



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 587 OF 2016**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 7<sup>th</sup> December, 2016)**

**RICHARD MASINDE .....CLAIMANT**

**VERSUS**

**NAIROBI CITY COUNTY.....RESPONDENT**

**RULING**

1. The Applications before Court are the ones dated 11/4/2016 and 13.4.2016 respectively. The Application dated 11.4.2016 was filed by the Claimant/Applicant, herein under Certificate of Urgency and brought through a Notice of Motion filed under Section 3A of the Civil Procedure Act Cap 21 Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 44, 46 (h) of the Employment and Labour Relations Act Section 59 of the Labour Relations Act, Section 30 and 31 of Collective Bargaining Agreement entry RCA No. 21 of 2013, Industrial Court Act, Article 41, 25 (c), 159 of the Constitution of Kenya and all other enabling provisions of the law.

2. The Applicant sought the following orders:

***1. That this Application be certified urgent and be heard ex-parte in the first instance.***

***2. That this Honourable Court be pleased to make an order directing the Respondent to unconditionally lift the suspension of the Claimant from employment and order for his immediate reinstatement pending the inter parties hearing and determination of this application.***

***3. That upon prayer 2 herein above, this Honourable Court do hereby make an order for the payment by the Respondent the Claimant's withheld emoluments during this period of his suspension.***

***4. That this Honourable Court be pleased to make an order restraining the Respondent from replacing the Claimant's position pending the interpartes hearing and determination of this Application.***

***5. That this Honourable Court be pleased to make an order restraining the Respondent from replacing the Claimant's position pending the interpartes hearing and determination of this Claim.***

***6. That this Honourable Court be pleased to make an order restraining the Respondent to unconditionally lift the suspension of the Claimant from employment and order for his immediate reinstatement pending the interpartes hearing and determination of this claim.***

**7. That pending the hearing and determination of this application, this Honourable Court do make an order of injunction restraining the Respondent either by themselves, employees, servants and/or agents from terminating the employment of the Claimant.**

**8. That pending the hearing and determination of this claim, this Honourable Court do make an order of injunction restraining the Respondent either by themselves, employees, servants and/or agents from terminating the employment of the Claimant.**

**9. That costs of this application is provided.**

3. The Application was also supported by the annexed affidavit sworn by Richard K. Masinde, the Claimant Applicant herein and on the following grounds:

**1. The Claimant is employed by the Respondent as the Ag. Assistant Director of Environment in Charge of Environmental Monitoring, Compliance and Enforcement.**

**2. The Claimant diligently and with due honesty served the Respondent throughout his employment term with the Respondent and is ready and willing to continue with such employment.**

**3. On 30<sup>th</sup> March 2016, the Claimant received a letter from the Respondent dated 16<sup>th</sup> March 2016 demanding that he shows cause why he should not be summarily dismissed for gross misconduct.**

**4. The aforementioned letter also suspended him forthwith and without any salary.**

**5. Vide a letter dated 30<sup>th</sup> March 2016, the Claimant responded to the notice to show cause demonstrating that there was no conduct amounting to gross misconduct on his part reasons among others being that:**

**a) The genesis of his supposed conduct was the unlawful interference in the operations of Environmental Monitoring Compliance and Enforcement (EMCE) which were captured in a Memo dated 2<sup>nd</sup> March 2016.**

**b) The grievances were also shared with the Director of Environment Mr. Muraya as per protocol.**

**c) By the nature of the aforesaid interference, justice would best be served by the office of the Inspector General whereof the Claimant made a complaint vide letter dated 7<sup>th</sup> March.**

**d) The disciplinary process and suspension are therefore invalid as initiation of a complaint is not a ground for imposing a disciplinary process or termination of employment as per stature and morality.**

**6. The Claimant avers that reason for the said action by the Respondent was based on unreasonable and malicious grounds, which were baseless, unfound and unlawful and motivated by ulterior motives.**

**7. Further that the Respondent's conduct was nevertheless unprocedural and in breach of Collective Bargaining Agreement entry RCA No. 21 of 2013 as follows:**

**a) Contrary to the CBA no warning notices were issued.**

**b) Contrary to the CBA disciplinary measures were to be conducted by the Department**

**head.**

**c) Contrary to the CBA suspension was to be issued by the Department head.**

**d) Suspension with no salary was unwarranted as there was no financial loss by alleged conduct of Claimant.**

**e) There is no time period set for the suspension and evidence of the suspension letter dated 16<sup>th</sup> March 2016 and served on 30<sup>th</sup> March 2016 indicate that the Respondents shall breach the time limit of 3 months to the detriment of Claimant/Applicant.**

**8. The Claimant is now weary that unless restrained by this Honourable Court, Respondent is hell bent in continuing the malicious, unfounded and unlawful disciplinary process with the intent to unlawfully dismissing him.**

**9. The Respondent has begun grooming the Claimant's assistant to fill Claimant's position which he already occupies in an acting capacity.**

**10. Indeed this Court has jurisdiction to interdict any unfair conduct including disciplinary action and the disciplinary proceedings are commenced with ulterior motive or as a process shrouded with illegalities, then the Court must intervene and stop such an illegality.**

**11. That unless the orders sought herewith are granted the Claimant/Applicant shall suffer prejudice and irreparable loss and damages.**

**12. It is only fair, just and in the interest of justice that the orders sought are granted.**

4. The Applicant has deponed that he has diligently and with due honesty served the Respondent throughout his employment term with the Respondent and is ready and willing to continue doing so.

5. He avers that on 30<sup>th</sup> March 2016 he received a letter of show cause from Respondent dated 16<sup>th</sup> March 2016, demanding he shows cause why he should not be summarily dismissed for gross misconduct. The said letter also suspended the Claimant from work without any salary.

6. The Claimant responded to this letter on the same day vide a letter dated 30<sup>th</sup> March 2016 demonstrating that he was not guilty of any gross misconduct.

7. The Claimant avers that the genesis of his alleged misconduct was the unlawful interference in the operation of EMCE which were captured in a Memo dated 2-3-2016 (Annex RKM 3) and he had shared his grievances with the Director of Environment one Mr. Muraya as per the protocol.

8. He avers that the disciplinary process and suspension are therefore invalid as initiation of a complaint is not a ground for imposing disciplinary process or termination of employment as per statute and morality. He contends that the suspension was based on unreasonable and malicious grounds which are baseless, unfounded and unlawful and motivated by ulterior motives.

9. He further avers that the Respondent's action was unprocedural and in breach of the CBA entry RCA No. 21 of 2013 as no warning notices were issued and that the Head of Department is the one to conduct the disciplinary measures and even conduct the suspension. He is apprehensive that unless the Respondent is restrained, the Applicant will remain on suspension beyond the 3 months limit to his detriment.

10. The Applicants filed another application dated 13.4.2016 filed through a Notice of Motion brought under Section 3A of Civil Procedure Act Cap 21 Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 44, 46 (h) of the Employment and Labour Relations Act Section 59 of the Labour Relations Act, Section 30 and 31 of Collective Bargaining Agreement entry RCA No. 21 of 2013, Industrial Court Act,

Article 41, 25 (c), 159 of the Constitution of Kenya and all other enabling provisions of the law.

11. In this application the Applicant sought orders as follows:

- 1. That this Application be certified urgent and be heard ex-parte in the first instance.**
- 2. That the Respondent do pay the Claimant's salary for the month of March 2016 forthwith and he continue drawing his house allowance and medical insurance premium pending hearing and determination of this application.**
- 3. That the Respondent do reinstate the Claimant in the pay roll pending hearing and determination of this application.**
- 4. That this Application be consolidated with the Claimant's application dated 12/04/2016.**
- 5. That the cost of this Application be provided.**

12. The Application was also supported by the affidavit of the Claimant dated 13.4.2016 and supported by the following grounds:

- 1. The Claimant is employed by the Respondent as the Ag. Assistant Director of Environment in Charge of Environmental Monitoring, Compliance and Enforcement.**
- 2. The Claimant received a suspension letter from the Respondent on 30<sup>th</sup> March 2016.**
- 3. Prior to suspension, the Claimant had worked diligently and with due honesty served the Respondent throughout the month of March 2016.**
- 4. However the Claimant/Applicant was shocked to learn that he had been irregularly struck off the payroll and denied his just dues for the aforesaid month of March 2016 and consequently denied the benefits he was to continue enjoying the house allowance and medical insurance premium.**
- 5. That the Claimant/Applicant is prejudiced and facing extreme hardship as this is his sole source of income and he has Dependents too.**
- 6. That this denial of fair remuneration is an unfair labour practice.**
- 7. That it is in the interest of justice that Claimant/Applicant receives his dues for the month of March 2016 forthwith.**
- 8. That it is in the interest of justice that the Claimant/Applicant is reinstated in the Respondent's pay roll.**
- 9. That unless the orders herewith are granted the Claimant/Applicant shall suffer prejudice and irreparable loss and damages.**
- 10. That it is only fair, just and in the interest of justice that the orders sought are granted.**

13. The main contention in this Application is that the Applicant aver that he has been irregularly struck off the payroll and denied his dues for March 2016 despite working and he avers that it is in the interest of justice that he be paid his March 2016 salary forthwith and be reinstated to the payroll. He also wanted the 2 Applications consolidated.

14. Though the Respondents had ample time to file a reply to the 2 Applications, they didn't. They however filed submissions on 16.9.2016 where they have submitted that they had justifiable reason to

send the Applicant on suspension, the reason being insubordination. They submit that this case of insubordination led them to lose faith in the Claimant and also opened the Respondent to huge financial losses.

15. They also submitted that they followed the Public Service Commission of Kenya Discipline Manual of July 2008 which at Section 10 provide as follows:

***“If the misconduct is one which can lead to dismissal, the officer will be served with a show cause letter which shall also contain a communication on suspension, a sample of which is provided in Appendix V”.***

16. They have cited Anne Wambui Kamuru vs. Kenya Airways Limited (2016) eKLR where this Court held that:

***“The Courts on their part will not interfere with proper internal disciplinary processes unless the Court is satisfied that the process is marred with irregularities or it is stage managed towards dismissal. The Court will interfere not to stop the process altogether but to put the correct process on course. This position was held in Industrial Cause No. 1789/2013 Rebecca Ann Maina & 2 Others vs. JKUAT where Hon. J. Ndolo made similar findings. See also Cause 324/2012 Aviation & Allied Workers Union vs. Kenya Airways Limited.***

17. They also pray that this Court allows them to proceed with the disciplinary process that they have commenced as it is in accordance with the law.

18. On the prayer to release withheld emoluments the Respondents have submitted that it will determine the entire suit. They submit that there is no evidence that they want to replace the Applicant. They ask Court to reject the Applicant's applications.

19. The Applicants also filed their submissions and they submit that there were no valid reasons to warrant suspension of the Claimant. They also aver that due process has not been followed as per the RCA No. 21 of 2013.

20. They cited Donald C. Avude vs. Kenya Forest Service (2015) eKLR where it was held that suspension without pay should be for a definite period.

21. I have considered the Applicants averments and submissions plus the Respondents submissions herein. I will first agree with the prayer of the Applicant to consolidate both applications as there was no objection from the Respondents. It is also clear that the issues arise from the same transaction and it is therefore appropriate that the 2 applications be consolidated and handled as one.

22. It is also clear that the Respondents failed to reply to the applications and so they stand unopposed.

23. That notwithstanding, I have opted to consider their submissions to enable this Court deal with the substantive issues and avoid procedural technicalities.

24. From the letter written to the Applicant suspending him from work, reasons given were interference with some processes. This is what the Respondent terms as insubordination. The Applicant indeed replied to the letter and allegations promptly. No further disciplinary processes followed. The Applicant was never given a hearing but was then terminated on 14/6/2016 and then retired. This all happened when the application before Court was pending and it is my view that the whole reason was to try and pre-empt this Court's ruling on the application.

25. It is obvious that the Respondents are not acting in good faith.

26. However based on prayers sought, I find the disciplinary process that had been instituted against the Applicant was flawed and since it appears the process was overtaken by events, and lifted, I will not give

any order concerning the suspension and the disciplinary process.

27. Concerning the order for reinstatement at this point, I will also decline to give any order as this will determine the entire claim.

28. Costs of this application will be in the cause.

Read in open Court this 7<sup>th</sup> day of December, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance the for Claimant/Applicant

No appearance for the Respondent