



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 2218 OF 2016

SAMMY ERICK NJERU.....CLAIMANT

VERSUS

DR. DESTAINGS NYENYI NYONGESA

PROF. JULIUS NYABUNDI

PROF. CATHERINE MUHOMA

DR. ALI ADAN ALI

GLADYS OTIENO

BENARD NYAORO

WYCLIFFE OWOKO (Sued on behalf and as trustees of)

MASENO UNIVERSITY RETIREMENT BENEFITS SCHEME.....1ST RESPONDENT

MASENO UNIVERSITY RETIREMENT BENEFITS SCHEME.....2ND RESPONDENT

RULING

1. The Claimant's application brought by Notice of Motion dated 14th October 2016 and filed in Court on even date seeks stay of suspension letter dated 11th October 2016 addressed to the Claimant.
2. The Claimant also seeks a temporary injunction restraining the Respondent from breaching the contract of employment dated 11th November 2013.
3. The application which is supported by the Claimant's affidavit sworn on 14th October 2016 is based on the following grounds:
 - a. On 20th April 2016, the Retirement Benefits Authority (RBA) raised some questions regarding the running of the Maseno University Retirement Benefits Scheme particularly on the sale and purchase of two properties being L.R No. Kisumu/Mun. Block 7/330 and L.R No. Pioneer/Ngeria Block 1 (EATEC) Eldoret. RBA sought an explanation from the Claimant;
 - b. The Claimant responded on 21st April 2016 after which RBA appointed an independent

investigator, M/S Roberts Insurance Brokers Limited who filed a report dated 23rd June 2016. The report did not assign any wrongdoing to the Claimant. Rather, the investigation found the 1st Respondent's Trustees responsible for making decisions affecting the Scheme;

c. The Respondents thereafter purported to carry out their own investigation through a Select Committee of the Board. The Select

Committee proceeded to carry out their own investigation without giving the Claimant a written list of allegations they were investigating to allow him to respond;

d. In its preliminary report, the Select Committee did not find any fault with the Claimant. The Select Committee presented a report to the full Board on 11th October 2016 but the Respondents have failed to avail a final report to the Claimant.

e. On 11th October 2016, the Respondents purported to suspend the Claimant contrary to the law as no allegations of wrongdoing are stated nor is the suspension period specified;

f. On 13th October 2016, the Claimant was locked out of his office and he is apprehensive that the Respondents may be planning to breach his employment contract;

g. The Claimant believes that he has a *prima facie* case with a high chance of success and that he stands to suffer irreparably if the orders sought are not granted.

4. In a replying affidavit sworn by the 1st Respondent's Chairman Dr. Destaings Nyenyi Nyongesa on 27th October 2016, it is deponed that the Claimant's performance has been unsatisfactory.

5. With specific reference to the report by RBA, Nyongesa depones that the Claimant was found to have made a property bid without professional advice on valuation of the property. He adds that by letter dated 4th May 2016, RBA asked the Claimant to leave office, a request the Claimant declined as evidenced by the Claimant's letter dated 5th May 2016.

6. The Claimant was also accused of failing to advise the 2nd Respondent's Board to comply with the Scheme Rules and the law.

7. It is further deponed that pursuant to a Board meeting held on 26th August 2016, a Sub Committee was appointed to verify the findings of M/S Roberts Insurance Brokers Limited.

8. The Sub Committee presented its report at a subsequent Board meeting held on 11th October 2016 and it was resolved that the Claimant be invited to show cause why disciplinary action should not be taken against him. It was also resolved that the Claimant be suspended pending his appearance before the Board on 11th November 2016.

9. The question for determination in this application is whether the Court can interfere with the internal disciplinary process initiated against the Claimant. A disciplinary process initiated by an employer against an employee ranks high among what is commonly known as 'management prerogatives'. The Court will therefore not normally interfere with such a process unless there is evidence that the procedural fairness requirements set out in law are being violated. And even where the Court interferes, it cannot be to halt the disciplinary process but to put things right.

10. Section 41 of the Employment Act, 2007 sets the threshold for procedural fairness in internal disciplinary cases. In ***Rebecca Ann Maina and 2 Others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR*** this Court rendered itself as follows:

“In order for an employee to respond to allegations made against them, the charges must be

clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence.”

11. In the instant application, the Claimant seeks injunctive orders barring the Respondents from subjecting him to a disciplinary process because he has already been cleared by the RBA. The Respondents have contested this averment but even if the Court were to adopt the Claimant’s account, this does not bar the Respondents from initiating internal disciplinary proceedings.

12. However, in pursuing these proceedings, the Respondents must comply with the law and their own internal disciplinary rules. Consequently and in view of the foregoing findings I direct that the internal disciplinary process initiated by the Respondents against the Claimant shall proceed in accordance with the parameters set out in Section 41 of the Employment Act. Specifically:

- a. The Claimant shall be served with specific charges for his response;
- b. The Respondents shall allow the Claimant adequate time within which to respond;
- c. The Respondent shall allow the Claimant reasonable access to documents required by him for his defence;
- d. The Claimant shall be afforded an opportunity to appear before a duly constituted disciplinary panel with his right to be accompanied being secured;
- e. The Claimant’s suspension shall subsist as a neutral action only for the period that the Respondents will be conducting investigations;
- f. In the intervening period, the Respondents must not act in any manner that may be construed as harassment to the Claimant.

13. The effect of this ruling is that the interim orders granted on 14th October 2016 are vacated.

14. The costs of this application will be in the cause.

15. Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 25TH DAY OF NOVEMBER 2016

LINNET NDOLO

JUDGE

Appearance:

Mr. Koceyo for the Claimant

Mr. Wasuna for the Respondents