



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 80 OF 2015

SHEDD DENNIES SIMOTWO.....CLAIMANT

v

SPEAKER, NAROK COUNTY ASSEMBLY1st RESPONDENT

NAROK COUNTY ASSEMBLY SERVICE BOARD.....2nd RESPONDENT

RULING

1. Shedd Dennies Simotwo (applicant) was deployed by the Transition Authority to the County Assembly of Narok as Interim Clerk, through a letter dated 25 February 2013.
2. The Chairman of the County Assembly of Narok Service Board (2nd Respondent) through a letter dated 13 March 2015 informed the applicant that he was being suspended from duty for 90 days to pave way for investigations, following a resolution of the 2nd Respondent made on the same day.
3. The suspension letter also informed the applicant that the suspension was pursuant to sections 41 and 43 of the Employment Act, 2007.
4. The suspension letter informed the applicant of several allegations he was required to respond to within 7 days, and that he was expected to hand over to the Legal Counsel, who was to act in his position.
5. The suspension aggrieved the applicant and on 17 March 2015, he lodged the present motion under certificate of urgency seeking several orders including (relevant for this ruling)

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2. THAT this Honourable Court be pleased to stay the suspension as per the letter dated 13th March, 2015 and the Claimant/Applicant do proceed with his duties pending the hearing and determination of this application.

3. THAT pending hearing and determination of this application this Honourable Court be pleased to restrain the Respondent by themselves, agents and or servants from locking the Claimant's offices or blocking the Claimant from accessing the office of Clerk Narok County Assembly or use of his official motor vehicle.

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7. That the cost of this application be provided for.
6. The Court certified the motion as urgent on 17 March 2015 and directed that it be served for *inter partes* hearing on 19 March 2015.

Applicant's case

7. The applicant's case as set out on the face of the motion and supporting affidavit are that, under regulation 29 of the Public Service Commission Regulations he was entitled to 21 days to respond; that he had been denied access to his office and therefore he cannot respond to the allegations in the suspension letter ; that suspension for 90 days without a salary was unreasonable; that he had not been given a show cause letter in accordance with regulation 29 of the Public Service Commission Regulations; that the suspension letter was not clear or specific on the allegations; that the applicant would not interfere with investigations; that the applicant was not given sufficient notice to be heard before the decision to suspend was made; the decision to suspend the applicant was not in the agenda of the meeting which resolved to suspend him; *that the Respondents did not comply with the disciplinary procedures set out in the Public Service Commission Delegation Instrument to County Public Service Boards and County Assembly Service Boards on Discipline of Seconded Officers to the County Governments* ; that the suspension letter was defective for not meeting the requirements of procedural and substantive justice; that the person appointed to act in the office of Clerk is not qualified under section 13 of the County Government Act.
8. Mr. Kibet who urged the applicant's case submitted that the suspension was illegal and contravened the clear provisions of the applicable Regulations because no notice to show cause was issued to the applicant and that the suspension letter did not give details/particulars of the allegations the applicant was to respond to.
9. Counsel also submitted that under the Regulations, the applicant was entitled to 21 and not 7 days to respond to the allegations, and that suspension was only applicable in cases of allegations of serious breach of discipline or where an employee had been charged with or convicted of a criminal offence.
10. Mr. Kibet further submitted that the suspension letter did not inform the applicant of his entitlements during the suspension.

Respondents' contestations

11. The Respondents filed and relied on a replying affidavit sworn by Olooltisatti Nicholas K. Nabulu, the 1st Respondent and Chairman of the 2nd Respondent.
12. The deponent deposed that the applicant's position had not been advertised because the applicant had been an impediment; that the applicant was served with specific details of allegations against him after a meeting of the 2nd Respondent on 13 March 2015; that the 2nd Respondent complied with section 41 of the Employment Act, 2007 on disciplinary action; that the applicant was suspended in accordance with section 2(a) and (b) as read with section 9 of the *Public Service Commission Delegation Instrument to County Public Service Boards and County Assembly Service Boards on Discipline of Seconded Officers to the County Governments*; that the suspension was to allow investigations; that giving the applicant 7 and not 21 days to respond was an error; that the request by the applicant to access his office was to conceal and tamper with evidence; that the applicant will be on half salary, full house allowance and medical allowance during the period of suspension and that the applicant was using the Court process to circumvent the disciplinary process.
13. Mr. Kamwaro took the Respondents' case. He submitted that the decision to suspend the applicant was anchored in regulation 2 of the *Public Service Commission Delegation Instrument to County Public Service Boards and County Assembly Service Boards on Discipline of Seconded Officers to the County Governments* and that investigations could not be carried out while the applicant was in office as he could tamper with the records. But he conceded that the applicant could be allowed controlled access.
14. He also submitted that the Regulations provided that an officer on suspension would be entitled to

half salary and that the Regulations allowed for suspension up to 90 days.

Discussion

15. For a suspension of an employee to be lawful, it must have either a contractual authority or statutory underpinning (see *Kenya Plantation & Agricultural Workers Union v Finlays Horticulture Kenya Ltd* (2015) eKLR and *McKenzie v Smith* (1976) IRLR 345).
16. In the instant case, the suspension of the applicant is underpinned by statute. Regulation 2(b) of the *Public Service Commission Delegation Instrument to County Public Service Boards and County Assembly Service Boards on Discipline of Seconded Officers to the County Governments* provides

The power to suspend a seconded public officer Under regulation 24 of the Commission, where a public officer has committed a serious breach of discipline or has been charged or convicted of a criminal offence, the Board shall:

- i. suspend the officer from the exercise of the functions of his public office pending consideration of his case under the regulations; or
 - ii. Suspend the officer from the exercise of the functions of the public office if proceedings for dismissal are contemplated.
17. Both parties herein agree that the applicant was suspended to pave way for investigations. In this regard, regulation 2.b of the Regulations relied on by the Respondents was not the correct or applicable one.
 18. The Regulation which deals with temporarily leaving office to enable investigations is Regulation 2.a and the Court will for the sake of clarity set out it out.
 19. Regulation 2. a provides

The power to interdict a seconded public officer

Under Regulation 23 of the Commission, where the Board is satisfied that a public officer should temporarily cease from exercising the powers and functions of the public office they hold to allow for investigations, they shall interdict the officer. A public officer who has been interdicted shall receive half basic salary, full house allowance and medical allowance or medical insurance remitted (emphasis mine).

Where disciplinary or criminal proceedings have been taken or instituted against a public officer under interdiction and such public officer is neither dismissed nor otherwise punished, the withheld salary shall be restored to him/her upon termination of such proceedings.

If any punishment other than dismissal is imposed, the public officer may be refunded such proportion of the salary withheld as a result of the interdiction.

20. I have already observed that both parties agree that the suspension was to pave way for investigations.
21. Investigations of the nature contemplated here are to establish the facts upon which disciplinary action may be taken against the employee. The Respondent was sending the applicant out of office to facilitate investigations to establish whether there was serious breach of discipline or to show commission of a criminal offence.
22. With this consideration in mind, it is my view that the Respondent should not have *suspended* but rather *interdicted* the applicant (I say so with a lot of trepidation that this may be interpreted to mean that I am making determinations which should be left for the trier of facts on the merits).
23. The applicant also challenged the suspension on the ground that he was given 7 and not the prescribed 21 days to respond.
24. The Respondents admitted that giving the applicant 7 days to respond was an error. Even

- assuming it was an error, the Court is satisfied at this interlocutory stage and based on the papers and submissions that the Respondent did not observe its own disciplinary procedures.
25. In *The Post Office v Strange* (1981) IRLR 515, it was held that a failure by an employer to observe its own disciplinary procedures may amount to repudiation of contract.
26. In my view, this holding though from a comparative jurisdiction would be sound legally within our jurisdiction considering the statutory framework and employers such as the Respondents here should be on notice that they must scrupulously observe their internal disciplinary procedures or risk falling afoul of the requirements of procedural fairness and reinstatement of an employee or payment of huge damages.
27. In the instant case, there is a grave danger that the applicant may suffer prejudice if the Respondents are allowed to proceed the way it has started to move.
28. But the Court should also intervene to stop a disciplinary process only in exceptional circumstances where compelling reasons have been given (see my review of the authorities and legal principles in *Kenya Plantation & Agricultural Workers Union v Finlays Horticulture Kenya Ltd* cited in paragraph 15 above).
29. The applicant had sought access to the office to get material he could use to prepare a response. Without making a determination of the question, the Court notes that the Respondents counsel indicated the same may be furnished to the applicant if so requested.
30. Prayers 3, 4, 5 and 6 of the motion are declined.

Orders

31. The orders as sought by the applicant are rather overbroad. Considering the discussion herein instead of granting prayer 2 as sought, the Court would grant prayer 2, but modified as follows:

THAT an order hereby issue staying the suspension of the applicant pending the Respondents complying with the Disciplinary Control Procedures in the *Public Service Commission Delegation Instrument to County Public Service Boards and County Assembly Service Boards on Discipline of Seconded Officers to the County Governments* and pending such compliance the applicant is entitled to the benefits and privileges of office.

32. The applicant to have costs of the motion.

Delivered, dated and signed in Nakuru on this 27th day of March 2015.

Radido Stephen

Judge

Appearances

For applicant Mr. Kibet instructed by Mirugi Kariuki & Co. Advocates

For Respondents Mr. Kamwaro instructed by Kamwaro & Co. Advocates