



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.34 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 25th June, 2015)

PIUS MUTUKU MUEKE PETITIONERS

VERSUS

**MANAGING DIRECTOR, KENYA BROADCASTING CORPORATION1ST
RESPONDENT**

KENYA BROADCASTING CORPORATION2ND RESPONDENT

RULING

1. The application before court is the one dated 10/4/2015 brought under Certificate of Urgency by the Petitioner Applicant herein and through a Notice of Motion brought under Articles 22 (1) (4), 47, 50, 162 (2) and 236 of the Constitution and all other enabling provisions of the law.
2. The Applicant Petitioner seeks orders that:
 1. ***THAT the application be certified as urgent, heard in the first instance and service thereof be dispensed with.***
 2. ***THAT pending the interpartes hearing and determination of this application a conservatory order be and is hereby issued prohibiting the Respondents whether by themselves or through their agents, officers, servants, employees and/or whomsoever from suspending, sacking, terminating the Petitioner from employment and/or in any way implementing the impugned recommendation/order of the 1st Respondent letter dated 19th day of May 2014 and the 16th day of January 2015, and in particular as relates to the suspension and sacking of the Petitioner.***
 3. ***THAT pending the inter-partes hearing and determination of this application an order be and is hereby issued directing the Respondents to pay to the Petitioner the withheld salary as from 19th day of May 2014 to date, and to forthwith reinstate the Petitioner's salary and other benefits entitled to the Petitioner as an employee of the 2nd Respondent.***
 4. ***THAT pending the hearing and determination of this petition, a conservatory order be and is hereby issued prohibiting the Respondents whether by themselves or through their agents,***

officers, servants, employees and/or whomsoever from suspending, sacking, terminating the impugned order/ recommendation contained in the 1st Respondents letter dated the 19th day of May 2014 and the 16th day of January 2015.

5. *THAT pending the hearing and the determination of this petition an order be and is hereby issued directing the Respondents to pay to the Petitioner the withheld salary as from 19th day of May 2014 to date, and to forthwith reinstate the Petitioner's salary and other benefits entitled to the Petitioner as an employee of the 2nd Respondent.*
 6. *THAT any other order and/or directions as this Honourable Court deems fit just to grant.*
 7. *THAT the costs of this application be provided for.*
3. The application is supported by the annexed affidavit of Pius Mutuku herein and are based on the following grounds.
1. *That the Petitioner was an employee of the 2nd Respondent at all the material time for the last 35 years.*
 2. *That the Respondents have not laid any valid allegations against the Petitioner.*
 3. *Note worthy, the Petitioner has served the Respondent faithfully and without complaint from the outset of his from duty to date. It is therefore with profound shock and bad faith that on the 19th day of May 2014 the Respondent suspended the Petitioner from employment and has continued to do so to date.*
 4. *That the Petitioner was never accorded a fair hearing before the said suspension was made nor was the due process followed, which would include proper notice of any indictments against him as stipulated in the 2nd Respondent's Code of Regulations, the employment Act and the Constitution.*
 5. *Moreover, the Petitioner contends that the Respondents have frustrated his substantive and procedural legitimate expectations that he would be accorded by them a fair and legal process punctuated by the right to due notice, the right to be heard and to be represented as well as reasons for decision and/or recommendation taken against him and purported to have "established that the Petitioner has a case to answer" hence the Petitioner's continued suspension to date.*
 6. *The Petitioner contends that he was never accorded a fair hearing before the recommendation to suspend him from duty was made nor was the due process followed, which would include proper notice of the indictments against him as stipulated in the 2nd Respondent's Code of Regulation, the Employment Act and the Constitution of Kenya.*
 7. *In the circumstances, the Petitioner contends that the conduct of the Respondents herein smack of impropriety, arbitrariness, unreasonableness, irrationality, oppression and the same is callous, ultra vires, illegal, manifestly unjust and in flagrant breach of the rules of natural justice.*
 8. *In the same wavelength, the Petitioner contends that ostensibly he is a victim of intrigues and corporate political lynching against which, as an employee, he is insulated and protected by the Constitution and the applicable laws.*
 9. *The Petitioner avers that since his illegal suspension on the 19th day of May 2014 to date the Respondents have continued to unreasonably and unlawfully withhold his salary and other benefits entitle him thereby causing him untold suffering and humiliation and in total*

disregard of the long service the Petitioner has given to the Respondent for 35 years.

10. *The Petitioner further avers that despite his appeal to the Respondent that his salary and other benefits entitled to him be reinstated pending the “purported investigations” the Petitioner’s request was again arbitrarily, unreasonably and irrationally turned down.*
11. *To that end, the Petitioner contends that the said suspension by the Respondents and their conduct herein offends the Constitution and infringes his constitutional right to a fair administrative process and the due process as stipulated under Articles 47 and 236 of the Constitution as well as the due process envisaged under the Employment Act and the 2nd Respondent’s Code of Regulations.*
12. *In view of the foregoing, unless this Honourable Court potently intervenes to protect the Petitioner against this serious travesty of justice, the Petitioner who has worked for the Respondent for the last 35 years will be sacked under very dishonourable and disdainful circumstances in contravention of the Constitution, Legislation and the 1st Respondents Code of Regulations.*
13. *In the premises, it is only fair and in the interest of justice that the orders sought herein be granted.*

4. The Applicant has submitted before this court that the claimant has been an employee of Respondent for 35 years. The Respondent suspended the Petitioner from employment on 19/5/2014 and have continued to do so to date and also withheld Petitioner’s salaries and all other benefits he is entitled to to date. This suspension is what the Petitioner is challenging on the grounds that he was not given a fair hearing before the decision was made.
5. It is the Petitioner Applicant’s position that the decision to suspend him having been made without being accorded a hearing, the Respondent acted without due process which would include proper notice of any indictment against him as stipulated in the Employment Act and in Respondents Code of Regulations.
6. In the circumstances, the Applicant has submitted that his suspension should be quashed as being arbitrary and unreasonable.
7. The Applicant has submitted further that the suspension was based on an audit report which was conducted which the Petitioner was not aware of and was never questioned about. Furthermore, the Applicant avers that Regulation 8 (c) of the Respondents code of Conduct also requires that all disciplinary cases shall be dealt with expeditiously and within a period of not more than 6 months.

However the Applicant contends that it is more than a year and no decision has been made by the Respondent. That Regulation 8 (iv) also deal with period of disciplinary issues and provide that the period cannot exceed 1 year which period has since lapsed.

8. The Respondents opposed this application. They filed their replying affidavit to this application on 29/4/2015. The affidavit was sworn by one Daniel Okoth an Assistant Human Resource Officer of the 2nd Respondent.
9. It is the Respondents position that there is no proper suit in court as the law has not been complied with. They refer court to provisions of Section 46 of KBC Act paragraph A which provide that a Statutory Notice must be issued before commencing action against the Corporation. They aver that no written notice was served upon the Corporation.
10. They therefore ask court to strike out the Petition and this Motion. They aver that the application is premature and should be dismissed. They also submit that the prayers sought in the application are those sought in the petition.

11. On issuance of notice, the Petitioners have submitted that the same was issued on 19/3/2015 and is annexed in their further affidavit.
12. I have considered the submissions of both parties and issues for consideration by this court are as follows:
1. **Whether the application is properly before court as provided for under Section 46 of KBC Act.**
 2. **Whether the Applicants rights were breached before his suspension.**
 3. **Whether the Claimant's prayers can be granted.**
13. On 1st issue, the Respondent submitted that the application and petition should be struck out as Section 46 of the KBC was not followed. Section 46 of Chapter 221 Laws of Kenya provides that a Statutory Notice to commence suit at the expiry of 30 days from the date of service of the Statutory Notice has to be given before instituting a suit.
14. The Applicants have submitted that they issued this notice on 19/3/2015 and they have annexed notice to their further affidavit filed in court on 26/5/2015. The notice issued however was issued on 19/3/2015 and the action commenced on 13/4/2015 within a period of 24 days which is less than the 30 days mandatory period provided under Section 46 of Chapter 221.
15. The question then is whether failure to give the requisite notice as required under the law renders these proceedings annulity?. The answer to this is found in case law determined on this matter.

In High Court Civil Case No. 504/2008, **Kenya Bus Service Limited & Another vs Minister for Transport and 2 others** – Hon. Majanja J. considered this matter wherein Section 13(A) of the Government Proceedings Act (Chapter 50 Laws of Kenya) and Section 3(1) of the Public Authorities Limitation Act (Chapter 39 Laws of Kenya) was in issue. Section 13 A (1) of Chapter 50 provides that:

“No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to these proceedings.”

J. Majanja held that this provision violates the provisions of Article 48 of the Constitution on access to justice.

I do find that this determination of my brother is sound doctrine and I agree with that position. Coupled with this, is Article 159(2) (d) of the Constitution of Kenya 2010 which requires the court's to administer justice without undue regard to procedural technicalities.

16. I therefore find that the failure to give the 30 days Statutory Notice does not render the case a nonstarter as the Respondent was aware of the case, the Applicant having written to them complaining of the way he had been treated. In any case the Respondent still have a chance to answer to the case and will not be condemned unheard.
17. The 2nd issue is whether Applicant's rights were breached before he was suspended from duty.

Under the Respondents Disciplinary Regulation – Regulation K8:

“the establishment of the quality on innocence of the accused employee shall as far as possible be done orally where there is reason to believe that an offence has been committed, the Manager HRM shall draw up or cause to be drawn in broad terms a statement or charge of the importation of misconduct or misbehavior. The statement shall be forwarded to the employee under inquiry and he shall be required within forty eight (48) hours to make a written statement of defence”

“K8 (iv) All disciplinary cases shall be dispensed with within a period of six (6) months except in circumstances where more time may be required for investigations but the period should not exceed an aggregate period of one year...”

18. From the above provisions, it is clear that the process should not exceed 1 year even if the issues are very serious. In case of the Claimant this process began on 19/5/2014 when the Petitioner was suspended and to date this process is not yet over – over a year down the line.

19. On the face of it, this process is flawed and the Respondents have breached their own regulations.

20. In the process, I allow the application, I set aside the orders of suspension against the Applicant and I direct he be reinstated forthwith in his position and be paid all outstanding salaries and allowances from the time of suspension to date and for Respondent to continue paying his salaries when due till this petition is heard and determined.

Read in open Court this 25th day of June, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Musugu for Claimant Applicant – Present

No appearance for Respondent