



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CUASE NO.1406 OF 2016

AGNES ONGADI.....CLAIMANT

VERSUS

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED.....RESPONDENT

RULING

1. On 18th July 2016, the Claimant filed application through Notice of Motion seeking for orders that;

1. ...

2. *Pending the hearing and determination of this application and or suit a conservatory order do issue restraining the Respondent whether by themselves their agents and or servants from recruiting and or employing any person in the position of either the Chief Manager, Human Capital and Administration or Senior Manager, Human Resource and Administration or replacing the Claimant with any such person to be recruited.*

3. *Pending the hearing and determination of this application and or suit, a conservatory order do issue to stay any further disciplinary process by the Respondent against the claimant.*

4. *Pending the hearing and determination of this application and or suit the suspension letter and or decision dated 28th April 2016 be stayed and the Claimant be reinstated to employment.*

5. *Costs of this application be provided for.*

2. The application is supported by the affidavit of the Claimant and on the grounds that in violation of the Constitution and the Employment Act, the State Corporations Act and the Human Resource manual, the Respondent commenced and has continued with disciplinary process against the claimant. The Respondent has acted in bad faith, malice and in bias when they declared the claimant's position redundant/abolished and advertised the same even before conclusion of disciplinary process and appeal were finalised. The Respondent chief executive officer (CEO) and or board have acted as the complainant, the investigator and the judge in the disciplinary process. The Claimant has been denied the right to a fair hearing in violation of fair administrative action and rules of natural justice and unless conservatory orders are issued there will be irreparable loss once the position is filled in.

3. In the supporting affidavit, the Claimant avers that the Respondent is a state corporation and registered as a company. She has been an employee of the Respondent since 14th January 2009 as Chief Manager, Human Capital and Administration on permanent and pensionable terms. The Respondent

management and employee matters are governed by the Constitution and employment laws and the Human Resource Policies and Procedures Manual (HR Manual).

4. On 5th April 2016 the Claimant was issued with a show cause letter by the CEO and managing director of the respondent. On 6th April 2016 the Claimant responded and held a meeting with the CEO to give oral explanations and he said he was satisfied. Clause L3 of the HR Manual requires that if a response to a show cause is not satisfactory the supervisor and CEO should write back to the employee informing her of the same and give a chance to the employee to give further explanations. If the supervisor is still not satisfied with the further explanation, this should be communicated back to the employee for a further response and case is then forwarded to the Disciplinary Advisory Committee, DAC.

5. Ms Ongadi also avers that the Respondent has failed to adhere to clause L3 of the HR manual. The last letter issued to the Claimant on 28th April 2016 was a communication by the board placing her on indefinite suspension. Under the HR Manual, a suspension or interdiction only follows criminal charges and could lead to dismissal and the Claimant was not facing such circumstances.

6. That the Respondent has acted contrary to HR Manual, have contravened the substantive law on employment and constitutional safeguards on fair labour practices. The Respondent CEO went on to present the claimant's case to the board in her absence, the CEO recommended a suspension, there was no hearing or opportunity to give a defence before such advance action was taken against the claimant, and the CEO as the supervisor was part of the meeting making such decision which was unprocedural.

7. Ms Ongadi also avers that the complaint against her set out in the show cause was that she contravened a board's approval and overlooked the CEO's office and by the board dealing with the matter, it was thus investigating their own case against the claimant. On 10th June 2016 the Claimant was asked to Respondent to an audit query on HR Department on a matter unrelated to the disciplinary issues against her and when she frantically tried to access the information required from the CEO he was not available. Such information has not been provided to date.

8. On 5th July 2016 the Claimant received a letter asking her to appear before the staff Remuneration Committee of the Board, this came 3 months after the disciplinary process had commenced which is contrary to L8.1 of the HR Manual which requires that all internal cases be addressed within 3 months. During the hearing on 13th July 2016, the Claimant submitted her written response and oral highlights which were ignored.

9. That it is futile to try and exhaust the internal mechanisms for remedy by appealing to the Respondent board as they dismissed submissions made. The submissions made on the audit touch on the role of the chairman and CEO of the Respondent and has potential in causing potential bad blood between the Claimant and her supervisors.

10. Since December 2015 the procedures disciplining public servants changed pursuant to article 234 of the constitution, the PSC delegated to the State Corporations' Advisory Committee the powers to discipline over and remove persons acting in the public service. As such matters as facing the Claimant should have been forwarded to such a Committee.

11. Further to the above, on 14th July 2016, while disciplinary matters were pending, the Respondent declared the Claimant redundant and abolished the officer she held and designated the same as Ag. Senior Manager, HR & Administration. By this date, the disciplinary process was incomplete and the Respondent proceeded to advertise in the print media the claimant's position. The disciplinary process was therefore a sham designed to get rid of the claimant. That unless the orders sought are not granted, the Claimant shall suffer loss and damage.

12. The Claimant also filed Further Affidavit and avers that her changed job title did not comply with section 10(5) and 40(1) (b) of the Employment Act. Renaming her position does not change the job

functions. The abolition of her office and creation of an acting position was an attempt to revoke her appointment without valid reasons. To advertise for the positions is tantamount to unfair dismissal. That the HR Manual apply to all employees with regard to L3 provisions and issuance of show cause letters and pursuant to section 12 of the Employment Act, an employer has to specify the disciplinary rules applicable to employees and make the same reasonably accessible to the employees.

13. The letter of suspension did not state the reasons and timeframe for the same and it was thus arbitrary and indefinite. Clause 8 of the HR manual only allow a suspension in specific instances. That the Claimant did not commit any acts of gross misconduct as alleged and had her written and oral submissions been properly addressed, the Respondent CEO and Board would have come to a different conclusion. There was no fair hearing or opportunity to give a defence and this was in clear violation of the applicable law and HR Manual. There is a right to challenge internal disciplinary process that are not fair.

14. In reply the Respondent on 29th July 2016 filed **Replying Affidavit of Fernandes Barasa**, the Managing Director and CEO of the respondent. That following a restructuring programme within the respondent, the Claimant was appointment to the position of Ag. Senior Manager, HR & Administration from 1st July 2016.

15. The Claimant was issued with a show cause letter and replied on 6th April 2016. Clause L.3 of the HR Manual does not apply to the Claimant as this relates to disciplinary procedures for staff at job group KET.8 and below while the Claimant was at job group KET.3. The Respondent board addressed the claimant's case as she was a board appointee.

16. In the letter dated 28th April 2016, the Respondent communication to the Claimant on her suspension until her case was determined. It was not indefinite and a suspension was not only in cases where there were criminal charges as an offence of gross misconduct warranted a suspension. She was given a hearing before the board. Fairness and natural justice principles were not violated and the questions raised on the audit was normal process and unrelated to the disciplinary process. The Respondent complied with the constitution, employment laws and the HR Manual.

17. Mr Barasa also avers that the Claimant was suspended on 28th April 2016 and was given a hearing within 3 months but the process was stopped by the Court before 21st July 2016 when 3 months were to last. The meeting meant to be held on 7th July 2016 was frustrated by a public holiday.

18. Mr Barasa also avers that the declaration of redundancy not only affected the position of Chief Manager, HR & Administration but also all the other senior position that report directly to the managing director. A memo dated 14th July 2016 was issued to all Respondent staff.

19. That the Claimant was in breach of the constitution, the Employment Act and the HR Manual. On 9th February 2016 the board approved the change of terms for 4 employees who were on 2 years contracts of employment to permanent and pensionable. On 5th March 2016 the Claimant issued a letter to one employee who was not on the list of 4 employees changing his terms of employment from 2 years contract to permanent and pensionable with approval of board of CEO. The employee had been on contract terms since 18th May 2015 together with 7 others but the Claimant backdated the terms of the employee to permanent and pensionable with effect from 1st July 2015. The letter meant that confirmation of such an employee was before probation period had been fully served. The Claimant also irregularly authorised back wages and benefits amounting to kshs.191, 223.00 to the employee. There was no clear criteria used by the Claimant as the other 4 employees subject of change had been employed in 2013. This caused disquiet with other staff members similarly placed and their terms were not changed.

20. That the claimant's conduct contravened chapter 6 of the Constitution on the trust and authority placed on her that should promote confidence and integrity. She failed to apply objectivity and impartiality and her decisions were influenced by nepotism, favouritism and other improper motives. This

contravened the Employment Act when the Claimant negligently performed her duties and failed to comply with lawful orders of the Respondent and committed criminal offences to the detriment of the respond leading to the loss of kshs.191, 223.00 improperly paid to an employee.

21. That the Claimant contravened the HR Manual clauses B.17 where staff appointed and under probation are supposed to serve to 6 months prior to confirmation and one month prior to expiry of probation the supervisor of the employee must submit an assessment report of the employee to the CEO for approval. The Respondent board thus dealt with the claimant's case and the board decision should not be anticipated until it is made. The application before Court is premature and thus should be dismissed.

Submissions

22. The Claimant submit that the Respondent has suggested that the Court has no jurisdiction to entertain the application and suit on account that the Respondent has the prerogative to deal with discipline of its employee and that internal mechanisms are yet to be exhausted. In **Mulwa Msanifu Kombo versus Kenya Airways Ltd** cited in **Prof. Francis M Njeru versus Jomo Kenyatta University of Agriculture & Technology [2013] eKLR**, the Court held that the Court can intervene in an administrative disciplinary process if it is established that the employer has offended fairness or due process and where the procedures applied are found to be in violation of clear legal provisions. That such intervention should be in exceptional cases especially where grave injustice might occur or justice cannot be attained through any other means as held in **Booyesen versus the Minister of Safety and Security [2011] 1 BLL, South Africa labour Appeals Court**. that the Court has jurisdiction to entertain urgent applications relating to lifting of a suspension for compelling reasons that are urgent pursuant to the provisions of article 165(5) of the Constitution as held in the case of **Joseph Mutuura Mbireia & Another versus Council of Jomo Kenyatta university of Agriculture & Technology [JKUAT] [2013] eKLR**. Where the Court establishes that such disciplinary procedures are commenced with ulterior motive or the process is shrouded with illegalities, then the Court must intervene to stop the illegalities.

23. That the Court may lift a suspension by taking into account the period taken to finalise the same as held in **Gregory O Owouth versus Mumia Sugar Co. ltd [2016] eKLR**. It is unfair labour practice to place an employee on indefinite suspension without pay as held in **Donald C Avude versus Kenya Forest Service [2015] eKLR**. The unilateral suspension of an employee does not relieve the employer of the duty to pay the employee. The law provides that an employee should not be suspended without pay.

24. The Claimant also submit that the Court can issue a mandatory injunction whose effect is to determine the entire suit where the case is clear and one which the Court finds ought to be decided at once or if the act complained of was summary and can easily be remedied as held in **Shepard homes versus Sandman [1970] 3 All ER 402**.

25. The Respondent submit that on 5th march 2016 the Claimant was employed as Chief Manager, Human Capital & Administration with the role to ensure effective and efficient staff recruitment, continuous staff development, fair and equitable compensation of employees, maintenance of harmonious employee relations, provisions of efficient and effective administrative services and use of resources. On 5th march 2016 the Claimant issued Charles Odhiambo Oguoko with letter of employment by changing his terms from 2 years contract to permanent and pensionable terms backdated to 1st July 2015 and back wages amounting Kshs.191, 223.00. She was issued with a show cause letter on a case of gross misconduct on 5th April 2016. On 28th April the Respondent told the Claimant that her responses to the show cause was unsatisfactory and thus she was to cease exercising the function of her office and be on basic salary and was placed on suspension. On 13th July 2016 the Claimant was invited to the staff remuneration committee where she made detailed submissions. Full board was to meet on 21st July 2016 to deliberate on the matter but on 18th July 2016 the Court issued interim orders stopping the same.

26. On 14th July 2016 the Respondent wrote to all staff on the subject of restructuring on the grounds the Respondent was going to implement a new organisational structure. The circular related to 6 senior positions created following abolition of the previous offices and the office of Chief Manager, Human

Capital Management and Administration held by the Claimant was declared redundant and a new position of senior manager, Human Resources and Administration created. The Claimant was appointed in acting capacity pending recruitment of a new person to fill the position.

27. The Respondent submit that the disciplinary process is not in violation of the law and the Respondent had a right and duty to enquire and institute disciplinary proceedings in the conduct of the claimant. The Claimant was give every chance to state her case and was given a hearing pursuant to her rights in the constitution, the Employment Act and the HR Manual of the respondent. The disciplinary process is procedurally fair and pursuant to the rules of natural justice.

28. That the declaration of redundancy was not done in bad faith and followed the new strategic plan of the respondent. The Claimant was aware of the implementation of the restructured strategic plan and that it would lead to redundancy of at least 6 senior manager which included the claimant.

29. The Claimant has not demonstrated that she is entitled to the orders sought as the full board meeting that was to address the suspension and the substantive issue of gross misconduct has not been concluded. Interviews for new managers has not been conducted. Any issues on the resulting redundancies and abolition of office ought to have been raised before the effective date of 1st July 2016 when the new strategic plan commenced.

30. The Respondent also submit that the Court has jurisdiction to hear a matter involving internal disciplinary proceedings and rely on the cases of **Prof. Francis m Njeru versus Jomo Kenyatta university of Agricultures and Technology [2013] eKLR, Joseph Mutuura Mberia & Another versus Council Jomo Kenyatta University of Agriculture and Technology [JKUAT] [3013] eKLR; and Rebecca Ann Maina 7 Others versus Jomo Kenyatta University of Agriculture and Technology**. The court will intervene in an employer's administrative action if established that the procedure relied upon offends fairness sand due process; such should be in exceptional cases; a suspension will be lifted here there are compelling reasons; but the employer retains the prerogative to take disciplinary action against an employee as held in **Miguna Miguna versus The PS, Office of the prime Minister & AG, JR Case No.188of 2011; Aviation and Allied Workers union versus Kenya Airways limited, Cause No.324 of 2012; Multimedia university 7 prof. Walter Oyawa & prof. Gitile N Naituli, Court of Appeal, Civil Application No.225 of 2013**.

31. The suspension of an employee for purposes of conducting an investigation relating to the allegations that touch and concern the employee is a normal practice in any institution. The Court can only interfere only in a case where there is sufficient prove that the employer acted contrary to the law. The employer should be allowed to manage its business without undue judicial intervention.

32. In this case, the orders sought by the Claimant lack merit and should not be granted. The application should be dismissed with costs.

Determination

whether conservatory orders should issue stopping the Respondent from recruiting and or employing any person in the position of either the Chief Manager, Human Capital and Administration or Senior Manager, Human Resource and Administration or replacing the Claimant with any such person to be recruited.

Whether a conservatory order do issue to stay any further disciplinary process by the Respondent against the claimant.

whether there should be stay of the suspension letter and or decision dated 28th April 2016 issued to the claimant; and

Whether the Claimant should be reinstated to employment.

33. on the issue as to whether the Respondent should be stopped from recruiting and or employing a Chief Manager, Human Capital and Administration of Senior Manager, Human Recourses and Administration and thus effectively replacing the claimant, the Respondent has relied on letter issued to the Claimant and dated 14th July 2016 thus;

RE DECLARATION OF VACANT POSITIONS AND APPOINTMENT ON ACTING CAPACITY

Following Board approval to implement the new Company Structure, the office of the Chief Manager, Human Capital & Administration has become redundant as its role has been taken over by the Senior Manager, Human Resource & Administration.

You have therefore been appointed as the Ag. Senior Manager, Human Resource & Administration effective 1st July 2016 as the Company embarks on a competitive recruitment process.

34. On the same date, 14th July 2016, the Respondent issued memo on a restructuring thus;

RE RESTRCUTURING

Following Board approval to implement the new organisational structure as per our new Strategic Plan, the following offices have been appointed on acting capacity effective 1st July 2016 in the following divisions until the positions are filled competitively:-

- 1. Dr (Eng.) John Mativo – Ag. General manager, Technical Service;*
- 2. CPA Tom Imbo – Ag. General manager, Finance & Strategy;*
- 3. Mr Duncan macharia – Ag. Company Secretary/Senior manager, legal Services;*
- 4. Ms Agnes Ongadi – Ag. Senior Manager, human Resource & Administration;*
- 5. Mr Peter Njehia – Ag. Senior Manager, Supply Chain;*
- 6. CPA Simon Nabosu – Ag. Senior manager, Internal Audit.*
- 7. This follows the declaration of their former positions redundant.*

35. In paragraphs 4 and 5 of the Replying Affidavit of Mr Barasa filed on 29th July 2016, he admits that the Claimant was employed by the Respondent on 14th January 2009 as Deputy Manager, Administration. She was promoted to the position of Chief Manager, Human Capital and Administration. The Claimant avers that she was employed on permanent and pensionable terms.

36. On the basis of the notice and memo issued to the Claimant and staff respectively on the subject of restructuring and declaration of her position together with other senior officers of the Respondent redundant, on 15th July 2016 [the day after the notices] the Respondent through the print media advertised for the positions referenced in the memo and notice of 14th July 2016. The third position advertised related to *Senior Manager, Human Resource and Administration*, which position would be held by a person reporting to the managing Director.

37. It is trite, a restructuring, redundancy or reorganisation of a business is defined to encompass what section 2 of the Employment Act defines as ‘redundancy’ and provides;

“Redundancy” is the loss of employment, occupation, job or career by involuntary means through no fault of the employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous, and the practices commonly known as abolition of office, job or occupation, and loss of employment.

38. Therefore, the Court in **Jane I Khalachi versus Oxford University Press E. A Ltd, Cause no.924 of 2010** held that;

Courts have held that employers have the prerogative to determine the structures of their businesses and therefore make positions redundant. Positions and not employees, become redundant. When the position becomes redundant, the employee can be re-deployed, which means the employee is given another job, or the employee is retrenched, meaning the employee loses the job altogether. 'Reorganisation' is not defined in our law books. Dictionary describe 'reorganization' to include "significant modification made to legal, ownership, or operational structures of a company to make it more profitable." Although not expressly defined under the Employment Act 2007, 'reorganization' is contemplated by section 45 [2] as a fair termination reason. The provision refers to Operational requirements of the employer.

39. Section 40 of the Employment Act therefore addresses the procedures applicable in a redundancy situation or in this case a restructuring situation such as the one set out by the respondent. Section 40 of the Act is set out in mandatory terms. Once a general notice of redundancy has been issued, the employer has to issue criteria to be applied as stipulated under section 40(1) (c) noting the seniority, skill, ability and reliability of each employee. Work experience is also a factor to be put into account. As such there must be an objective criteria to apply and not a random pick as held in **Christopher Onyango 7 others versus Heritage Insurance Company Limited, Cause No.781 of 2015**.

40. A redundancy must therefore be justified before an employer can commence recruitment of new officers to replace existing employees who have ongoing contracts of employment and hold substantive offices in similar capacity as the advertised position. The justification of the redundancy is upon the employer as this cannot be applied as a general term so as to lay off employee on a whim as held by the Court of Appeal in **Kenya Airways Limited versus Aviation and Allied Workers Union Kenya and Others [2014] eKLR**.

41. A restructuring or abolition of office are not matters that just happen. They require serious considerations by the employer and based on the positions held by various officers, all efforts must be shown to have been made to retain or redeploy such officers as to abolish office and then advertise for recruitment of persons with similar skills or abilities without giving a consideration internally, would be to abuse the very essence of a restructuring and purpose of abolition of office as held in **Aviation and Allied Workers Union 7 Others versus Kenya Airways Limited, Cause No.1616 of 2014**. This position is given affirmation by the Court of Appeal in the same Case upon the employer going on appeal as cited above.

42. On this basis, noting the office held by the claimant, and the basis given to the restructuring by the Respondent being a new strategic plan that commenced on 1st July 2016 while the Claimant was a senior officer of the respondent, I find good basis and reason to stop the recruitment of any person, officer as advertised, to take over duties held by the Claimant in her substantive office or in her acting capacity. To allow the Respondent to advertise and put the position of the Claimant to competitive recruitment would effectively negate the principles set out under section 40 of the Employment Act and without setting clear safeguards to an employee who through no fault of her own, loses employment due to a redundancy that has not been justified at this stage.

43. The Respondent is restrained from recruiting for the advertised positions that seek to source for a Senior Manager, Human Resource and Administration or replacing the Claimant in her current capacity. In accordance with the Respondent HR Manual Clause B21, where the Claimant has held an acting position as specified, such shall guide the Respondent as otherwise, she should revert to her substantive position.

44. Even without going into the merits of the other issues set out above, on the above findings, such is sufficient to warrant the grant of the orders sought. However, for the completeness of the matter I will address each issue on its merits.

45. On the second issues with regard to a stay on the disciplinary process against the claimant, indeed, on 18th July 2016 the Claimant moved the Court on an application under Certificate of Urgency seeking interim orders pending hearing of the same inter parties. The Court on good basis stopped further disciplinary process and effectively stopped the board meeting scheduled for the 21st July 2016.

46. In the affidavit of Mr Barasa dated 29th July 2016 at paragraph 8 and 9 he avers;

8. *That in response to paragraph 8 of the Supporting Affidavit I state that the clause L.3 of the Human Resources Policies and Procedures Manual (the HR Manual) is not applicable to the claimant. Clause L.3 sets out the disciplinary procedures to be followed when dealing with employees in job group KET.8 and below. The Claimant is in job group KET.3.*

9. *That in reply to paragraph 9 of the Supporting Affidavit I state that the Claimant's case was dealt with by the Board of Directors as provided for under Clause L.3 of the HR Manual. The Claimant was a board of Directors' appointee and I had no powers to discipline her in my individual capacity as the managing director of the Respondent organisation.*

[Emphasis added].

47. On these averments, which provisions of the HR Policy applied to the claimant? The obvious contradiction on the averments of the CEO as set out above is telling.

48. As submitted by both parties, this Court will on good reason stop a disciplinary process against an employee by the employer if there are compelling grounds and particularly where in the assessment of the Court there is found to be no fairness or due process has not been adhered to. Indeed it is not the duty of the Court to supervise internal affairs of an employer as such must be left for the parties to the employment relationship to address but the employee retains the right to approach the Court where there is good basis that there is no fairness. There must be a claim that responsible and with foundation as held in **kombo Msanifu case**, cited above.

49. In analysing the issues herein, it is not lost to the Court the series of events leading and forming part of the claimant's case. Such events can be summarized as follows;

50. On 21st July 2016 the Respondent board was scheduled to hold a meeting and probably address the claimant's case. This can be surmised from the submission and affidavit of Mr Barasa where he avers that the decision on the claimant's disciplinary case was frustrated as the Court stopped the scheduled board meeting for 21st July 2016;

On 18th July 2016 the claim herein and application were filed and interim orders issued;

On 14th July 2016, the memo on restructuring by the Respondent was issued;

On 14th July 2016, the Claimant was issued with notice of the restructuring and notified that she would be in acting capacity;

On 13th July 2016, the Claimant appeared before the Staff and Remuneration committee to make her presentations and oral submissions; and

On 28th April 2016, the Claimant was suspended.

51. Of these events, the claim by the Claimant is that of the meeting held on 13th July 2016 before the Staff and Remuneration Committee, she was not given a fair hearing and her submissions were ignored. That she was made to leave the meeting together with the company secretary. To this end the defence is that the Respondent went out of its way to ensure that the Claimant was given all opportunities possible

for a fair hearing and due process was adhered to. That the board was scheduled to make a decision on the disciplinary case against the Claimant on 21st July 2016 when the Court stopped the same.

52. However, where there is a disciplinary process and the same is contested as the parties have, the duty is upon the employer to submit the records of such meeting for the Court to assess the events and processes gone into the same. Of paramount importance is to refer to the safeguards set out under section 41(1) of the Employment Act thus;

41. (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

53. Such safeguards are to ensure that the employee is given a hearing at the shop floor as this is the place where primary evidence to any allegations can be sourced. In addressing the same, the employer must ensure that the employee is present together with her union representative of a representative of her choice. Such a provision is mandatory and where not followed, the duty is upon the employer to demonstrate the exceptional circumstances that led to the failure to adhere. The implications of any disciplinary process against the employee are dire as where the employee is challenged as to their conduct, performance or incapacity, and the employer finds good basis, a termination of employment can follow. It is therefore imperative to ensure the legal safeguards are followed.

54. On the basis that there is challenge to the manner and procedures applied against the Claimant during the disciplinary meeting held on 13th July 2016, upon the failure by the Respondent to demonstrate that indeed the due process of the law was followed, I find good reason to find that the process lacked fairness and the resulting decision, whether made or pending was clothed with an illegality. Such a process cannot be allowed to proceed as its foundation is lost.

55. Save for the above, as at 13th July 2016 when the Claimant was called for the disciplinary hearing, I take it, the restricting decision taken on the following day on 14th July 2016 was not an accident. It did not just happen. Mr Barasa in his letter and notice to the Claimant and staff makes reference to “... following the Board approval to implement the new organisation structure as per our new strategic plan” Which therefore means the board had meeting(s) and approved the new strategic plan commencing 1st July 2016 and with it a decision to restructure and declare a redundancy that was to affect the Claimant reached.

56. What then was the purpose of the memo and notice to the Claimant vis-à-vis the disciplinary process ongoing at the time and the scheduled meeting of 21st July 2016? The nexus is obvious. The board had made a decision to abolish the position held by the Claimant vide notice and memo of 14th July 2016 and the board meeting following soon thereafter was just a matter of course.

57. The Court in **Jane I Khalechi**, cited above posed a similar question;

Did the Respondent act in a reasonable manner and in good faith?

I did not find evidence indicating a fair process was employed in the process of re-organisation by the respondent. No records were shared to convince this Court that indeed there were consultations within the respondent's business to ascertain the purpose and the need for a re-organisation resulting in some positions being unnecessary thus the termination of the Claimant as the only persons affected.

58. A redundancy, a restructuring or reorganisation commenced with the sole purpose of lying off specific employees is a sham. Such is not justified and cannot be sanctioned by the court. There must be a rationale, justification and participation of the employees upon the employer setting out a clear criteria to

be followed. Where there are available jobs/positions, the employer must demonstrate that the available employee cannot be redeployed or engaged in such and that a layoff is the last option available.

59. Similar in this case, I find no good faith in the processes and procedures adopted by the Respondent from the time of suspension, 28th April 2016 to the disciplinary meeting called for 13th July 2016 and subsequent events leading to notices and memo on a restructuring that lack basis. To proceed on such flaws would negate the principles of fair labour relations and allow an employer geared to remove an employee from her employment for no good cause.

60. On the above findings, the process of redundancy that challenged, the disciplinary process based on an illegal foundation, the continued suspension of the Claimant is not justified. Such is lifted as regards matters set out in the show cause issued and forming basis of the suspension vide letter of 5th April 2016 and 28th April 2016 unless there are other allegations with regard to conduct, performance or capacity against the Claimant in a different case.

61. I also find, the Claimant had good basis and reason to seek the orders herein and should not be victimised in her duties and employment with the respondent. I refer to section 46(h) of the Employment Act;

46. The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—

...

(h) An employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation;

62. In the main, I have had chance to go through the memorandum of Claim, the orders sought in the application are similar save for the alternative claim for compensation and damages for unfair termination. Noting the lifting of the suspension against the Claimant and a stoppage to the disciplinary process and further with regard to the stoppage in the replacement or recruitment of any person to take over the duties and position held by the Claimant as Chief Manager, Human Capital and Administrative or in the Acting role as communicated on 14th July 2016, the Claimant is reinstated back to her position with the respondent. The main claim thus is academic. It is hereby dealt with.

The application by the Claimant and dated 18th July 2016 is hereby allowed in its entirety with the following orders;

a) The Respondent is hereby restrained from recruiting other persons for the positions held by the Claimant as Chief Manager, Human Capital and Administration or as Chief manager, Human Resource and Administration;

b) The disciplinary process against the Claimant commenced vide show cause dated 5th April 2016 is unlawful and a nullity;

c) The suspension against the Claimant commencing 28th April 2016 is hereby lifted;

d) The Claimant shall resume her duties as allocated and assigned by her supervisor with the respondent on 17th October 2016 at 8.30am;

e) The Claimant shall be paid all salaries and benefits due to her office as held 1st July 2016.

Orders accordingly.

Delivered in open Court at Nairobi this day of 13th October 2016.

M. MBARU

JUDGE

In the presence of:

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