



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.915 OF 2016

RICHARD ISAAC MWANGANGI.....CLAIMANT

VERSUS

KENYA NATIONAL EXAMINATIONS COUNCIL.....RESPONDENT

RULING

1. On 18th May 2016, the Claimant, Richard Isaac Mwangangi filed application and Notice of Motion seeking for orders that;

1. ...

2. *A permanent injunction restraining the Respondent its servants or authorised agents from advertising the claimant's position.*

3. *The Court be pleased to order the lifting of the claimant's suspension and retirement on public interest pending hearing and determination of his claim.*

2. The application is not supported by any grounds thereof, but there is the affidavit of the Claimant who avers that he was employed by the Respondent on 15th December 2009 as Estate/properties Officer and moved through the ranks to Deputy Secretary, Administration. On 29th March 2016 he was issued with letter of suspension on allegation of investigations on his involvement in the malpractices and examination leakages. From January 2014 his duties were solely related to Administration of business and Technical Examinations and was not involved in the Kenya Certificate of Primary Education or Kenya Certificate of Education at all.

3. On 24th March 2016, the Claimant was accused on involvement in the KCPE and KCSE national examinations leakages and irregularities over the media and on 29th he was issued with a letter of suspension to allow for investigations. On 15th April 2016 the Respondent issued the Claimant with a show cause letter citing 6 allegations of malpractice. On 17th April 2016 he replied to the show cause but on 25th April 2016 he was issued with a letter of retirement from public service on public interest on the ground of gross misconduct.

4. That the Claimant was not given a hearing and no committee was set up to hear his claim and the retirement is therefore is with malice and witch hunt as there is no basis for the allegations of gross misconduct or reason for retirement on public interest. The Respondent acted unfairly and tarnished his name by the retirement on public interest.

5. That unless the Court orders a reinstatement the Claimant shall suffer irreparable loss and damage and the retirement letter should be cancelled and the Respondent stopped from filling in the position held by the Claimant before retirement. The publication of the claimant's name through the media was detrimental to his name and profession and risk never having another job and due to the involved injustice and unfairness, the orders sought be granted.

6. In reply, the Respondent filed Replying Affidavit sworn by Patrick Ochich Onyango the Director Test Development with the respondent. He avers that the Respondent is a government parastatal set to maintain examination standards. Conduct public academic, technical and other national examinations; award certificates or diplomas. The Claimant was appointed Estates/properties officer on 15th December 2009.

7. On 1st October 2013 the Claimant was deployed to the position of Deputy Secretary Administration and on 5th December 2015 his duties were changed on disciplinary grounds as he failed to supervise contracted works especially the repair works at the Respondent offices and also had poor working relations with his colleagues and Respondent customers.

8. Mr Onyango also avers that in recent years the Respondent operations have been increasingly been plagued by persistent leakage of examinations to the dismay of government, the stakeholders in the education sector and members of the public... on 24th march 2016 in an effort to contain the situation and re-establish public confidence, the government dissolved the Respondent Council and appointed a new one. Criminal investigations into the conduct of several employees of the Respondent commenced including the claimant. On the appointment of new council, one responsibility was to establish the suitability of all employees and it became apparent that some of them were involved in the examination leakages.

9. In a meeting held on 29th march 2016, the Respondent council resolved to suspend the Claimant from duty among other members of staff to allow for further investigations into the operations of the Respondent fulfilment of disciplinary procedures. On 15th April 2016 the Claimant was issued with a show cause letter on account of gross misconduct and the suspension and show cause were pursuant to the policy manual of the respondent.

10. On 23rd April 2016 the council decided to retire the Claimant in public interest as it was obvious that given the rate at which the confidence in the Respondent had deteriorated, members of the public would continue having no faith in its work. The Claimant was therefore retired in the public interest.

Submissions

11. The Claimant submit that his termination was not procedural as it was announced in the media while his disciplinary case had not been resolved. No reason was given for the termination save that it was a retirement on public interest. This was unfair termination of employment as the Claimant was not accorded a hearing and the case of gross misconduct was not established to warrant the termination. Section 43 of the Employment Act was not followed as the Respondent has failed to prove the reasons for termination of employment.

12. The Respondent submit that the application by the Claimant is incompetent as the orders sought cannot issue where the Claimant alleges that he is being harassed by the police. The Respondent is not in charge of police investigations.

13. That the application fails to set out the principles for the grant of injunction as held in **Giella versus Cassman Brown 91979) EA 538** as no prim facie case has been established that has a chance of success and as set out in **Mrao versus First American bank of Kenya Ltd & 2 Others [2013] KLR**. That the Court in **Dr. Joseph M Kivilu versus Kenya national Examination Council [2016] eKLR**. The Court held that the Respondent has become the focus of adverse publicity over the management and administration of national examination for schools which led to reconstruction of the board and other

measures to arrest the rapid slide into the path of disrepute. As such, matters leading to the claimant's retirement on public interest follows a series of events taken to build public confidence in the respondent. Hearing over disciplinary case does not need to be oral as held in **Local Government Board versus Arlidge [2015] A.C 120**. In this case the Claimant was issued with a show cause letter and he gave his responses. The Claimant will not suffer any irreparable loss or damage if the orders sought are not granted as the order of reinstatement can only issue upon full hearing.

Determination

14. The claimant's is seeking reinstatement back to his position with the Respondent and that his position should not be filled until the suit herein is heard and determined. The Claimant admit that on 25th April 2016 he was issued with a letter of retirement on public interest. As such, his employment with the Respondent was effectively terminated on 25th April 2015.

15. The order of reinstatement in the interim has now been addressed and regulated under the Rules of the Court and should not issue until both parties are heard in the main and a determination made. Such provisions are on the basis that reinstatement being an order for specific performance should only issue in exceptional case upon an enquiry on the conditions existing at the time of termination as held in **Mary Chemweno kiptui versus Kenya Pipeline Company Limited, Cause No.435 of 2013**;

... To order specific performance. ... this follows an enquiry as to the precedent conditions applicable in a case where reinstatement is sought and pursuant to the provisions of section 49(4) of the Employment Act [and where] The Claimant has a legitimate expectation of a reinstatement.

16. Therefore the order of reinstatement being final and requiring specific performance requires call of evidence for the Court to assess and be certified that this is the best remedy to grant. Such shall not issue in the interim.

17. Equally, noting matters set out in the application by the claimant, on the filling of his position as held before retirement, on the basis that no interim orders were issued upon the filing of his application, the Court would require to be appraised of events that followed at the Respondent with regard to the subject position. To stop recruitment and appointment of another employee to take over the duties the Claimant held after 6 months would be to ignore work dynamics and changing work relations within the respondent.

18. I however note various averments made by the Respondent that warrant highlighting. In the Replying Affidavit of Mr Onyango sworn on 21st June 2016 at paragraph 9 he avers that;

That upon being appointed the new council had as one of its responsibilities to determine the suitability or otherwise of all members of staff because it became apparent that some of them were involved in exam leakages.

19. The Claimant was suspended to pave way for investigations. He was issued with a show cause letter to which he submitted his responses. At what point did the Respondent new council determine the suitability of all members of staff to have been involved in exam leakages? Was the Claimant found culpable? Was the Claimant issued with the investigation findings touching on him to enable him respond at a hearing?

20. Such are questions the Court cannot determine in the interim as only the Claimant can answer at the hearing. Such require the call of evidence. To determine such serious issues in the interim will deny the parties a chance to argue their case and for the Court to determine the same on merit.

21. In the circumstances, I find serious questions of fact and law that must be gone into before the Court can grant any of the orders sought by the claimant. A hearing of the main claim will enable the Court to address all issues with finality.

22. Noting the above findings, the parties have filed their pleadings, and noting the Claimant came to Court under Certificate of urgency and the orders sought in the interim cannot issue at this stage, it is only fair that a hearing date be given when the main claim can be gone into.

The application dated 18th May 2016 shall not be allowed in the interim save to direct that the Respondent or any other agency such as the police should not harass or intimidate the Claimant due to the suit herein unless there are other proceedings outside this Cause that require the Claimant to attend which should follow its own course. A hearing date for the main claim shall be issued in court.

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

M. MBARU

JUDGE

In the presence of:

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