



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE NO. 301 OF 2016

(Before Hon. Lady Justice Maureen Onyango)

LYDIA TEMKO NANDEMUCLAIMANT

-Versus-

**MASINDE MULIRO UNIVERSITY OF
SCIENCE AND TECHNOLOGY RESPONDENT**

R U L I N G

By a notice of motion dated 10th October, 2016 and under certificate of urgency on the same date the applicant seeks the following orders:-

- 1) **That** this application be certified as urgent and service of the same be dispensed with in the first instance.
- 2) **That** pending the hearing and determination of this application *inter partes* an order be issued lifting the suspension of the Claimant from the service of the Respondent.
- 3) **That** pending the hearing and determination of this application *inter partes* an order be issued compelling the Respondent to resume payment of the full monthly salary of the Claimant with effect from the time when the Claimant was put on half pay.
4. **That** upon *inter partes* hearing of this matter and pending the hearing and determination of the substantive claim an order be issued confirming orders (2) and (3) above, that is, lifting the suspension of the Claimant from the service of the Respondent and compelling the Respondent to resume payment of the full monthly salary of the Claimant with effect from the time when the Claimant was put on half pay.
5. **That** the costs of this application be provided for.

The application is supported by the affidavit of the applicant and the grounds on the face thereof.

The Respondent opposes the application and filed a replying affidavit of JOSEPHINE RENEE OSIRO.

Facts

The applicant was suspended from duty by the Respondent on 17th August, 2016 on grounds that he stormed the Vice Chancellor's Boardroom, disrupted a meeting while shouting and banging tables and

further threatened to physically assault Mr. Noah Wafula the Ag. Registrar Administration. The letter of suspension warned the applicant to keep off the Respondent's premises unless permitted by the Vice Chancellor or an authorised officer.

During the suspension the applicant was to be on half salary. The purpose of the suspension, according to the letter of suspension, was to facilitate investigations.

On 23rd August, 2016 the Respondent addressed another letter to the applicant informing him that investigations had revealed that on Monday 15th August 2016, in the company of other KUSU Union Officials, the applicant stormed a meeting in the Vice Chancellor's Boardroom, disrupted the meeting while shouting and banging tables and threatened to physically assault Mr. Noah Wafula the Ag. Registrar Administration. The letter required the applicant to show cause why disciplinary action should not be taken against him an account of professional misconduct within 14 days.

In her brief response dated 1st September 2016, the applicant stated that she neither stormed the meeting, disrupted the meeting, banged tables or threatened to physically assault Mr. Noah Wafula the Ag. Registrar Administration, hence she was not in breach of law.

It is the applicant's position that her continued suspension is in breach of clause 12 of the Collective Bargaining Agreement signed between the Respondent and the Universities Non-Teaching Staff Union (UNTESU) which provides that suspension shall not exceed 21 days. It is on the basis of this clause that the applicant has prayed for the lifting of the suspension and reinstatement of his full salary including refund of the salary withheld during suspension.

The Respondent's case is that on 15th August 2015 while it was in the process of negotiating a Collective Bargaining Agreement with Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA WORKERS) the Applicant together with two other employees stormed into the meeting abusing the management team including Mr. Noah Wekesa threatening to beat up the acting registrar, and were only restrained by other employees attending the meeting. That following her response to the show cause letter the Respondent informed the applicant by letter dated 9th September, 2016 that it was considering her response and would inform her of the next course of action and that by letter dated 18th October, 2016 the applicant was invited to a disciplinary committee meeting for the hearing of the disciplinary case against her but the meeting was adjourned to 1st October, 2016.

It is the Respondent's case that it is entitled to institute and finalise disciplinary cases against its employees and that the suspension of the applicant was lawful, that the Respondent conducted its investigations and commenced disciplinary process within 21 days but the disciplinary process has not been finalised as the disciplinary hearing has not been held. It is further the Respondent's case that the applicant has not suffered any prejudice, has not demonstrated she will suffer irreparable harm and that it is not just and fair to reinstate the applicant before the conclusion of the disciplinary process.

It is further the Respondent's case that the applicant is guilty of non-disclosure having failed to disclose that she was invited for a disciplinary hearing. It is further the Respondent's case that should the orders be granted, the case will be concluded at interlocutory stage.

Submissions

At the hearing of the application Mr. Elisha Z Ongoya learned counsel for the applicant submitted that the issue before the court are whether the power of the Respondent to exercise disciplinary power in respect of its employees by way of suspension is limited and the collateral issue of whether the Respondent, in dealing with the applicant, operated within such limits.

Mr. Ongoya submitted that the Collective Bargaining Agreement covering the terms and conditions of service of the applicant provides for suspension for a period not exceeding 21 days. He further submitted that the clause provided an in-built remedy in cases where suspension exceeds 21 days being that the employee shall be reinstated. He submitted that the only exceptions provided in the clause are where the

union and management have both agreed that more time is required to complete investigations, where investigations are carried out by police and where the case is pending before a court of law. Mr. Ongoya submitted that none of these exceptions are applicable to the instant case.

Mr. Ongoya submitted that 21 days lapsed on 7th September 2016 and the Respondent had by then concluded the investigations as conveyed to the applicant by its letter dated 23rd August, 2016 requiring her to show why disciplinary action should not be taken against her. He submitted that the issue of the Respondent requiring more time for investigations does not therefore arise. He urged the court to grant the orders sought.

Ms. Lorraine Oyombe learned Counsel for the Respondent submitted that the prayers sought by the applicant are also the substantive orders sought in the claim and the effect of granting the orders is that the applicant will be granted final orders before hearing of the case. She submitted that the Respondent commenced the disciplinary process well within the 21 days and that by the time the applicant came to court she had been invited for a disciplinary hearing, a fact that she failed to disclose to the court. She submitted that the Applicant deliberately failed to attend the disciplinary hearing and has been interrupting the disciplinary proceedings. That she is attempting to be reinstated before exhausting the disciplinary process. Ms. Oyombe submitted that an employee can only be reinstated if the offence has not been proved and that in the present case the case has not been concluded to justify her reinstatement. She submitted that under clause 12 an employee can only be reinstated on agreement of the parties.

Ms. Oyombe submitted that the applicant was invited for a disciplinary hearing on 4th October 2016 but instead rushed to court before appearing for the disciplinary hearing, that the only conclusion that can be drawn by the applicant's conduct is that she does not want the disciplinary process to go on. Ms. Oyombe further submitted that the applicant has prayed for liquidated damages and will therefore not suffer irreparable harm. She prayed that the application be disallowed.

In his rejoinder Mr. Ongoya submitted that the prejudice to the applicant is self evident as she has been on half pay during suspension. He further submitted that clause 12 sets out the purpose of suspension being to facilitate investigations.

Mr. Ongoya also submitted that the CBA provides for reinstatement under two circumstances, the first being by effluxion of time and the second being upon conclusion of disciplinary process. He submitted that the applicant is seeking reinstatement under the former.

Mr. Ongoya submitted that the Respondent's contention that the applicant has been non-responsive to invitations to attend disciplinary hearing is not factual as the minutes of the two meetings held on 18th and 21st October 2016 show that the meetings were dealing with preliminary internal issues and there was no opportunity to start the disciplinary hearing. That it is not true that the applicant failed to avail herself for the disciplinary hearing.

On the orders sought Mr. Ongoya submitted that every interlocutory order sought is subject to confirmation after the hearing, that an order demanding mandatory orders must be given in the clearest of cases and nothing can be clearer than the textual reading of clause 12 which provides for reinstatement of an employee after 21 days suspension. Mr. Ongoya also submitted that the Respondent's contention that the applicant has rushed to court to avoid disciplinary hearing is fallacious as the applicant has not sought an order stopping the disciplinary hearing.

Determination

As already stated by counsel for the parties in their oral submissions, the issue in dispute is whether the applicant is entitled to the orders lifting their suspension as prayed in the application before me for determination.

Clause 12.2 of the Collective Bargaining Agreement applicable to the applicant provides as follows:-

12.2 Suspension

- i) *Where misconduct by an employee requires investigations, the employee may be suspended from duty with half pay for a period not exceeding 21 days whilst an inquiry is being carried out.*
- ii) *Depending on the circumstances, all suspension letters will be accompanied by show cause letters within seven days.*
- iii) *All suspension/show cause letters shall be copied to the Union Chapter Secretary within seven (7) days. Where such letters may not be copied for whatever reasons as provided, the Union shall take up the matter in accordance with the grievance handling procedures.*
- iv) *No suspension period shall exceed 21 consecutive days. If exceeding the employee shall be reinstated except where the Union and Management have both agreed that more time is required to complete the investigation or where the investigation is done by the police or the case is pending before a Court of Law, when the employee will continue to receive half pay.*
- v) *If it is proved that the employee has committed an offence, he/she shall be dismissed or terminated as from the date of determination.*
- vi) *If the offence does not warrant dismissal or termination of service, the employee shall be served with a written warning letter copied to the Union Branch Secretary.*
- vii) *If the offence is not proven the employee shall be reinstated to his/her job, with full pay and benefits from the date of suspension.*
- viii) *An employee on suspension shall not be subject to daily reporting unless otherwise required.*
- ix) *Security investigations reports touching on suspended employee may be availed to the Union where necessary.*

The section is explicit, that suspension cannot be for a period exceeding 21 days except in the circumstances set out at sub-clause (iv) being where the union and the management agree that more time is required to complete investigation, where investigation is by police or where the case is pending in court. None of these circumstances apply in the instant case.

Sub-Clause (iv) further provide for the resolution in cases where investigations are not concluded within 21 days to the effect that the employee **SHALL** be reinstated.

It is not in dispute that the 21 days have lapsed since interdiction of the applicant. There are no investigations by police, there is no agreement between management and union that more time is needed and there is no case pending before a court of law.

The Respondent's grounds in opposition to this application are that the prayers sought in the application are the substantive prayers in the claim, that the disciplinary process was commenced well within the 21 days and the applicant has been invited to a disciplinary hearing but she deliberately failed to attend the disciplinary hearing and further that the Applicant is attempting to be reinstated before exhausting the disciplinary process. It is the Respondents further argument that the Applicant can only be reinstated after being absolved from blame.

All these arguments by the Respondent are not applicable according to clause 12.2 which provides for suspension and which is an agreement between the Respondent and the Union representing the applicant. The Respondent is bound by the Collective Agreement and was aware of those provisions right from the time that it suspended the applicant. It cannot escape from the situation which it has created.

This court has severally stated that suspension is not punishment and an employee does not have to be away from work simply because there is a disciplinary case pending against him. The charge against the applicant is one of storming a meeting, disrupting the meeting, banging tables and threatening to beat up the acting vice Chancellor. The Respondent has not demonstrated to the court why such charges should take more than 21 days to investigate or why investigations cannot continue while the applicant is at work. In any event, as pointed out by the applicant's counsel, the Respondent in its letter dated 23rd August 2016 stated that the investigations had been concluded. The Respondent by the same letter require the applicant to show cause why disciplinary action should not be taken against the applicant.

According to Clause 12.2 (i) the only purpose of suspension is to carry out investigations. It is not supposed to be for purposes of disciplinary hearing. The argument of the Respondent that the disciplinary hearing has not been conducted or that the disciplinary process has not been concluded therefore does not lie.

For the foregoing reasons, I find that the applicant has demonstrated that her continued suspension is in violation of the clause 12.2 of the Collective Bargaining Agreement that is applicable to the Applicant. I therefore grant the orders sought by the applicant and lift the suspension forthwith. I further order that the applicant's salary be reinstated from the date of lifting of the suspension.

The applicant will however have to wait until the conclusion of the disciplinary hearing before accessing the salary withheld during the suspension as provided in Clause 12.2 (vii) which provides for reinstatement with full pay only upon the case against the employee not being proved.

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MAUREEN ONYANGO

JUDGE

This Ruling and Orders shall apply to Cause Nos. 302/2016 and 304/2016 between **COSMAS CHEPTOO v MASINDE MULIRO UNIVERSITY OF SCIENCE & TECHNOLOGY** and **RONALD WAMALWA v MASINDE MULIRO UNIVERSITY OF SCIENCE & TECHNOLOGY**

Dated and signed and delivered this 3rd day of November, 2016

MAUREEN ONYANGO

JUDGE