



**Omollo v Judicial Service Commission (Cause 47 of 2015)
[2015] KEELRC 1295 (KLR) (3 March 2015) (Ruling)**

Benedict Abonyo Omollo v Judicial Service Commission [2015] eKLR

Neutral citation: [2015] KEELRC 1295 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

CAUSE 47 OF 2015

HS WASILWA, J

MARCH 3, 2015

BETWEEN

BENEDICT ABONYO OMOLLO CLAIMANT

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

RULING

1. On 19/1/2015 the Applicant filed an application under Certificate of Urgency through the firm of Kemboy & Co. Advocates. The application was filed through a notice of motion dated the same date and filed under article 23 of the Constitution of Kenya, 2010 and rules 13 and 23 of the Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, Section 3 and 20 of the *Industrial Court Act* 2011, Rule 16 of the Industrial Court (Procedure) Rules 2010 and all other enabling provision of law.
2. The Applicant sought orders:
 1. That for reasons to be recorded notice of this application be dispensed with and heard ex-parte in the first instance.
 2. That pending the hearing and determination of this application, the Respondents whether by themselves, their agents or otherwise howsoever be restrained from accepting any applications and subsequently recruiting and filling the position of Director Finance of the Judiciary.
 3. That pending the hearing and determination of the suit, the Respondents whether by themselves, their agents or otherwise howsoever be restrained from accepting any applications and subsequently recruiting and filling the position of Director Finance of the Judiciary.



4. That pending the hearing and determination of the Criminal Case No. 2052 of 2013, the Respondents whether by themselves, their agents or otherwise howsoever be restrained from advertising the position of Director Finance of the Judiciary as vacant and thereafter accepting any applications and subsequently recruiting and filling the position of Director Finance of the Judiciary.
 5. That the letter dismissing the Claimant be quashed and his dismissal be reversed.
 6. That a priority date be given for the substantive claim.
 7. That costs of this application be provided for.
3. The application was grounded on the following grounds:
- a. The Claimant was an employee of the 1st Respondent as the Director of Finance of the Judiciary with effect from 1st July, 2012.
 - b. On or about the 17th of September, 2013 the Claimant discovered that between the 12th and 13th September, 2013 fraudulent transactions were carried out at the Judiciary where a total sum of approximately Kshs.80,013,302.00 was stolen. Thereafter, he took the necessary steps to stop further fraudulent transactions and reported this turn of events to the Chief Registrar of the Judiciary.
 - c. This incident was reported to the Police who conducted their own investigations and on the 5th of November, 2013 the Claimant, was charged with conspiracy to commit a felony namely stealing Kshs.80,013,302.00 in CMCC No. 2052 of 2013, a case which is pending.
 - d. Via a letter dated 5th November, 2013 the 3rd Respondent communicated the decision to the Claimant of the Claimant's interdiction from service with effect from the date of the letter for being implicated in a report of the investigation on theft of Kshs.80,013,302.00.
 - e. Vide a letter dated 8th November, 2013 the Claimant responded to the 3rd Respondent's letter of interdiction and sought to be supplied with the full final report on the investigations on the theft of the Kshs.80,013,302.00.
 - f. The 3rd Respondent did not and has not responded to the Claimant's request.
 - g. During the period of interdiction, the Claimant was earning half of his salary and was required to report to the 3rd Respondent every Friday. The Claimant was further instructed to hand over all Government stores including accountable documents and a detailed financial report to the 3rd Respondent.
 - h. In furtherance to the letter of interdiction dated 5th November, 2013 the 2nd Respondent preferred charges of gross misconduct against the Claimant vide a letter dated 23rd June 2014. The charges were; irregular payments, laxity at work, lack of professionalism in conduct of business and authorizing payment from deposit accounts. All these charges arose from the Special Audit Report of the Judicial Service Commission and the Judiciary dated May 2014.
 - i. The Claimant was not interviewed during the conduct of the special audit nor provided with an opportunity to respond to some of the audit findings before the Special Audit Report of the Judicial Service Commission and the Judiciary dated May 2014 was presented to Parliament.
 - j. Vide letters dated 21st July 2014 and 5th August 2014 respectively, the claimant requested for documents that were in the custody of the 1st Respondent and were in relation to the charges of



gross misconduct against him. These documents were necessary to enable the Claimant defend himself appropriately at the disciplinary hearing and to protect his job, his integrity, human dignity and fair labour practice.

- k. The 2nd Respondent did not supply all the documents requested for by the Claimant hence the Claimant could adequately represent himself against all the charges preferred against him.
 - l. Despite the pending criminal case and lack of documents to support the charges leveled against the Claimant, the 2nd Respondent went ahead to conduct disciplinary proceedings on 7th November, 2014 and 12th November, 2014 respectively were in claimant presented his oral submissions.
 - m. At the oral submissions the Claimant brought to the attention of the 2nd Respondent that the criminal case against him was pending and not all documents he requested for from the 1st Respondent were availed to him.
 - n. Some of the charges leveled against the Claimant were on transactions that occurred before the Claimant was employed by the 1st Respondent. Furthermore some of the 2nd Respondent's Commissioners conducting the disciplinary hearing did propose and approve some of the purported irregular payments made by the Claimant.
 - o. The Claimant submitted his written submissions dated 15th December, 2014 on 16th December, 2014. A day after the Claimant's submissions was received by the 2nd Respondent, the Claimant was summarily dismissed vide a letter dated 17th December, 2014.
 - q. On the 23rd of December, 2014 the 2nd Respondent put up a vacancy advertisement in one of the local newspapers inviting applications for the position of the Director of Finance of the Judiciary. The 2nd Respondent is now in the process of recruiting and filling the above position. The Respondents unlawful and unfair actions if allowed to proceed will gravely imperil and prejudice the Claimant's rights to a fair hearing, fair administrative action, fair labour practices, right to human dignity and tarnish the otherwise good name and integrity of the Claimant.
 - r. It's only just and fair that this Honourable Court protects the Claimant rights by way of an injunction pending the hearing and determination of this application and the main suit.
4. The application was also supported by the annexed affidavit of Benedict Abonyo Omollo the Applicant and other grounds adduced at the hearing of the application interpartes.

At the interim stage, the parties were heard by Hon. J. Nzioki Wa Makau who granted orders in terms of prayer 1 and 2.

5. The application came up for hearing interpartes on 2/2/2015 and the suit originally filed against the Judiciary and the Hon. Dr. Willy Mutunga as 1st and 3rd Respondents respectively was withdrawn.

The parties were further allowed to file supplementary affidavits and list of authorities.

On 16/2/2015, the Claimant/Applicant filed a supplementary affidavit sworn on 13/2/2015. The Claimant also filed a list of authorities dated 16/2/2015. The Respondents on their part filed their replying affidavit sworn by Winfrida Mokaya, the Registrar of the Respondent the Judicial Service Commission herein on 2/2/2015. They also filed a list of authorities on 16.2.2015.

The application then proceeded for interpartes hearing on 16/2/2015.



The Applicants case and Submissions

6. It is the Applicants case that they have a prima facie case with a probability of success to warrant the granting of the orders sought above as held in the case of *Giella v Cassman Brown*. They contend that if at the end of the case, the court were to decide in favour of the Applicant, damages will not be adequate to compensate the applicant. It is also their position that if the Court were to decide this application on a balance of probabilities of success it shall decide in favour of the Applicant.
7. The Applicant submitted before this court that on 5/11/2013, the Claimant was interdicted by the Respondent pursuant to Section 16 of the 3rd schedule of the Judicial Service Act, thereafter referred to as the JSA. This was after the Chief Justice had received a full report on investigations of Kshs.80,013,302/=.

The Applicant avers that on 17/9/2013 he had discovered that between the 13th and 14th of September 2013 fraudulent transactions were carried out at the Judiciary where this amount was stolen.

The Applicant contends that, on making this discovery, he took necessary steps to stop further fraudulent transactions and reported the same to the Chief Registrar of the Judiciary. The incident was further reported to the Central Bank of Kenya (CBK) Banking Fraud Investigation Unit (BFID) who conducted their own investigations.

The Banking Fraud Investigation Department concluded their investigations and on 5/11/2013, the Applicant was charged with conspiracy to commit a felony namely stealing Kshs.80,013,302/= in CMCC No. 2052 of 2013, a case which is still pending in court todate.

8. The Applicant was interdicted soon thereafter on the same day of 5/11/2013 as per his letter of interdiction Appendix BAO -4. The letter of interdiction stated that the reason for his interdiction was that the report of the investigation on theft of Kshs.80,013,302/= implicated him and as such proceedings which may lead to his dismissal were about to be undertaken.
9. Vide a letter dated 8/11/2013, the Applicant responded to the Respondents letter of interdiction and sought to be supplied with the full final report on the investigations on the theft of the Kshs.80,013,302/=. This request was never responded to. The Applicant further avers that during the period of interdiction he was earning half salary and was required to report to the Hon. Chief Justice every Friday. He was further instructed to hand over all Government stores including accountable documents and a detailed financial report to the Hon. Chief Justice.
10. It is further the Applicant's case that he also requested and was granted permission by the Chief Justice to conduct a Forensic Audit on the computer that were used to commit the said crime. He managed to conduct the said audit and cared to share its findings with the Chief Justice on 14/10/2014 as a matter for public duty in line with Section 68 of the Public Finance Management Act. He annexed copies of correspondences between himself and the Chief Justice as Appendix BAO -6.
11. The Applicant avers that, further to his interdiction letter dated 5/11/2013, the Respondent preferred charges of gross misconduct against him vide a letter dated 23rd June 2014. The charges inter alia were in relation to irregular payments, laxity at work, lack of professionalism in conduct of business and authorizing payment from deposit account. He was required within 14 days from the date of the letter to show cause why he should not be severely punished. He annexed a copy of the said letter and marked Appendix BAO-7.
12. It is the Applicant's contention that the letter preferring charges of gross misconduct against him was fatally flawed and unprocedural and the same should be quashed. The reason according to the



Applicant is that this letter was signed by the Chief Registrar of the Judiciary yet Section 25 Part IV of the Third Schedule of the JSA provides that it is only the Chief Justice who is mandated to frame the charges against an employee.

13. The Applicant also contends that during the special audit, he was neither interviewed nor provided with an opportunity to respond to some of the audit findings before the Special Audit Report of the JSC and the Judiciary dated May 2014 was presented to Parliament.
14. The Applicant avers that pursuant to Section 23 Part IV of the Third Schedule of the JSA, vide letter dated 21st July 2014 and 5th August 2014 respectively, he requested for documents that were in custody of the Judiciary and were in relation to the charges of gross misconduct against him. These documents, he contends were necessary to enable him to defend himself appropriately at the disciplinary hearing to protect his job integrity, human dignity and in accordance with fair labour practices. The said letters are marked as Annex BAO-8.

The Applicant contends that the Judiciary did not supply all the documents he requested for. He avers that he raised this fact during the disciplinary hearing conducted on by Respondent on 7th and 12th November 2014. He avers that he could not therefore adequately defend himself against all the charges preferred against him.

He produced and annexed copies of the hansard reports for the disciplinary hearing as Appendix BAO-9.

15. The Applicant further contends that during the disciplinary hearing, he brought to the attention of the Respondent the fact that the criminal case against him was pending and not all documents he requested from the Judiciary were availed to him and as such he should only be restricted to answer to the charges concerning documentation that was availed to him. Despite all these concerns, the Applicant avers that the Respondent proceeded with the disciplinary hearing.

The Applicant therefore contends that he did not receive a just and fair hearing contrary to Articles 47 and 50 of the *Constitution of Kenya* 2010. It is also his contention that some of the charges leveled against him were on transactions that occurred before he was employed by the Judiciary and which had even been approved by some of the Respondents Commissioners.

16. The Applicant contends that his summary dismissal further contravenes Section 18 Part IV of the Third Schedule of the JSA, in that he was dismissed on 17/12/2014 yet he has a pending criminal case at the CM's Court being CMCC No. 2052 of 2013.

He avers that he was instructed to hand over all the Government property and documents in his possession which he did on 22/11/2014 as per Annexure BAO-13.

17. In 23/12/2014, the Respondent put up a vacancy advertisement in one of the local newspapers inviting applications to fill the position of Director of Finance of the Judiciary.

He wants the advertisement and recruitment stopped and that the summary dismissal be reversed so that he is reinstated to work. He avers that it is in the interest of justice that the orders he has sought are granted.

Respondents Case

18. Through the replying affidavit sworn by Winfrida Mokaya sworn on 20/1/2015 and filed on 2/2/2015 the Respondents avers that indeed the Applicant was appointed to the position of Director of Finance on 30th April 2012 by the Judicial Service Commission (JSC) as per his appointed letter WW-1. Further that as head of the Finance Unit in the Judiciary, he was expected to provide professional and



administrative advice on all matters dealing finances included but not limited to answering prudent financial management and controls. The specific duties were as follows:

- i. Develop and ensure the implementation of financial management strategies in line with Government Financial Management strategy and Judicial Transformation Frame work;
- ii. Develop and implement robust financial management policies, procedures and controls to ensure integrity with relevant legislative framework;
- iii. Advise the Chief Registrar of the Judiciary on regulatory matters concerning public finance as it relates to the Judiciary fund;
- iv. Coordinate and administer the Judiciary budget and ensure timely and effective implementation of the activities under the Judiciary Transformation Network
- v. Develop accountability structures, ensure periodic reporting and monitor the performance indicators for the finance department;
- vi. In collaboration with the Director of ICT coordinate the development of appropriate financial information management system;
- vii. Advise the Chief Registrar on administration of complementary funding from development partners, including development and execution of budgets;
- viii. Ensure timely compliance with financial and fiduciary obligations of the Judiciary;
- ix. Allocation and monitoring of funds to all identified and approved A.I.E holders based on approved activities.

19. The Respondents contend that in the discipline of its staff the JSC is guided by the following provisions:

- i. The JSC is established under Article 171 of the Constitution and its functions are spelt out in Article 172 of the Constitution;
- ii. Article 172(1)(c) of the Constitution provides that he JSC shall promote and facilitate the independence of the Judiciary and the efficient, effective and transparent administration of justice and shall appoint, receive complaints and investigate and remove or otherwise discipline registrars, magistrates, and other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament.
- iii. The Parliament enacted the Judicial Service Act, 2011 to prescribe the procedures for appointment and disciplining of registrars, magistrates and other judicial officers.
- iv. Section 3 of the Judicial Service Act provides for the objects and purposes of the Act. In particular Section 3(a) and (h) provides that the Act shall ensure that the JSC and the Judiciary shall be organs of management of judicial services and the administrative manifestation of the Judiciary's autonomy and inherent power to protect and regulate its own process. The JSC achieves these objectives through application of principles set out in the Constitution and other laws.
- v. Section 32 of the Judicial Service Act, 2011 provides for the appointment, discipline and removal of judicial officers and staff as provided for in the Third Schedule of the Actg. The JSC constitutes a Committee or panel for purposes of appointment and disciplining of judicial officers and other judicial staff.



- vi. The Third Schedule of the Judicial Service Act, 2011 makes provisions relating to the appointment, discipline and removal of judicial officers and staff. Part IV of the Third Schedule provides for the discipline of judicial officers and staff.
 - vii. Regulation 15 of the Third Schedule to the Judicial Service Act, 2011 delegates to the Chief Justice the power to interdict, suspend and administer a severe reprimand or a reprimand to a judicial officer.
 - viii. Regulation 16 of the Third Schedule of the Judicial Service Act, 2011 provides that if the Chief Justice is satisfied that the public interest requires that an officer should cease forthwith to exercise the powers of their office, the Chief Justice may interdict the officer from exercise of those powers.
 - ix. Regulation 17(2) of the Third Schedule to the Judicial Service Act, 2011 provides that the Chief Justice may suspend an officer against whom proceedings for dismissal have been taken, if as a result of the disciplinary proceedings, he considers that the officer ought to be disciplined.
 - x. Regulation 19 of the Third Schedule to the Judicial Service Act, 2011 provides for dismissal as one of the punishments that may be inflicted on a judicial officer as a result of the disciplinary proceedings.
 - xi. Regulation 25 of the Third Schedule to the Judicial Service Act, 2011 provides for the proceedings for the dismissal of judicial officers and staff.
 - xii. Regulation 25(1) of the Third Schedule to the Judicial Service Act provides that the Chief Justice may institute disciplinary proceedings against an officer on grounds of misconduct which, if proved, would in the Chief Justice's opinion justify dismissal. The regulation provides that Chief Justice shall forward a statement of the allegations and the officer shall be given an opportunity to respond.
 - xiii. Regulation 25(20) of the Third Schedule to the Judicial Service Act, 2011 provides that the Commission shall, after consideration of the report of the Committee or panel, decide on the punishment if any, which should be inflicted on the officer.
20. In reply to the supporting affidavit of the Applicant herein, the Respondents aver that the Applicant was charged in court in CMCC No. 2051/13 with conspiracy to commit a felony, that is stealing Kshs.80,031,302/=. This was done following investigations by the Central Bank of Kenya, Banking Fraud Investigation Department on fraudulent transactions carried out between 13th and 14th September 2013 at the Judiciary.
- Following the Applicant's arraignment in court, the Respondents aver that the Applicant was interdicted by the Chief Justice on 5/11/2013 in accordance with Regulation 16 of the Third Schedule of the JSA 2011 (Appendix WM 2).
- Thereafter a meeting was held between 19th and 21st June 2014 whereby the JSA deliberated on a Special Audit Report of the JSC and Judiciary whereby various irregularities linked to the Finance Department were noted. The Audit Report is marked (WM-3).
21. The Respondents aver that based on the two audit reports the JSC issued the Applicant with a notice to show cause letter dated 23rd June 2014 informing the Claimant that he had failed to carry out his duties diligently and set out in detail the allegations of gross misconduct that had been leveled against him. The letter is marked WM-4.



Allegation of gross misconduct were set out in this letter and the Applicant was given 14 days within which he should show cause why severe punishment should not be administered without any reference to the criminal case pending in court.

22. The Respondents contend that the letter by the Chief Justice of 5th November 2014 was written on behalf of the JSC by the Chief Registrar of the Judiciary in accordance with the provision of Section 21 of the JSA read together with Article 172(1) of the *Constitution* which rests the JSC with the disciplinary mandate even all judicial staff.

They contend that the Applicant was informed of all the charges against him in accordance with Regulation 24 Part IV of the Third Schedule of the JSA and therefore the claim that the letter was fatally defective is baseless.

They also contend that the Applicant was not in any way prejudiced and submitted a response to the notice to show cause on 7th July, 2014 produced as WM-5.

23. The Respondents contend that they considered the allegations of gross misconduct and the response by the Applicant and the JSC resolved that disciplinary proceedings be instituted against the Claimant. The Claimant was notified of the same and informed that the disciplinary hearing would proceed on 27th August, 2014. The Respondents aver that on 21/7/2014 though the Applicant wrote a letter requesting for access to certain documents which he needed to retrieve from the IFMIS System – This is as per Exhibit WM-6.

Vide a letter dated 1-8-2014, though, the JSC informed the Claimant to specify the documents that he sought to be retrieved from the IFMIS as his authority to access and sign into the IFMIS had been deactivated. WM-7 is a true copy of the said letter. The Respondents aver that on 27th August 2014, the Claimant appeared before the Committee however the hearing was adjourned for lack of quorum.

24. The Respondents further aver that the Applicant was invited to appear before the Committee on 7th November 2014 which he did accompanied by his counsel, Tom Macharia. The disciplinary hearing then proceeded in accordance with the procedure set out in the JSA and was later adjourned to 12/11/2014 as one of the Commissioners was indisposed.

The verbatim reports of the Committee hearing on 7th and 12th November 2014 produced and marked WM-8 and WM-9 respectively.

The Respondents aver that the Applicants allegation that he was not accorded a fair hearing for lack of documents is baseless as the Applicant had confirmed receipt of the requested documents when he appeared before the Committee on 7th and 12th November 2014 as per page 5 of the verbatim report dated 7th November and pages 41-42 of the report of 12th November 2014.

Further that one Committee Member Rev. Samuel Kobia informed the Applicant that the disciplinary hearing would proceed by considering the documents produced before the Committee as per page 41 of the Hansard Report of 12th November 2014. The Respondents therefore aver that the disciplinary hearing was fair and just and that the Applicant was throughout the proceedings guided by the provisions of the *Constitution*, JSA 2011, the Code of Conduct for Judiciary Staff and the Rules of Natural Justice.

25. The Respondents contend that the Applicant has not established that some of the charges leveled against him were transactions that occurred before his appointment and that this defence was not raised before the Committee.



26. It is the Respondents position that they considered submissions of the Applicant before the Committee WM-10 and the evidence adduced and the Committee established that the allegations against the Applicant had been proven and recommended appropriate action by the JSC. The Respondents further depone that the disciplinary proceedings were not based on the interdiction nor premised on the criminal charges that were pending against the Applicant.

They aver that at the disciplinary hearing held on 7th November 2014, the Applicant emphasized that he would not make any presentations touching on the criminal case as the matter was before court and that he would limit himself to the letter dated 23rd June 2014 which communicated the charges on gross misconduct (pages 5-6 of the Hansard Report dated 7th November 2014). This same position was repeated in the proceedings of 12th June 2014 (page 45 of the Report).

27. It is the Respondent's position that the decision to dismiss the Claimant was a corporate decision of the JSC and the Respondent was guided by the provisions of the *Constitution*, JSA 2011 and the Code of Conduct for Judiciary staff, Rules of Natural Justice, the findings of the Special Infernal Audit Report dated 22nd January 2014 and the External Audit Report dated May 2014. It is therefore the Respondents prayer that the Applicant's Interim Orders should be discharged and the Respondent allowed to advertise and recruit for the post of Director of Finance.

28. The Respondents aver that the position of Director of Finance of the Judiciary is crucial on the overall administration and management of the Judiciary and it will not be in the public interest or for the proper administration of Judiciary for the position to remain vacant.

Issues for determination

29. Upon hearing submissions from both parties the issues for determination by this court is whether the applicant has fulfilled the requirements for grant of the Interim Orders sought. In determining this aspect, the court will proceed to examine the law against the facts presented in court. The law as established is that before the court can grant Interim Injunctive reliefs certain conditions must be fulfilled. Under Order 40 Rule 2:

“(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant of such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.”

30. Under Section 12 of the *Industrial Court Act* 2010, this court has power to grant injunctive relief as sought herein. In granting such a relief however, case law as established is a guide to this court. The celebrated case of *Giella v Cassman Brown & Co. Ltd* (1973) EA 358 laid down the principle for grant of injunctions as follows:

“(i) An Applicant must show a prima facie case with a probability of success.



- (ii) An injunction will not normally be granted unless the Applicant shall otherwise suffer irreparable injury
- (iii) When the court is in doubt, it will decide the application as the balance of convenience”.

31. This same principle has over and over again been restated in various authorities (see *Waitbaka v Industrial and Commercial Development Corporation* (2001) KLR 374 – Ringera J and *Suleiman v Amboseli Resort Ltd* (2004) 2 KLR 589. Both cases, the issue of damages as per the 2nd limb of *Giella v Cassman Brown* was considered and it was the finding of the court that (Ringera J) that:

“I would for these reasons alone accede to the Plaintiffs prayer for Interlocutory Injunction in respect of the two properties on the grounds that the 1st and 2nd Plaintiffs have a very strong prima facie case with a probability of success. I would not be deterred by any argument that the National Bank would compensate them in damages if it failed at the trial. In my opinion, no party should be allowed to rise rough shod on the statutory rights of another simply because it could pay damages”.

As to the 3rd limb of *Giella v Cassman Brown*, the courts have held (Ojwang J *supra*):

“the court in responding to prayer of Interlocutory Injunctive relief should always opt for the lower rather than the higher risk of injustice”.

32. In the case of the Applicant herein, his main submission is that he has a prima facie case with a probability of success. This is based on the submission that when the charges against him were preferred, the law was flouted. He submits that under Section 25 of the 3rd Schedule of the *ISA*, a letter of that nature should be signed by the Chief Justice and the Chief Registrar of the Judiciary.

Section 25 of the 3rd Schedule reads as follows:

“where the Chief Justice, after such inquiry as they may think fit to make consider it necessary to institute disciplinary proceedings against an officer on the ground of misconduct which if proved would in the Chief Justice’s opinion justify dismissal, he shall frame a charge or charges against the officer and shall forward a statement of the said charge or charges to the officer together with a brief statement of the allegations, in so far as they are not clear from the charges themselves, on which each charge is based, and shall invited the officer to state in writing should he so desire, before a day to be specified any grounds on which he relies to exculpate themselves”

33. The question then is whether a letter as signed by Chief Registrar of the Judiciary framing charges against the Applicant is fatally void making the entire disciplinary process annulity.

It is the Respondents submission on this issue that, the Chief Registrar of the Judiciary is the Secretary of the JSC and disciplinary issues are done by the JSC and not the Chief Justice. It is further the Respondents position that under Section 32 of the *ISA* the disciplinary process is spearheaded by the JSC and not the Chief Justice and even the Chief Registrar of the Judiciary acts on behalf of the JSC. They further contend that under Regulation 15, powers to prefer charges are not exclusively vested in the Chief Justice and the Chief Justice can delegate such powers to the Chief Registrar of the Judiciary.



34. Section 32 of the JSA provides for the procedure to be adopted in the appointment discipline and removal of judicial officers and staff. Under Section 32(1):

“For the purpose of appointment discipline and removal of judicial officers and staff, the Commission (emphasis is mine) shall constitute a committee or panel which shall be gender representative”.

The Chief Justice has already written a letter to the Applicant Appendix BAO-4 interdicting him as provided for under Section 16 of the JSA. The letter preferring charges against the Applicant is Appendix BAO -7 and is signed by the Chief Registrar of the judiciary but on the letter head of the JSC as an indicating that it is a decision of the JSC and written by the Chief Registrar of the Judiciary as the JSC’s Secretary.

35. Regulation 25 of the 3rd Schedule is a regulation made pursuant to Section 32 of the JSA. Under Section 32 of JSA as stated above the work of the disciplining staff is wholly rested in the Commission. The Commission donates these powers to the Chief Justice under regulation 25 to prefer charges against an errant staff.

Delegated power can also be exercised by the principle donor of the said power.

To argue that the Chief Registrar of the Judiciary acting for the Commission, the principle holder of the power cannot communicate the charges leveled against a staff member is to miss the point. This court finds that the fact that the letter informing the Applicant of charges of gross misconduct is not fatally defective for the reason that it is communicated by the Chief Registrar of the Judiciary and not the Chief Justice as submitted by the Applicant.

36. Another question is whether the Applicant was accorded a fair hearing and whether he was adequately informed of the charges against him. The Applicant contends that he was not given all the documentary evidence that was necessary to answer accusations leveled against him. He has pointed out that he sought to be supplied with certain documents but this was never done.

The Respondents on their part have submitted that indeed all the documents the Applicant wanted were given to him. They pointed out that as per the hansard proceedings of 7/11/2014 at page 97 of the proceedings Mr. Macharia addressing the disciplinary meetings confirmed that they were given documents in two batches and were ready to proceed.

They also reserved the right to raise the issue of documents if need arose. The proceedings were adjourned to 12/11/2014 and at page 50 of the proceedings Mr. Macharia also confirmed that they got the documents they wished to.

37. As to other documents if any which the Applicant contends he may have wished to have, but didn’t, leading to a miscarriage of justice, the details can only come out during the hearing of the main suit and not at this preliminary stage. The issue of documents needed by the Applicant is therefore an issue this court cannot make a determination on at this point without hearing all the parties.

38. The last issue is whether the Applicant was subjected to changes for misdeeds occurring before his appointment as Director of Finance. Again on this issue, a determination can only be made by this court upon hearing evidence from both parties.

39. It is therefore the finding of this court that the issues raised by the Applicant can only be adduced upon hearing all the parties and cannot be determined at this preliminary stage.



40. As to the relief's sought, the Applicant has not submitted that he stands to suffer irreparable damage if orders sought are not granted. However as held in the case of *Suleiman v Amboseli Resort Ltd* the court will have to decide this matter based on the lower rather than the higher risk of injustice.
41. The Applicant had sought orders that the letter dismissing him be quashed and his dismissal be reserved. On this prayer several authorities abound. In the case *Henry Morara Onwenyi v Ethics & Anti-Corruption Commission and 8 others* (2014 eKLR, Justice Onyango M in declining to order for a reinstatement rendered hereof thus:
- “The courts have had occasion to consider similar applications and in the case of *Joab Mehta Oudia v Coffee Development Board of Trustees* (2014) eKLR Justice Rika stated that” Reinstatement of an employee is ordinarily a substantive remedy to be given after the full hearing of the parties. Instead of seeking interim reinstatement, the Claimant should seek to be heard in full, utilizing the accelerated hearing procedure that is available in the Industrial Court”.
42. In the case of *Professor Gitile Naitule v University Council Multimeida University College* J. Rika also declined to grant orders sought and rendered himself thus:
- “To grant the orders sought would mean the court has entered the employment place exercising the management, prerogative on behalf of the employer. The court cannot stay termination of the employer’s decision”.
43. I do agree with my learned colleagues as rendered. It would not be appropriate for this court to reverse the dismissal without according the parties a full hearing. The Applicant still has a chance, if vindicated at the end of the hearing to be reinstated or reengaged as the case may be and even to seek to receive back all salaries unpaid still dismissal in addition to other remedies. I therefore decline to grant the order quashing the dismissal letter as sought.
44. The other remedy sought is to bar the Respondents from accepting any applications and subsequently recruiting and filling the position of Director of Finance of the Judiciary pending hearing of this suit and also criminal case No. 2052/2013. A similar prayer was made in the case of *Prof. Gitile (supra)*. In declining to grant the prayer the Hon. J. Rika stated:
- “There is no justification for interim reinstatement stay of termination or order barring the Respondent from proceeding to fill the position that was held by the Claimant”.
45. In the interim case, the Respondents have submitted that the position held by the position of Director of Finance plays a crucial role in the administration of the Judiciary and that it will not be in the interest of justice to leave a vacuum in the position.
- PJ. Mathews N. Nduma in the case of *Gladys Boss Shollei v JSC* (2013) eKLR had this to say in the face of a similar application:
- “Though it may be unnecessary to delve into the issue of balance e.g. convenience in view of the court’s finding above, it is opportune to note that the office of the Chief Registrar of the Judiciary play the role of head of Judiciary Administration and Accounting functions. It is in pubic interest that, that office which is critical to the functioning of the Judicial Arm of Government does not remain vacant. That is where the balance of convenience falls with regard to this matter.



46. In the current case, the same position of Director of Finance of the Judiciary is as crucial dealing with all the financial accounting functions of the Judiciary. It will not be in the best interest of the administration of justice to leave the position vacant. This is in my view tantamount to deciding this matter based on the lower than the higher risk of injustice. I therefore decline to grant the prayer staying the recruitment and filing up of the position of Director of Finance of the Judiciary.
47. The upshot of this application is that the Interim Orders are vacated. However for the ends of justice the prayer seeking to have the matter given a priority date for the substantive claim is granted. This will be granted based on the courts diary for the earliest opportunity.

Costs of this application in the cause.

READ IN OPEN COURT THIS 3RD DAY OF MARCH, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ambala for Applicant

Ms. Mugo holding brief for Issa for Respondent

