



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2 OF 2015

PATRICK LUMUMBA.....CLAIMANT/APPLICANT

VERSUS

BOARD OF MANAGEMENT KIAMBU

INSTITUTE OF SCIENCE & TECHNOLOGY.....RESPONDENT

TEACHERS SERVICE COMMISSION.....INTERESTED PARTY

RULING

1. The Claimant/Applicant filed a Notice of Motion application dated 31st December 2014 seeking a temporary stay of interdiction of the Claimant by the Respondent and the Interested Party and that the Respondent do furnish minutes of the two alleged disciplinary meetings held on 20th November and 15th December 2014 respectively. The application was premised on the grounds on the face of it as well as the Claimant's affidavit sworn on 31st December 2014 in support of the motion. The Claimant deposed that he was subject to disciplinary action by the Interested Party and that the Respondent did not conduct any investigations, he was not informed of the nature of allegations against him and that the accuser in his case sat as a judge in the board meeting. He deposed that the Respondent summoned him to an Executive Board of Management which consisted of 5 members as opposed to the expected full board consisting of 10 members. He deposed that the 5 members were not properly constituted as representatives of the Interested Party as the agent for the Interested Party is the full board and not a part thereof. He deposed that he had been advised by his counsel that the decision to interdict him was illegal and unprocedural and that it was in conflict with grounds under the TSC Code of Regulations and thus unwarranted.
2. The Interested Party filed a Replying Affidavit on 9th February 2015 sworn by Mary Rotich the Senior Deputy Director in charge of Post Primary Section at TSC. She deposed that the Claimant was alleged to have engaged in unprofessional conduct by failing to submit students' marks for stage examinations, failed to attend a scheduled staff meeting, negligence of duty by failing to submit course outlines schemes of work and failing to conduct teaching as required. She deposed that the Respondent gave the Claimant opportunity to respond to these allegations and the Claimant replied through letters he wrote in reply to the letters by the Respondent's principal. She deposed that the Claimant was aware of the allegations against him and was informed of the reason for his interdiction. She deposed that the Claimant was invited to appear before the Respondent's Board to answer to the allegations against him. He appeared and was given an opportunity to make presentations in his defence. The deliberations of the Board resolved that the

Claimant be interdicted to pave way for a disciplinary hearing by the Interested Party. Consequently the Claimant was issued with the letter of interdiction dated 23rd December 2014 asking him to show cause. She deposed that the board meeting on 20th November 2014 was not constituted as a disciplinary panel and it sat merely in an attempt to administratively resolve the concerns relating to staff and students indiscipline including the Claimant's conduct at work and the Claimant's case could not be conclusively resolved hence the escalation of the disciplinary case to the full Board as mandated by law. She deposed that the full Board interdicted the Claimant and that the Claimant was fully informed of the allegations against him and he responded in writing, his response considered during the Board meeting, he appeared in person before the Board's disciplinary panel and heard the accusations against him and had opportunity to rebut the allegations against him. She deposed that the Claimant had opportunity to be heard, the evidence adduced was considered before the decision to interdict him. She confirmed that upon receipt of the order against the interdiction the Interested Party had suspended further disciplinary process against the Claimant in compliance with the Court order. She deposed that the Principal of the Respondent sat in the Board as secretary to the Board and not as the Respondent's principal as by law the principal is the an ex-officio member of the Board. She deposed that the Claimant was not being truthful in asserting that he has never been cited for any professional misconduct in his entire career life and yet while a teacher at St. Teresa's Boys' Secondary School he had been cited for negligence of duty.

3. The Respondent it would appear did not file any Replying Affidavit or any pleadings in response to the Claimant's application.
4. The parties proposed to have the application determined through documents in terms of Rule 21 of the Industrial Court (Procedure) Rules 2010. The Claimant/Applicant filed his submissions on 13th April 2015. In his submissions he submitted that the Teacher's Service Commission Act bestows upon the Respondent the mandate and power to take any form of disciplinary proceedings against the employees of the Teacher's Service Commission and that the Respondent can only undertake this process as an agent of the Interested Party. The Claimant submitted that the Respondent did not undertake the disciplinary process as required under the law and that there was no adherence to the Code of the TSC. The Claimant submitted that the interdiction was not only unprocedural and also illegal and the punishment meted out to the Claimant was unnecessary. He relied on the case of **Frederick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 Others [2014] eKLR**. He thus sought that the Court grants the orders he sought in the application.
5. The Interested Party in its submissions filed on 23rd April 2013 submitted that it was vested with powers to institute disciplinary proceedings/ processes against teachers in its service either directly or through an authorised agent. The Interested Party submitted that the Respondent, which acts as the agent of the Interested Party at institutional level, was informed of the breach of the Code and invited the Claimant to appear before the Respondent to answer to allegations against him. After hearing the Claimant it was resolved that the Claimant had a case to answer and he was interdicted paving way for the full disciplinary hearing by the Interested Party. The Interested Party distilled the issue for determination to be whether the Claimant/Applicant had satisfied the conditions for the grant of interlocutory orders – the temporary stay of interdiction. The Interested Party relied on the Supreme Court decision on the issue in the case of **Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others Supreme Court No. 2 of 2014** (unreported), **Gladys Boss Shollei v Judicial Service Commission [2013] eKLR** which cited the cases of **Mary Liviza & Okoth Mondo v Attorney General of Kenya and Secretary General of EAC Application No. 3 of 2010 EALS Law Digest 2005-2011 P.I.**, **Sergeant v Paul (1949) 16 E.A.C.A 63**, **Noor Mohamed Hanmohamed v Kassamali Virji Madhani (1953) 20 E.A.C.A 8** and **Garden Cottage Food Limited v Milk Marketing Board [1984] AC 130**. The Interested Party submitted that the decisions in the cases were premised on principles enunciated in the celebrated case of **Giella v Cassman Brown & Co. Ltd (1973) EA 358** and **E.A Industries v Trufoods (1972) EA 420**. The Interested Party submitted that the Claimant had not established a *prima facie* case with a probability of success as he had been interdicted after being given notification of the allegations against him, given opportunity to respond to the allegations (which he did) and invited to appear

before the Respondent and having failed to give any reasonable explanation was given a show cause letter and interdicted pending the disciplinary process by the Interested Party. The Interested Party submitted that the Claimant has not demonstrated that the refusal to grant the orders he seeks would lead to irreparable injury which would not be adequately compensated by an award of damages and that finally, the balance of convenience did not tilt in his favour. The Interested Party submitted that it had met the threshold for the interdict. The Interested Party thus sought the Claimant's application be dismissed with costs as it was devoid of merit.

6. The Claimant/Applicant seeks a temporary injunction against the interdict arising from allegations of misconduct made against him. In the case of **Giella v Cassman Brown** the principles of grant of injunction are well set out. These are the subject of many a court decision and have found restatement here and in the Courts above.
7. Grant of injunctive relief follows the pattern in the oft-cited case of **Giella v Cassman Brown** (supra). The test laid out in the **Giella v. Cassman Brown** case is threefold. It was restating the principles in **E.A Industries v Trufoods** (supra), where the learned judge Spry V-P stated as follows:

“There is, I think, no real difference of opinion as to the law regarding interlocutory injunctions, although it may be expressed in different ways. A plaintiff has to show a prima facie case with a probability of success, and if the court is in doubt it will decide the application on the balance of convenience. An interlocutory injunction will not normally be granted unless the applicant for it might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages.” (emphasis mine)

8. The interdict was meted out after the allegations of misconduct made in relation to the Claimant/Applicant. The allegations were responded to in letters written by the Claimant. The real objection is in the manner the Respondent reached a decision to interdict and cause the Claimant to face a disciplinary process under the Interested Party's Code. The interdict must fall within the purview of the test laid out by Mbaru J. in the case of **Amolo v Principal Namanga Mixed Day Secondary School & Others** (supra). In this case, my learned sister held as follows:-

Therefore, before an interdict can be found to be valid, the same must be based on fair reasons and must be implemented pursuant to fair procedure. This is what can be cited as the 3-dimension criteria;

First, the employer must have a justifiable reason to believe the employee has engaged in serious misconduct to form what is commonly called a *prima facie* case;

Secondly, there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct, or some relevant factor that would place the investigation or the interest of the affected parties in jeopardy; and

Thirdly, the employee is given the opportunity to state his case or be heard before any final decision to interdict is made.

The justifiability of an interdict rests on the existence of a *prima facie* case on the reason that the employee committed serious misconduct and the employee is formally informed in writing of the allegations of misconduct that precipitated the interdict, in circumstances where knowledge of the allegations are apparent from the surrounding circumstances and where such circumstances do not exist, since there is a pending investigation, the reasons can only be broad, vague or general hence subjective and removed from what is a *prima facie* case. An interdict has the result to deny an employee access to the workplace and when done without due process and due regard to the first criteria the ultimate result is to negate the principles of procedural fairness and thus unfair labour practice as held in **IC 1972 of 2012 Elizabeth Washeke et al v Airtel Network Ltd et al**. Therefore the reason to deny an employee access to the workplace is closely linked to any ongoing

investigations over alleged gross misconduct in that;

... the continued presence in the workplace could potentially jeopardise the investigations, is reasonable in light of the serious nature of the charges brought against an employee.

There must be a clear reason why the employee interdiction is necessary, independent of any contention relating to the seriousness of the misconduct. An interdiction or suspension is the employment equivalent of criminal trial arrest, with the consequence that an employee suffers palpable prejudice to reputation, advancement and fulfilment. Thus a suspension or interdiction should only follow pending a disciplinary enquiry only in exceptional circumstances, where there is reasonable apprehension that the employee will interfere with any investigation that has been initiated, or repeat the misconduct in question. The purpose of such removal from the workplace even temporarily, must be rational and reasonable and conveyed to the employee in sufficient detail to enable the employee to defend himself in a meaningful way.

Once these preliminaries are addressed, then the employee must be heard on the merits of the case as a cardinal rule. This is not to revisit the decision to suspend or interdict, the hearing is simply aimed at determining the allegations levelled against the employee and any defences that the employee may wish to make. Only then, after the close of the hearing or investigation is a sanction issued to the employee. In a case where an interdiction is the sanction, The period of the interdiction must be stated and the reasons for the same as well as what the employee is expected to do during this interdict to avoid further injury to the reputation of the employee or any stigma as a result. Where an interdict is without pay or a condition that removes part of the pay, this must clearly be indicated together with the applicable provisions, administrative policy, the law or the employment contract. Where these do not exist and are stated, the employee must remain on full pay and any deduction without valid cause would be in breach of the employment contract on the part of the employer and an unfair labour practice. Therefore, where an employee is not heard or his right to be heard not guaranteed per the law, such an employee is entitled to urgent relief in the event that he is interdicted without being given the opportunity to state his case.

9. The learned judge was clear that firstly, the employer must have a justifiable reason to believe the employee has engaged in serious misconduct forming a *prima facie* case; secondly, there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct, or some relevant factor that would place the investigation or the interest of the affected parties in jeopardy; and thirdly, the employee is accorded an opportunity to state his case or be heard before any final decision to interdict is made. Failure to adhere to these pillars would render the interdiction unfair and amenable to reversal by a Court.
10. The interdiction is faulted on only one ground. There is no evidence that the Claimant was accorded the opportunity to defend himself as decreed by the Respondent on 23rd November 2014. The Claimant was entitled to be permitted to defend himself as required by the Code of the Interested Party and in compliance with the three dimension criteria. The Court notes that there was basis for the Claimant to be summoned to appear before the Board and therefore annuls the disciplinary process before the Interested Party. The Claimant should be accorded a chance to appear before the Respondent as directed by the Respondent on 23rd November 2014. The Board is to sit and deliberate on the matter within one month of the order of this Court failing which the suspension of the Claimant will be lifted in toto. The application succeeds in part and thus there will be no order as to costs. The parties are at liberty to apply.

Orders accordingly.

Dated and delivered at Nairobi this 31st day of July 2015

Nzioki wa Makau

JUDGE