Respondents lacks capacity and competence to unilaterally usurp the Powers of the County Public Service Board and suspend the Petitioner from duty vide the letter dated **1st October 2015 and 2nd day of October, 2015**.
4. Permanent injunction, restraining the Respondents either by themselves, agents, servants and/or employees, from interfering, preventing, barring, restricting the Petitioner's performance and/or execution of duty as accounting officer 1, Kisii County Government, whatsoever and/or howsoever, subject only to observance of the provisions of the County Government Act 2012, the employment Act and the Constitution of Kenya, 2010.
5. An order quashing the decision letter of suspension dated the 1st day of October 2015, and directing the Respondents to immediately allow the Petitioner to resume his duty as accounting officer.
6. Declaration that the Respondent's conduct amount to unfair labour practices and administrative action thus unlawful and unconstitutional.
7. The Respondents be compelled to pay costs of these proceedings.
8. Any further and/or such Orders that the Honourable Court may deem fit and just to grant in the circumstance.

The Respondents did not file any response to the petition. In the written submissions filed by the Respondent it is submitted that the action taken against the Petitioner was in accordance with the County Human Resource Manual and that the letter of suspension required the petitioner to show cause within 14 days why disciplinary action should not be taken against him. That after the petitioner's response was received the suspension was lifted and the petitioner was reinstated back to work. It is the Respondent's position that the petition was filed prematurely as the disciplinary process had just commenced and the petitioner had not been denied a chance to be heard. The Respondents state that there were reasonable grounds to suspend the petitioner and that following the lifting of the suspension and release of moneys withheld during the suspension there is nothing more issues outstanding for the court to determine.

The Respondents also submitted that the 1st Respondent is the Head of Human Resource and only conveyed the decision to suspend the petitioner on behalf of the County Secretary and Head of Public Service and submit that he should not have been sued in his personal capacity. It prays that the 1st Respondent's name be expunged from the proceedings.

Determination

I have considered the pleadings and the submissions of the Respondent. I note that the petition does not set out what provisions of the constitution have been violated or threatened. The petitioner does not even describe the Respondents so that the court cannot tell from the petition who or why the 1st and 2nd Respondents have been enjoined in the petition or even why the 1st and 2nd Respondents are considered to have usurped the powers and duties of the 3rd Respondent.

Under the County Governments Act the County Public Service Board is mandated to establish and abolish offices and to appoint persons to hold those offices, delegate its powers to any such office and to investigate any complaint made by any such office and to investigate any complaint made by any person or group of persons the violation of any values and principles and recommend any necessary action. Section 76(6) permits the County Public Service Board or the concerned Chief Officer or other Lawful Authority to interdict or suspend or take any other interlocutory decision against a public officer and section 55 requires a public officer dissatisfied with action taken against him to appeal to the Public Service Commission.

I find that besides not stating which rights have been violated and by whom, the filing of this petition was premature.

I further find that there was reasonable ground to take the action of suspending the petitioner in view of the nature of complaints raised against him by Wakenya Pamoja Sacco Society Limited which are issues of serious financial impropriety incompatible with the petitioners position as Accountant 1. Indeed I am surprised that the petitioner was appointed to his position while Nyamira CMCR NO.124 of 2013 was pending in court as he did not meet the requirements of integrity under both chapter Six of the Constitution and section 65 of the County Governments Act. From the proceedings attached by the Petitioner to his petition the criminal case was not determined on the merits but he was discharged when a witness, the investigating officer, was bereaved and was unable to attend court so that the prosecution was unable to present the witness in court. The discharge was on 29th April 2015 yet the petitioner was appointed to his position on 30th January, 2014 during the pendency of the criminal case.

I find the petition to be incompetent for failure to state with particularity the provisions of the constitution that were violated or threatened and to show that there was any violation at all (**Anarita Karimi Njeru [1979] KLR 162**). I also find the petition premature and an abuse of court process. For these reasons I dismiss the petition with costs.

Dated and signed and delivered this 15th day of September, 2016

MAUREEN ONYANGO

JUDGE