



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

CAUSE NO. 102 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

WILFRED ONSERIO METOBO.....CLAIMANT

VERSUS

1. THE COUNTY GOVERNMENT OF KISII

2. KISII COUNTY PUBLIC SERVICE BOARD.....RESPONDENTS

R U L I N G

Before me for determination is a motion filed under certificate of urgency on 21st April, 2016. The motion is brought under sections 1(a), 2, 3, 4, 12 and 15 of Employment and Labour Relations Court Act, Sections 9, 10, 35, 36, 41, 43, 45, 46 and 49 of Employment Act and all enabling provisions of the Law. The applicant seeks the following orders -

1. This application be certified as urgent and service the same be dispensed with in the first instance.
2. The Honourable Court be pleased to issue an order of a temporary injunction directed at the respondents either by themselves, employees, officers and/or commissioners from proceeding with the disciplinary process against the claimant, pending the hearing and final determination of this application.
3. The Honourable Court be pleased to issue an order of mandatory injunction directed at the respondents to re-instate the claimant to his position on full pay and allowances unconditionally.
4. The Honourable court be pleased to issue an order of temporary injunction restraining the respondents either by themselves, employees, officers and/or commissioners from proceeding with disciplinary process of any nature on the basis of grounds of unsubstantiated allegations contained in a letter of interdiction to the claimant dated 6th April, 2016, pending the hearing and final determination of this claim herein.
5. Costs of this application be awarded to the claimant.

The application is supported by the grounds on the face thereof and the affidavit of Wilfred N. Gutwa, the Director, Human Resource Management of the 1st Respondent.

The application was argued on 16th June, 2016.

Summary of Facts

The applicant is an employee of the 1st Respondent, having been appointed to the position of Ward Administrator. On 26th August, 2015 he received a show cause letter stating that one DENNIS NYABUTO had filed a complaint against the applicant alleging that he had received Shs.300,000 under false pretence by pretending that he was in a position to assist the said DENNIS NYABUTO get a job with the Kisii County Public Service Board. The letter required the applicant to show cause within 7 days cause why disciplinary action should not be taken against him. The complaint from Dennis Nyabuto is dated 3rd September, 2015 while the show cause letter is dated 26th August, 2015 and is signed by Francis A. Osoro, Director Devolved Units, Kisii County Government.

On 13th October, 2015 the applicant was issued with another letter stating that the office had received complaints from Dennis Nyabuto and Zachary Ogeto Nyatuka accusing the applicant of soliciting bribes to offer them employment. The letter again required the applicant to respond to the complaints. There is no evidence that the applicant responded to the said complaints. On 8th December, 2015 the applicant was issued with yet another letter accusing him of the following;

1. Mr. Nyabuto A. Denis wrote a complaint letter dated 3rd November, 2015 to the Kisii County Government that he gave a total of Kshs.300,000 for promising to offer him a job at the Kisii County.
2. Lilian Kemunto Cherana wrote a complaint letter dated 8th October, 2015 to the Kisii County Government that she gave you a total of Kshs.100,000 for promising to offer her a job at the Kisii County.
3. Susan Kerubo Kinara wrote a complaint letter dated 18th November,2015 to the Kisii County Government that she gave you a total of Kshs.150,000 for promising to offer her a job at the Kisii County.
4. Zachary Ogeto Nyatuka wrote a complaint letter dated 14th November, 2015 to the Kisii County Government that he gave you a total of Kshs.55,000 for promising to offer him a job at the Kisii County.

The letter was from Human Resource Department and signed by Wilfred N. Gutwa for County Secretary Head of Public Service. The letter noted that the applicant had failed to respond to the show cause letters from the Director of Devolved Units. The letter invited the applicant to appear before the Human Resource Advisory Committee to defend/answer the allegations. The applicant appeared before the committee on 16th December, 2015 and asked for and was granted a further 7 days to respond to the charges after pointing out discrepancies in the dates on the complaints and those on the letter dated 8th December 2015. A letter making corrections on the dates in the show cause notices was written to him on 25th January, 2016 and required him to respond by 4th February, 2016. The applicant responded to the charges by his letter dated 14th December, 2015 in which he denied the charges and stated that they were baseless, pure malice and are intended to ruin his career in public service and prevent him from accessing future employment opportunities and promotions. In the letter he also demanded the following which are reproduced verbatim:-

- " 1. That I am innocent until proved guilty.
2. I want the complaint letters that match with allegations number 1 & 4.
3. I want to be served with a notice of seven (7) days so as to put up my defense.
4. The committee does not whatsoever have the jurisdiction to handle police cases unless they formally request for them.
5. The committee should stop serving personal interests that are full of malice and intentions to ruin

my career.

6. Let your office address **ALL** my complaints earlier possible. I want to protect my integrity.

7. This is pure witch-hunt and it has a direct bearing to the vacant position of Sub-county Administrator in Bomachoge Borabu Sub-County. "

The applicant was invited to appear before the disciplinary committee on 4th February, 2016 by letter dated 25th January, 2016 but failed to do so. The committee recommended that his case be referred to the County Human Resource Management Advisory Committee for necessary action. At its meeting held on 31st March, 2016 the County Human Resource Management Advisory Committee recommended that the applicant be interdicted and the letter of interdiction was issued to the applicant on 6th April, 2016. The letter is signed by Wilfred Gutwa for County Secretary. The applicant responded to the letter on 8th April, 2016.

The applicant thereafter filed this suit on 21st April, 2016.

At the hearing of the application Mr. Begi for the applicant submitted that the process of interdicting the applicant was unprocedural as he was not accorded an opportunity to cross-examine his accusers, that the Respondents acted in a vindictive manner and that the letter of interdiction is issued by somebody masquerading as a member of the County Public Service Board. Mr. Begi submitted that the process is a nullity.

Mr. Begi submitted that the applicant was called to disciplinary meetings on 31st March, 24th May and 7th June 2016, that at the meeting of 24th May, 2016 and 7th June, 2016 which were called after the filing of this suit the applicant's accusers were present.

For the Respondents Mr. Kila who was holding brief for Mr. Onsembe submitted that the claimant was given ample opportunity to respond to the charges against him, that the applicant was heard together with his accusers on 24th May and 7th June, 2016 by the County Human Resource Management Advisory Committee. That the Respondents complied with chapter 6 of the Constitution which provides for leadership and integrity, the Leadership and Integrity Act, the Code Conduct for Public Servants and the County Human Resource Manual.

Mr. Kila submitted that the interdiction letter was signed by Mr. Gutwa on behalf of the Secretary of the Public Service Board and as Head of Human Resource, and that he has delegated powers. He submitted that the applicant has not been terminated and should he be found to be at no fault his half salary that has been withheld during interdiction will be released to him. He submitted that the Respondents have not concluded the disciplinary case as the resolutions of the County Human Resource Disciplinary Committee have not yet been forwarded to the Public Service Board for further action, that before final action is taken the Respondents will comply with section 41 of the Employment Act, that the Claimant's absence from duty which was also a ground for interdiction is yet to be discussed and that the claimant came to court prematurely.

Determination

I have considered the pleadings and submissions of the parties. The thrust of the applicant's complaint in my understanding, is that the interdiction of the claimant is unprocedural first because the letter of interdiction was signed by a person who has no authority to do so, secondly that he was not given an opportunity to defend himself and finally that the allegations against him have not been proved.

On the first issue, I have seen the letter of interdiction and it is signed by Mr, Wilfred N. Gutwa for County Secretary. The applicant's position is that Mr. Gutwa had no authority to sign the letter of interdiction. I do not agree. In the first place, the letter is signed for the County Secretary meaning that the person under whose authority the letter is signed is the County Secretary.

Secondly, Mr. Gutwa is the County Head of Human Resources. It has not been alleged that he was not authorised to write the letter on behalf of the County Public Service Board. Under section 59 the County Public Service Board has authority to establish offices and appoint persons to hold those offices, investigate violations of any values and principles. Under section 64, the County Public Service Board has authority to delegate a duty for which the law does not prohibit delegation. It has not been alleged by the applicant that the County Public Service Board or the Secretary thereof had no authority to delegate the signing of the interdiction letter to its head of Human Resources. Section 76(6) further authorises a County Chief Officer or other lawful authority to interdict or suspend or take any other interlocutory decision against a public officer. Interdiction is such interlocutory action pending determination of the charges against the applicant.

The applicant conceded to having been called to at least three different meetings to defend himself against the charges. So his claim of having been condemned unheard is not valid.

The applicant referred the court to the case of **Joseph Kiprono Koech v County Government of Turkana & Another [2014]eKLR** wherein it was held that the suspension of the claimant therein was by a person who had no authority to discipline him. In that case it is the governor who took action and he clearly had no authority unlike this case where the letter of interdiction was written and signed by a person who had delegated authority to do so.

For the foregoing reasons, I find that the applicant has not proved that he is entitled to the prayers sought and dismiss the application. There shall be no orders for costs.

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

MAUREEN ONYANGO

JUDGE