



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1682 OF 2016

(Before Hon. Lady Justice Hellen S. Wasilwa on 6th October, 2016)

DR. GEORGE WEKESA.....PLAINTIFF

VERSUS

MULTIMEDIA UNIVERSITY OF KENYA.....DEFENDANT

RULING

1. Before the Court is a Notice of Motion Application dated 20th August 2016 brought under Order 40 Rules 1, 4, 5, Order 51 of the Civil Procedure Rules and Sec 3 A, 63 of the Civil Procedure Act, the inherent Jurisdiction of the Court and all the enabling provision of law by the Plaintiff/Applicant for Orders:

1. That this Application be certified as urgent and service be dispensed with in the first instance and interim orders granted ex-parte.

2. That a temporary order of stay be granted rendering the letter of interdiction dated 16th August 2016 issued to the Respondent ineffective null and void, ab initio, pending hearing and determination of this application and petition.

3. That the costs of this application be provided for.

2. The Application is supported by the annexed affidavit of Dr. George Wekesa and on the following Grounds:

1. That the Respondent did not follow due process in issuing the interdiction letter.

2. That the Petitioner has been condemned unheard.

3. That the Petitioner stands to suffer bias as he has not been served with any complaint and he is not aware of his accusers and nature of the allegations.

4. The Defendant/Respondents do not stand to suffer any prejudice if the orders sought are granted.

And on any other grounds adduced at the hearing hereof.

Facts

3. The Claimant herein was employed by the Respondents on or about June 2012 as a Doctor on permanent and pensionable basis, taking on administrative duties as head of the dispensary from September of 2012. He did not take his annual leave in the year 2015 as the University was undertaking ISO Certification and applied for the same for 20 days on the 30th of May 2016 having handed over the departmental affairs to his immediate junior as per the roster of operation to ensure the smooth running of the dispensary.

4. On the 16th of June 2016, the Respondent through the office of the Vice Chancellor wrote to the Claimant interdicting him pending investigation, on allegations that he had on several occasions failed to adhere to the laid down rules and regulations that govern public procurement at the University.

5. The Claimant claims that he had never been summoned on such complaints or allegations in his line of duty and more so on procurement matters as the responsibility lies in the procurement department.

6. He states that the procedure to interdict him was made in contravention of the laid out procedure and was done without reason and equates to his being condemned without being heard.

7. The Respondent has filed a Replying Affidavit dated 4th October 2016 deposed to by one Mumbi Mwihuri the Legal Officer at Multimedia University.

8. In it they aver that the Claimant is a medical officer at Multimedia University of Kenya the Respondent herein and is currently the head of the Universities Clinic.

9. They aver that he is responsible for the administration of the universities health services including treatment, acquisition of medicines and equipment among other duties. He was issued with an interdiction for failing to facilitate investigations into allegations that the Claimant had breached procurement regulations.

10. They aver that the interdiction does not in any way constitute a disciplinary sanction against the Claimant or an assumption that he is guilty of any misconduct it is in the proper manner and was issued in line with Schedule 5 of the University's Statutes and Clause 6:3:5 of the Terms of Service for Non – Teaching Staff in the Senior, Administrative, Catering, Clerical, Hospital, Library and Technical Categories under which the Vice Chancellor may interdict an employee for a period not exceeding 90 days in order to facilitate investigations into any allegations of misconduct.

11. They aver that the Claimant has not been condemned unheard as there are no charges levelled against him at the moment as investigations are still ongoing, moreover, the Claimant was given the opportunity to appear before the University's inquiry committee investigating the matter and appeared before the said Committee on the 5th of September 2016, but the Committee is yet to give a report on the findings.

12. They aver that under Schedule 6 disciplinary action against the Claimant can only be taken after the investigations are complete.

13. They aver that the application is frivolous and without merit and despite being issued with an interdiction the Claimant has refused to hand over his duties at the University.

14. In their submissions the Claimant state that he was issued with two letters, the first dated 17th July 2016 whose content was disciplinary leave for going on leave without approval and the second one was an interdiction letter dated 16th of August 2016. They submit that both letters are in bad faith and are meant to cause pain and suffering to the Claimant.

15. They submit that the University did not follow the correct procedure when suspending him as their own regulations at Article 6 state that 4 warning letters ought to be given and then 90 days of

investigation to follow before one is put on disciplinary leave.

16. They submit the letter that he was issued with did not state what his offence was. They submit that procedural fairness must be observed and fair administrative action is the right of the Claimant. To date the Claimant has not been issued with the report of the investigation, and if they do not get the orders sought the Claimant will be prejudiced. They pray that the application is allowed.

17. The Respondents in their submissions fully rely on the Replying Affidavit of Mumbi Mwihuri.

18. They reiterate that the interdiction is not a disciplinary action but it is meant to facilitate investigations into the matter. The Claimant was invited before the committee which is yet to finalise its reports therefore investigations are still ongoing.

19. The interdiction was within the regulations of the University and warning letters are only done after the finding of guilt, which has not happened. They submit that the other letters referred to by the Claimant are not attached to the replying affidavit and that the application before Court is premature. They pray that it is dismissed.

20. The Claimant responded that they were reading malice into the issue and are challenging the process. They pray that the application is allowed.

21. Having considered the averments of both parties, I will from the onset state that Courts do to and should not interfere with internal disciplinary processes between an employer and an employee unless the process is out rightly flawed and the interference would only be to correct the wrong procedure of conducting the process.

22. This is because Courts have held that, it is not the duty of the Court to police an employee in their day to day relationship with their employees. This has been the holding in Cause No. 1200/12 **Prof Gitile Naituli vs. University Council, Multimedia University of Kenya** where the Court observed that:

“the prerogative of the employee in managing its business and administration of its staff should not be unduly stifled by judicial intervention through issue of provisional injunctive measures such as those sought by the Claimant. The Employment Act and the Industrial Court Act seek to protect the weakness of the two parties in an employment relationship, not to deprive the employer of the management prerogative altogether”.

23. The same position was restated in Cause No. 2244/2014 – **Nixon Bugo vs. the Alliance for a Green Revolution in Africa** by Hon. J. Nderi stated as follows:

“Courts of law should be very slow to interfere in the internal disciplinary process at work place unless it is manifestly clear that the action by the Employer derogates materially from the internal disciplinary process and the law”.

24. Turning back to the instant case, the Applicant has submitted that he is being subjected to an unfair and unprocedural disciplinary process which he asks this Court to stop. The disciplinary process envisaged by the Claimant Applicant is as set out in the Respondent’s Appendix 3- Terms of Service for Non-Teaching Staff in the Senior Administrative, Catering, Clerical, Hospital, Library and Technical Categories and adopted in March 2010.

25. Under the Rules of Conduct Category page 141 of 233 to 142 of 233 the said Manual provide for 1st, 2nd and 3rd warning letters. However it is also provided that there are other offences that warrant disciplinary action. This is where there has been repetition of an offence after formal warning has been given.

26. The offences that warrant disciplinary action:

- a. ***“Conviction of a felony or any misdemeanour (crime) which the Vice-Chancellor shall deem to be as such as to render the member of staff concerned unfit to continue to hold the office. Such may include embezzlement, fraud, misappropriating funds or property which belongs to the University;***
- b. ***Conduct which Vice-Chancellor shall deem to be such as to constitute failure or inability of the member of staff concerned to perform their assignment or to comply with the conditions of their appointment;***
- c. ***Gross offence or neglect of duty such as unauthorised absence from the University for a period exceeding forty eight (48) hours;***
- d. ***If an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer’s property;***
- e. ***In lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within fourteen days either released on bail or on bond or otherwise lawfully set at liberty.***
- f. ***Drunkenness on duty to the extent rendering an employee incapable of performing their duties during working hours;***
- g. ***If an employee knowingly fails or refuses to obey a lawful and proper command which it was within the scope of their duty to obey, issued by the University or a person placed in authority over him/her by the University; and***
- h. ***Dishonesty or misconduct prejudicial to the standing of the University”.***

27. The disciplinary process is also set out in the Manual as follows:

2. “Serious offences

- a. ***More serious offences committed within employment, or the repetition of an offence for which formal warnings have already been given, shall be considered by the Vice Chancellor for the purpose.***
- b. ***Where the Vice Chancellor considers it necessary to institute disciplinary proceedings against an employee, he shall forward to the employee a statement of the charge or charge framed against him and shall invite the employee to state in writing before a date to be specified, any grounds on which he relies to exonerate himself/herself.***
- c. ***In case of particular complexity and if the employee has not exonerated himself/herself the case shall be referred to a Disciplinary Committee chaired by the appropriate Chairperson in accordance with Schedule 12 and Schedule 13.***
- d. ***An employee on whom disciplinary action is taken against by the Disciplinary Committee under the delegated powers shall reserve the right to appeal to the appropriate Appeals Committee”.***

28. The process above is instituted before any interdiction takes place.

29. In the case of the Applicant, on 16.8.2016 he was served with an interdiction letter without issuing a formal warning or issue of procurement. No statement of the charge or charges framed against him were given to the Applicant and he has not been served with any show cause letter and invited to reply.

30. It is therefore apparent that the process already instituted against the Applicant is flawed and the

Respondents are going against their own rules of procedure.

31. I therefore find the application by the Applicant meritorious. I order the process being undertaken stopped forthwith and the interdiction lifted immediately.

32. The Respondents are at liberty to institute fresh disciplinary process against the Claimant Applicant but must follow their process as per their own manual and accord the Applicant a fair hearing if at all.

33. Costs of this Application in the cause.

Read in open Court this 6th day of October, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent