



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

**CAUSE NO. 24 OF 2015**

**KENYA PLANTATION & AGRICULTURAL**

**WORKERS UNION**

**CLAIMANT**

**V**

**FINLAYS HORTICULTURE KENYA LTD**

**RESPONDENT**

**RULING**

1. Richard Onwong'a Nyandago (Grievant) is a member of the Kenya Plantation & Agricultural Workers Union (Union) and an employee of Finlays Horticulture Kenya Ltd (Respondent). He also serves as a Chief Shop steward.
2. On 23 January 2015, the Respondent, through a letter of even date informed the Grievant that he was being suspended from duty effective 24 January 2015 to 1 February 2015 to *pave way for investigations* into allegations that he had held unauthorised meetings at the staff canteen during supper with some staff and incited the said staff against the management team.
3. The Grievant became apprehensive and he consulted the Union as a result of which the Union filed a Memorandum of Claim against the Respondent stating the issue in dispute as *victimisation of Mr. Richard Onwong'a Nyandago* and seeking

1. A declaration that the Respondent's action of suspending the grievant herein is unlawful, unfair as it is meant to intimidate employees from joining the Claimant union and participating in its affairs and the employees' representatives from representing employees.

2. Permanent injunction restraining the Respondent from continuing with disciplinary action commenced against the grievant by the Respondent herein.

3. A permanent injunction restraining the Respondent from continued victimisation of the grievant herein on account of his active participation in the Claimant Union matters.

4. Costs of the Cause.

4. Simultaneously with the Memorandum of Claim, the Union filed a motion under certificate of urgency seeking

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2. That this Honourable Court be pleased to halt and/or lift the suspension of Mr. Richard Onwong'a Nyandago and the entire disciplinary process planned to be undertaken against

him by the Respondent pending the hearing and determination of this application and/or cause.

3. That this Honourable Court be pleased to refer the parties herein to conciliation with regard to the suspension of Mr. Richard Onwong'a Nyandago.

5. On 3 February 2015, I certified the motion as urgent and directed that it be served for *inter partes* hearing on 4 February 2015.
6. On 4 February 2015, during the *inter partes* hearing, and to enable the Respondent file its response to the motion, I directed that the Grievant remain on suspension with full pay pending hearing on 18 February 2015.
7. In the event, the motion was taken on 18 February 2015.
8. The facts in this Cause are mainly common and they have been set out in the suspension letter.
9. The Court will therefore delve into the respective parties submissions and set out the facts only as may be germane for the determination of the instant motion.
10. For the Union, Mr. Muli submitted that the Grievant was apprehensive that he might not receive a fair hearing because in the recent past the Respondent had dismissed another shop steward under similar circumstances, and those whom the Grievant had allegedly held the *unauthorised meeting* with had not been suspended.
11. Mr. Muli also submitted that the Grievant was not opposed to any intended disciplinary process if necessary safeguards were put in place and towards this end, he posited that the Grievant should be accompanied by Union officials during any such process.
12. Mr. Muli made reference to ILO Convention No. 135 on Workers Representatives (ratified by Kenya on 9 April 1979); Article 41(1) & (2)(c) of the Constitution (right to fair labour practices and right to form, join or participate in the activities and programmes of a trade union; section 5(2) of the Employment Act (elimination of discrimination in employment) and section 12(3)(iii) of the Employment and Labour Relations Court Act (powers of Court).
13. Mr. Obura urged the Respondent's case. He started off by stating that the Union and the Respondent did not have a recognition agreement and which issue had been subject of previous Court proceedings.
14. On the merits of the motion, he submitted that the Grievant, like any other employee was bound by the Respondent's Rules and Regulations and therefore subject to its disciplinary processes.
15. Mr. Obura also submitted that pursuant to Clause 6.4 of the Respondent's Human Resources Policies and Procedures Manual, suspension pending further investigations was provided for and that it is within this framework that the Grievant was requested to explain under what circumstances he held a meeting on 19 January 2015 and 20 January 2015. The Grievant as a result recorded a statement on 23 January 2015, and was suspended, to report back on 2 February 2015.
16. On 31 January 2015, the Grievant sought permission for 2 days to attend to family matters but on 3 February 2015, he moved to Court to forestall any further proceedings flowing from the suspension.
17. According to Mr. Obura, the Grievant wanted to stop an established disciplinary process which was one of the fair labour practices guaranteed by Article 41 of the Constitution.
18. Mr. Obura further submitted that the order sought by the Union could not in law, be granted and that Court's should not intervene in an employer's administrative processes (disciplinary) except in exceptional circumstances, which had not been demonstrated in the present case.
19. Mr. Obura cited a host of decisions both domestic and from comparative jurisdictions including *Miguna Miguna v Permanent Secretary, Office of the Prime Minister & Ar* (2011) eKLR, *Muthusi & 2 Ors v Gathogo & 2 Ors* (1990) KLR 90, *Aviation & Allied Workers Union (K) v Kenya Airways Ltd*, Nairobi Cause No. 377 of 2012.
20. The main issues herein revolve around the nature of suspensions and the disciplinary process within the framework of right to fair labour practices and natural justice.

## **Suspension**

21. Suspension of an employee, within the employment relationship, generally under the common law

- must have a contractual basis. Without the contractual authority, unilateral suspension by the employer with or without pay would constitute breach of contract (see *McKenzie v Smith* (1976) IRLR 345.
22. The dicta in *Miguna Miguna v Permanent Secretary, Office of the Prime Minister* that the suspension of an employee for purposes of concluding an investigation relating to allegations that touch and/or concern the employee is therefore largely true, except that I would add that there must be express or statutory authority for such action.
23. In the instant case, there is (was) contractual authority for the Respondent to suspend its employee's on full pay pending investigations in cases of alleged breach of contract.

### **Disciplinary procedures and natural justice**

24. Natural justice has now become entrenched in the employment relationship where an employer is contemplating terminating the services of an employee. That is one of the essentials of the right to fair labour practices which has been given statutory underpinning in section 41 of the Employment Act, 2007.
25. Where there is contractually agreed disciplinary procedure, an employer is bound to comply with those procedures. A failure by an employer to observe its own disciplinary procedures may amount to repudiation of contract (*The Post Office v Strange* (1981) IRLR 515).
26. Where an employer is contemplating taking a decision to terminate the services of an employee, the statute has provided procedural safeguards. An employee is thus protected from procedurally unfair termination of service.
27. This means that generally the employee will suffer the legal injury or actionable wrong after the employer has made the decision to terminate the employment in disregard of the prerequisite procedures or without valid and fair reasons.
28. In case an employer does not comply with these statutory procedural fairness safeguards, the statute has provided for very robust remedies, which remedies were not available under the common law. Such remedies include reinstatement.
29. An employer who fails to comply with these procedural fairness safeguards therefore does so at the risk of substantial damages/compensation or having the employee reinstated.
30. The right to the protection accrues after the employer has made a decision which is not in compliance. In the present case, the Grievant through the Union is seeking the Court's intervention before it is known whether the employer will comply or not comply.
31. But it is not clear within our statutory framework whether the right to a hearing is a prerequisite before suspension. It is in fact open to debate whether such right may be founded on the constitutional right to fair labour practices, because it is not founded in the Statute like in South Africa.
32. The Court is both a Court of law and equity. Apart from law and equity, the Constitution has added another consideration which is not fully appreciated in Kenya, *fairness*.
33. Considerations of fairness give the Court extremely wide latitude. But while giving due weight to the constitutional right to fair labour practices in the employment relationship, the Court must be alive to the reality that the employment relationship requires personal contact between employer and employee innumerable times and this of necessity requires mutual trust and confidence. In other words, specific performance must be granted with abundant caution.

### **Can Court Interfere?**

34. The Employment and Labour Relations Court has in the recent past considered intervening in disciplinary processes by employers. I will discuss just a couple of decisions before making my determination.
35. In *Rebecca Ann Maina & 2 Ors v Jomo Kenyatta University of Agriculture and Technology* (2014) eKLR, Ndolo J held that the Court should not take over and exercise managerial prerogative at the working place unless the process was marred with irregularities, but Court could not to stop the process, but only put things right.
36. In *Joseph Mutura Mberia & Ar v Council of Jomo Kenyatta University of Agriculture and Technology (JKUAT)* (2013) eKLR, Mbaru J held that the Court has jurisdiction to interdict any

- unfair conduct including disciplinary action but such intervention should be in compelling or exceptional cases.
37. Among the factors Mbaru J outlined as relevant was whether failure to intervene would lead to grave injustice or whether justice could be attained through other means.
  38. According to Mbaru J, in intervening in the disciplinary process, the Court would not be usurping or participating in an employer's administrative disciplinary process but exercising its constitutional and statutory powers.
  39. In *Aviation & Allied Workers Union v Kenya Airways Ltd* (2012) eKLR, Ongaya J held that the Court could intervene in an employer's disciplinary process and such intervention did not amount to usurping an employer's right to take disciplinary action against an employee, but warned that the Court must proceed with caution/reluctantly.
  40. The decision in *Booyesen v The Minister of Safety and Security & Or* (2011) 1 BLLR 83 (LAC), that the Court's intervention to interdict disciplinary action before it is concluded should be exercised in exceptional circumstances, is mirrored in the approach of the Kenyan Courts.
  41. From the authorities, it is clear that the Court has the jurisdiction to intervene in a disciplinary process, but such intervention must be in very exceptional cases where compelling reasons have been given to justify the Court's intervention. The compelling reasons would include the fact that grave injustice would be occasioned to the employee and that the employee had no alternative means of attaining justice or remedies.
  42. In the instant case, the Court finds that the Respondent had a contractual authority to suspend the Grievant, and it did suspend the Grievant pending establishment of the facts upon which a disciplinary process could be commenced against him.
  43. The Court also finds that the Union has not demonstrated that any grave injustice would be occasioned to the Grievant were the process commenced by the Respondent continue.
  44. The Court further finds that the Union and the Grievant do have alternative remedies and means of redressing any legal injury or actionable wrong which may be occasioned during any disciplinary process against the Grievant and such alternatives include reinstatement, if there is unfair termination of employment.
  45. Both the Employment Act, 2007 and the Collective Bargaining Agreement between the Union and the Respondent have safeguards during the disciplinary process and the Grievant should cooperate with the Respondent in ensuring the process is finalised.
  46. For the above reasons, the Court dismisses the motion dated 3 February 2015 with no order as to costs.

**Delivered, dated and signed in Nakuru on this 6<sup>th</sup> day of March 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Union                    Mr. Muli instructed by Kenya Plantation & Agricultural Workers Union

For Respondent            Mr. Obura instructed by Obura Mbeche & Co. Advocates