



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 677 OF 2015

ISAAC MUKONYICLAIMANT

VERSUS

NAIROBI CITY COUNTY RESPONDENT

RULING

1. On 15th May 2015, the Claimant filed his claim and application seeking for urgent orders that;
 1. *Spent.*
 2. *The dismissal of the Claimant on 1.7.2014 be and hereby suspended pending the hearing and final determination of the claim.*
 3. *The Claimant be and is reinstated to his position with full benefits forthwith.*
 4. *Costs of the application be provided for.*
2. The application is based on the annexed affidavit of the Claimant and on the grounds that the his fundamental rights have been grossly breached when the Respondent failed to follow due process in dismissing him and being the sole bread winner of his family and he cannot support them. The entity that dismissed the Claimant is not known in law and there time allowed for reinstatement has not lapsed.
3. In his affidavit, the Claimant states that on 26th march 2015 he received a dismissal letter from the Chief Officer for Public Service Management of the respondent. This was abrupt and sudden which has caused him tremendous financial embarrassment as he cannot meet his basic financial obligations and those of his family. It is not possible to have the case heard soon and thus the current application to seek urgent orders as he is the sole bread winner in his family of six (6) with children who go to school and require fees; rent is due and food is needed for the family. The Court should thus suspend and stay the dismissal pending the hearing and the determination of the case and that he should continue drawing his salaries until the matter herein is concluded. His salary was Kshs.49, 625.00 per month.
4. In reply the Respondent filed their Grounds of Opposition and a Replying Affidavit sworn by Karisa Iha the Director, legal services department of the Nairobi City County as the Respondent named herein. Mr Iha avers that the orders sought by the Claimant are final in nature and should not be granted at this stage; the application is not based on any known law and should be dismissed. To seek for reinstatement back to work and with due salaries is tantamount to obstructing justice noting the Claimant was dismissed after due proce4ss which if reversed will result in curtailing and preventing the Respondent from effectively discharging its duties to the public.
5. The respondent also states that the Claimant has sued the wrong party, the Nairobi City County in clear contravention of the law and statutory provisions as clearly enumerated and provided in the County

Government Act No. 17 of 2012 and in the Constitution. Article 235 of the Constitution makes provision that a County Government is responsible within a framework of uniform norms and standards prescribed by an Act of parliament. Pursuant to the Constitution, the County Governments Act was passed that establish the County Public Service Board. Section 57 of the County Government Act establish the County Public Board in each County and being the entity that can be sued and sue. The claim thus contravenes the express provisions of section 57 of the County Governments Act which create the body and or entity to be sued. The Respondent as Nairobi City County is non-suited and ought to be struck out from these proceedings. The County Public service Board as established has the legal mandate to discipline any officer holder under its mandate. Upon a decision made by the County Service Board, any dissatisfied party has right of appeal before the Public Service Commission.

6. The application by the Claimant has not met the threshold for the grant of the orders sought and should be grated. At the hearing, the Respondent shall raise a preliminary objection. The dismissal of the Claimant was effected after a complaint had been lodged against him and following due process he was found culpable and thus dismissed. On 20th March 2015 the County Secretary and head of public service to the County chief officer recommended the dismissal of the Claimant and this was done on 26th March 2015. A letter of dismissal was issued advising the Claimant to lodge an appeal within 42 days which he has failed to do. The application is thus bad in law, defective and misconceived and should be dismissed.

Submissions

7. Both parties filed their written submissions. The Claimant filed on 8th June 1015 and the Respondent on 23rd June 2015.

8. The Claimant submitted that the Claimant was dismissed on 26th March 2014 vide letter issued by the Nairobi City County and signed by the Chief Officer – Public Service management. Section 12 of the industrial Court give the Court jurisdiction to make various orders which include reinstatement. In this case the Claimant should be reinstatement back to his position and his salaries restored pending the hearing of this case.

9. On the Respondent on their part submitted that the facts leading to the claimant's dismissal are that complaints were lodged against him, they were investigated and a show cause issued to him and upon hearing, he was found culpable and hence the dismissal due to gross misconduct. The dismissal was approved by the County Executive Committee and a letter dared 26th March 2015 was issued tot eh claimant.

10. The Respondent also submitted that the Claimant has not sued the right party and his suit should be dismissed with costs. Section 57 of the County Governments Act is clear of the corporate nature of the County Public Service Board in each County. The claim herein is against the Nairobi City County which is non-suited for purposes of the suit herein. The responsible entity here is the County Public Service Board as held in **Paul Gichuke Kibathi versus National irrigation Board [2002] eKLR**.

11. The Respondent also submitted that the Claimant moved the Court prematurely contrary to section 77 of the County Government Act as any challenge to the decisions of the County Public Service is an appeal to the Public Service commission. . Where there is a procedure set in law that alternative remedy should be followed unless in exceptional circumstances.

12. Section 59(1) of the County Governments Act, grant the Public Service board various function that include the discipline of its officers and it decisions are rightly communicated by the Chief officer-public service management who is a member of the board. The Claimant is not entitled to the orders sought as he was dismissed following due process and he has not appealed to the relevant body. The application should be dismissed.

Determination

13. As outlined above, the gist of the application by the Claimant is seeking for orders that his dismissal on 1st July 2014 be suspended pending the hearing and final determination of the claim and that he should be reinstated back to his office and his salaries paid. The grounds in support of these orders are that he requires his job and the salaries to support self and family and that he was dismissed by an entity not known in law and the orders sought can be granted by the court. In response, the respondents state that the Claimant was lawfully dismissed following due process after a complaint had been lodged about him, the entity that dismissed him is the entity established under the County Government Act at section 57 the **County Public Service Board as Nairobi City County** is an entity non-suited here and should be struck out. That County Governments are established under the Constitution and Parliament has enacted a law setting the mandate of the County Public Service Boards as the entity to regulate relations within the County Government as under article 235(1) of the Constitution. The Claimant was therefore lawfully dismissed by the County Public Service Board on 20th March 2015. That the orders sought in the application cannot be granted as in their nature they are final.

14. Section 12 of the industrial Court Act give the Court jurisdiction to make orders of reinstatement subject to conditions as the Court deems fit to impose under circumstances contemplated under written law. The Court also has discretion to grant any other appropriate relief deemed fit based on the circumstances of each case. In this case what is sought is a reinstatement back to work and for the salary due. Such are orders the Court ordinarily makes upon hearing all the facts, evidence and analysis of the same at the final stage in a judgement. But this is not exclusive, such orders can be made in the interim based on the facts of each case and where the Court finds the same appropriate upon application and a show of good cause.

15. I also agree with the submissions of the Respondent to the extent that the Constitution at Article 253 set out the role of County Governments and direct Parliament to create a legal framework setting the norms and standards to operationalise County Governments. The County Government Act is therefore enacted for this purpose and establishes the County Public Service Boards as the legal entity to establish, appoint and discipline its officers. This is clearly set out under section 57 of the County Governments Act.

16. Under this framework, on 26th March 2015, Nairobi City County, wrote to the Claimant thus;

...

Dismissal

I wish to convey the decision of the Nairobi City County that you be dismissed from the service with effect from 1st July 2015 on account of gross misconduct.

...

Chief Officer – Public Service Management.

17. This letter is issued under the letter-head of the respondent, Nairobi City County.

18. On 12 May 2015, the Respondent entered appearance through their advocates Ms Kithi & Company Advocates and noted that such appearance was for NAIROBI CITY COUNTY, the Respondent herein. In response to the application, Karisa Iha in his Replying Affidavit at paragraph 8 avers;

That the Claimant has in fact sued the wrong party, the Nairobi City County in clear contravention of the law and statutory provisions as clearly enumerated and provided in the County Governments Act No. 17 of 2012 in the Constitution.

18. The Respondent further went on to outline the provisions of section 57 of the County Government Act and the powers granted to the County Government. That the law establishes a statutory body known

as the County Public Service Board to establish offices, appoint officers and discipline such officers. Indeed, Mr Iha at his paragraph 12 avers;

... The Claimant contravened the express provisions of section 57 of the County Government Act which has clearly provided for the body which can be sued in the circumstances and as such, the Nairobi City County in its entirety is non-suited and ought to be struck out from these proceedings.

19. It is therefore apparent that the decision to dismiss the Claimant was effected by the Respondent herein, Nairobi City County, such an entity has been challenged by the Respondent as being non-suited as the Respondent herein and as such the decision made by *Nairobi City County*, in law ought to have been made or was supposed to have been made by the County Public Service Board, for the County Government of Nairobi County. Indeed this is the ground under which the application by the Claimant is based upon, that his termination was made by a *none entity in law*. This is affirmed by Mr Iha in his Replying Affidavit at paragraph 18 where he avers;

That the claimant's dismissal was as a result of his own doing following a complaint lodged by Petlin Enterprises to the Governor, Nairobi City County received on 18/6/14 wherein the Claimant was accused of swindling the said Petlin Enterprises money in the pretext of helping to obtain licenses on its behalf.

20. in this case therefore, Is there any known entity in law such as the respondent, Nairobi City County? Did such an entity have the force of law to dismiss the Claimant as it did on 20th March 2015 and effective 1st July 2014? Indeed the respondents herein have admitted that NAIROBI CITY COUNTY is non-suited in this suit as the respondent. The subject decision made against the Claimant was made by the County Public Service Board as the legal entity for the County Government.

21. Article 6(1) of the Constitution sets the conceptual framework of devolution in Kenya by dividing the country into *Counties* that are specified in the First Schedule to the Constitution. Under the first Schedule, the 47th County is Nairobi. Hence my reading of article 6 together with article 235, both are complimentary and lack any ambiguity. What is established for purposes and given legal force through an Act of Parliament are *Counties* and not *Cities*. Where the County of Nairobi, for purposes of history or fancy opt to call itself *Nairobi City County*, in order for its decisions made to have the legal force subject of enforcement must be made by the legal entity, the County Public Service Board, of the County of Nairobi and not otherwise. To do so is to defeat the very essence of the Constitution and statutory provisions that establish the very entity called the *County*. I find the continued use and reference to decisions by the County Public Service Board as having been made by the *Nairobi City County* is legally misleading and where indeed such decisions as made herein affect the fundamental rights of an individual such as the claimant, such a decision is a nullity and lack the legal force intended. For the County Public Service Board to dismiss the Claimant under the name and style of *Nairobi City County* and not under its own legal name is a fundamental breach of his contract of employment contrary to fair labour practices as under article 41 of the Constitution. Such a violation and breach of a fundamental right is a matter that this Court has the power and jurisdiction to arbitrate and direct as appropriate.

22. I therefore find that in the circumstances of the case, based on the admission by the Respondent that the entity sued in the claim in a non-suited as this ought to have been the County Public Service Board, the dismissal therefore effected against the Claimant was a nullity *ab initio*. To hold such a decision against the Claimant so as to await the hearing of his claim does not serve any useful purpose known in law or in the practice of fair labour relations as under article 41 of the Constitution. Such a decision must be vacated forthwith.

23. I find that nothing prevented the entity supposed to have dismissed the claimant, being County Public Service Board to convey its decision to him as appropriate. To base the decision of the County Public Service Board, as having been made under the entity of the respondent, now admitted as non-suited herein, should not be visited against the claimant.

24. The ruling thus, affects the entire suit. To revisit the suit over a decision found a nullity is a miscarriage of justice. Where the Claimant was removed from his place of work by an entity non-suited as herein, such removal now nullified reinstates him back to the position he ought to have held and continued to hold as of 1st July 2014. With the ruling, the suit serves no purpose. Its subject matter is disposed.

I therefore allow the application dated 14th May 2015 and direct as follows;

- a. The letter of dismissal issued to the Claimant and dated 20th March 2015 is nullified; has no legal force and shall have no further reference;**
- b. The Claimant is reinstated back to his position held as at 30th June 2014 without loss of salary, benefits, allowances or such other entitlement due to his position on the same date;**
- c. The Claimant is to immediately resume his duties as at 0800 hours on 1st July 2015 by reporting to the County Chief Officer – Public Service Management, Nairobi County for allocation of duty, station or direction as appropriate;**
- d. The County Chief Officer – Public Service Management, Nairobi County shall compute all dues as under (b) above within the next seven (7) days all payable to the claimant;**
- e. Noting the nascent democracy and challenges facing devolved governments as they take shape and appreciate the fundamental rights due to employees as under article 41 of the Constitution, I shall not order the payment of costs. Each party shall therefore meet their own costs herein; and**
- f. With the above orders and directions, the suit herein is marked as settled.**

Delivered in open Court dated and signed at Nairobi on this 30th day of June 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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