



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 153 OF 2015

DR. JOHN MURIITHI.....1ST CLAIMANT
JACKSON AWUOR.....2ND CLAIMANT
JOICE ONYANGO.....3RD CLAIMANT
JUDY OBURA.....4TH CLAIMANT

VERSUS

THE REGISTERED TRUSTEES OF THE SISTERS OF MERCY.....
RESPONDENT

RULING

1. Before me were applications dated 9th February, 2015, 18th February, 2015 and 24th February, 2015. The applications dated 18th and 24th February, 2015 seek similar orders hence a ruling in one of them will mutatis mutandis resolve the other. Further by the orders of this Court made on 25th February and 25th March, 2015, cause numbers 212 and 241 were consolidated with cause number 153 of 2015 to proceed under cause number 153 of 2015.
2. The Court will therefore make a ruling in respect of the application dated 9th February, 2015 and in process consider prayers in the application dated 18th and 24th February, 2015 with the consequence that this ruling will dispose of the said applications.
3. In the motion dated 9th February, 2015 brought under certificate of urgency, the applicants sought among others orders that:-
 - (a) That the respondent be compelled to avail to the claimants and/or the claimants’ Advocates on record the Report of the purported Forensic Audit conducted at Mater Hospital cited in the letter of 5th February 2015 by the respondent as the basis for suspending the claimants.
 - (b) That the respondent be restrained whether acting by itself, its trustees, agents, officers, guards and/or whosoever from suspending, terminating, locking out from their respective officers and/or interfering with the salaries and/or benefits attendant to the claimants and/or from advertising the

impugned suspension and/or termination thereof and/or taking any other adverse action against the claimants pending the hearing and determination of the Memorandum of Claim.

4. The application was brought on the grounds that:-

(a) On or about 5th February 2015, the respondent sent letters to the claimants suspending them from the respective offices that they currently hold at Mater Hospital on account of diverse grounds stated therein but hinged on a supposed forensic audit undertaken by the respondent.

(b) In the same breath, the said letter purport to give the claimants up to 5th of February, 2015, barely a day, to present a written statement showing cause why disciplinary action should not be taken against them.

(c) To exacerbate the situation, with the service of the said letters to the claimants, the respondent deployed KK Security guards to whisk the claimants out of their respective offices in utter disdain, disgrace, dishonor and contempt in a matter unwarranted and unbecoming of their long standing professional service to the hospital.

(d) In the premises, the claimants are highly aggrieved by the said letters dated 5th February 2015 by the respondent and the respondent's subsequent conduct in suspending and locking them out of their offices without giving them a fair hearing or at all and generally in breach of the rules of natural justice.

(e) In particular, the claimants are aggrieved by the callous manner in which the respondent sought to suspend them from office, yet under their respective contracts of service and employees' handbook, there is no provision for such suspension and in the circumstances, the claimants are constrained by the view that the respondent's said conduct smacks of impropriety, illegality, impunity and flagrant breach of contract.

(f) Moreover, the supposed forensic audit, cited by the Respondent as the basis for suspending the claimants has not been availed to them and as such, the claimants are in the dark as to the salient findings in the said report and the rationale and/or factual basis informing the same.

(g) In view thereof, the claimants reasonably contend that they lack the wherewithal to substantively respond to the said allegations and/or to show cause as stated by the respondent in the said letter of 5th February 2015 as the allegation therein are omnibus, nebulous and short on substance.

(h) To that end, the claimants vide a letter dated 5th February 2015 from the claimant's Advocates on record articulated the claimants' plight herein and further demanded the release of the said Forensic Audit Report to enable the claimants know and understand the salient particulars of the allegations against them and accordingly respond thereto.

(i) However, the respondent has declined to oblige and avail the claimants and/or the claimants Advocates the said Forensic Audit Report.

(j) Significantly, the claimants employment in their respective capacity is premised on performance contracts and continuous appraisals by the respondent and in the same wavelength the affairs of the hospital is keenly monitored by external and internal auditors who have issued reports approved and certified by the respondent giving the claimants a clean bill of health.

(k) In the premises, the said conduct by the respondent in suspending the claimants in the

outlandish fashion herein is arbitrary, illegal, unfair, unprocedual, untoward and oppressive.

5. The application was further supported by the affidavit of one Dr. John Muriithi whose depositions in essence repeats the grounds upon which the application was brought hence the Court will not reproduce them again.

6. The respondent opposed the application and filed a notice of preliminary objections dated 16th February, 2015 stating in the main that:-

(a) That the suspension and/or termination from employment of the four (4) claimants which is sought to be curtailed and/or stopped through this suit had already been effected and concluded by the respondent before these proceedings were brought to the attention of the respondent on 10th February, 2015, hence the application is legally nugatory.

7. The respondent through one Sister Anne Itotia filed a replying affidavit in which she depones in the main that:-

(a) That I have read and been legally advised by the respondent's Advocates on record herein on the contents of the Notice of Motion Application dated 9th February, 2015 which was filed under Certificate of Urgency, and a copy thereof together with an Order that had been issued on 10th February 2015 were delivered and left at the Provincial House Villa Maria building (in Westlands, Nairobi) in his absence on 10th February, 2015 at around mid-day (as he was later informed by the staff members based there when he returned to the said Villa at around 4.00 p.m. The said documents had actually been placed on and left at a table situated outside the said building and he only saw them when he returned to the said premises having been engaged at the Mater Hospital (in South B, Nairobi) during the earlier part of the day.

(b) That each of the four (4) claimants who had instituted this Court Case jointly, are actually individually and separately suspended from employment by the respondent on 5th February, 2015 through specific letter addressed to each of them and for different and distinct reasons which were specified in each of those letters.

(c) That the said four (4) distinct letters also clearly required each of the four (4) claimants to show cause in writing, by the following day, why disciplinary action should not be taken against each of them. The said suspension and show cause letters were actually personally handed over and duly acknowledged by each of the four (4) claimants first thing in the morning on 5th February, 2015 as follows:-

- (a) Dr. John Muriithi - 8.00 a.m.
- (b) Joice Onyango - 8.00 a.m.
- (c) Judy Obura - 8.25 a.m.
- (d) Jackson Awuor - 10.00 a.m.

(d) That each of the four (4) claimants actually received their respective letters without any ugly or unpleasant incident and left their respective offices presumably to prepare their written responses to the show cause part of their said letter, and their allegations to the effect of having been "whisked" out of their respective offices in "utter disdain, disgrace, dishonor and contempt" or having been treated unfairly, improperly or in any illegal manner have no proper basis or merit at all and I confirm that the respondent at all relevant times acted in a proper, rational and legal manner in the circumstances to have the affected

employees proceed on suspension in order to facilitate the proper finalization of their respective disciplinary cases.

(e) That the four (4) claimants subsequently made a joint response to the respondent's show cause letter through the Law Firm of Kiarie, Kariuki & Associates Advocates dated 5th February, 2015 but received by the respondent on 6th February, 2015.

(f) That the respondent considered the joint written response that was submitted on behalf of the four (4) claimants on 6th February, 2015 but did not find that any of the claimants had satisfactorily responded on the specific issues which each of them had been required to respond to. The respondent therefore took the decision to terminate the services of each of the four (4) claimants summarily for gross misconduct with effect from 9th February, 2015.

8. In his submissions in support of the application, Mr. Kago for the applicants submitted that the claimants were highly aggrieved by the letters of suspension issued to them on 5th February, 2015 and the respondent's subsequent conduct in locking them out of a fair opportunity to be heard or at all and generally in breach of the rules of natural justice.

9. According to counsel, the claimants were aggrieved by the callous manner in which the respondent suspended them yet under their respective contract of service and employee's hand book, there was no provision for suspension.

10. In the circumstances they regarded the respondent's action as illegal and a flagrant breach of contract. Counsel further submitted that the alleged forensic audit, cited by the respondent as the basis for suspending the claimants was not availed to them as such they were in the dark as to the salient findings in the said report and the rationale or factual basis forming the same.

11. According to Mr. Kago, the claimants therefore reasonably contend that they lacked the wherewithal to substantively respond to the allegations contained in the show cause letter.

12. Counsel further submitted that by declining to make the Forensic Audit report available to the claimants, they were apprehensive that unless the Court intervened, the respondent would proceed to terminate their employment occasioning the claimants immense prejudice and irreparable harm.

13. Mr. Kago contended that his clients' employment was premised on performance contracts and continuous appraisals by the respondent and in the same wavelength the affairs of the hospital were keenly monitored by external and internal auditors who issued reports, and approved and certified by the respondent giving the claimants a clean bill of health.

14. According to Counsel, it was therefore suspicious, untoward and manifestly unjust to employ such drastic measures against the claimants who were senior management officers of long standing without hearing them or giving them reasons for such action.

15. It was Counsel's view that unless the orders sought were granted, the claimants stood to suffer immense prejudice and irreparable harm. Further, the claimants had established a prima facie case with a likelihood of success to warrant the granting of the orders sought. On the issue of irreparable harm which could not be compensated by award of damages, Counsel submitted that his clients would discernibly suffer a grave miscarriage of justice and violation of their constitutional and statutory rights and where there is such violation, irreparable harm is a foregone conclusion.

16. Mr. Mwiti for the respondent on the other hand submitted that the respondent called upon the claimants to defend themselves against the allegations of gross misconduct which were specified in each of their show cause letters but they each failed to present satisfactory answers on specific issues raised against them instead they chose to demand for an entire Audit report of the Respondent's Operations in a clear attempt to avoid addressing the real issues that related to each of them. To this extent, counsel

submitted that the claimant failed to make out a prima facie case with probability of success against the respondent.

17. Concerning the issue of irreparable damage and balance of convenience, counsel submitted that it could not be legitimately said that loss of employment if found to be wrongful, could not be compensated through damages. Second, the common thread on the reasons for which the four claimants' conduct was found unacceptable by the respondent, revolved around loss of trust and dishonesty making it difficult for the respondent to entrust the management of its assets and hospital resources to persons that it could not trust any longer. To support this contention counsel relied on this Court's decision in **Dr. Anne Kinyua v. Nyayo Tea Zone Development Corporation & 3 others (2012)eKLR.**

18. Regarding the issue of release of confidential documents, Counsel submitted that it would be undesirable and improper to publicise its internal confidential data contained in the forensic Audit Report which the claimants have demanded to be released to them. To support this submission, counsel cited the case of **Leland I Solano v. Intercontinental Hotel (2013) eKLR.**

19. Concerning the injunction in restraint of termination, counsel submitted that this would amount to reinstatement which according to counsel is a remedy that should normally be granted upon the full hearing of the employer and the employee.

20. This being an interlocutory application, the Court is careful not to delve too deep into the merits and demerits of the claim and the defences to it available to the respondent. All the Court needs to be satisfied about at the moment is whether the applicant has made out a prima facie case with any probability of success and if so, would the loss suffered, if he is ultimately found successful in the main claim be impossible to adequately recompense by way of damages.

21. In the main claim, the claimants herein seek an order against the respondent in the form of a declaration that their suspension without affording them an opportunity to be heard and without giving them concrete and substantiated reasons smacks of impropriety, manifest injustice, arbitrariness, illegality, unreasonableness and a blatant disregard of the rules of natural justice as well as the Constitutional principle of a fair administrative process.

22. They further seek an order of injunction restraining the respondent from suspending, terminating, locking them out of their respective offices or interfering with their salaries or benefits without following the due process as stipulated in the Employment Act, claimant's contracts of employment and Mater Hospital Employee Manual and the Constitution of Kenya.

23. The suspension letters dated 5th February, 2015 issued to the claimants although contained allegations specific to each of them, they referred to a forensic audit which had been going on for a period of seven months. The letters listed no fewer than five areas each of the claimants were required to respond to by the next day at 3 p.m.

24. The claimants did not respond to the accusations against them but instead through their advocate sought to be furnished with a copy of the Forensic Audit Report to enable them respond to the accusation against each of them. This request was never acceded to by the respondent. Instead by letters dated 9th February, 2015 the respondent summarily dismissed the claimants from service stating that the response by their advocate was unsatisfactory. These dismissal letters were however contested as the claimants claimed not have received them by the time the matter was filed in Court.

25. One of the main complaints by the applicants was that they were never accorded adequate opportunity to respond to the allegations against them. The suspension letters dated 5th February, 2015 which was a Thursday required their response to the allegations against them which were no fewer than five and quite elaborate in scope, by the next day Friday at 3.00 p.m. They thought this was too short and also asked for more information on the allegations against them which they thought was contained in the Forensic Audit Report.

26. It is a fundamental principle of natural justice that a person to be affected by a decision or action ought to be given a fair hearing. Fair hearing includes furnishing the person affected, with the charges against him or her together with at least a summary of the substance of those charges and allowing him or her a reasonable opportunity to respond to those charges. The respondent herein spent 7 months conducting a forensic audit out of which no fewer than five accusations were made against each of the claimants herein.

27. Most of these accusations were broad in scope and lacking in detail to enable the claimants make a response. The respondent refused to avail the Forensic Audit Report claiming in Court that it was confidential. The fiat of confidentiality however was not made known to the claimants before they were terminated. This Court in the case of Dinna Musindarwezo v. African Women's Development & Community Network (FEMNET) Cause No. 1390 of 2012 has observed as follows:-

“The right to fair hearing is one of the fundamental principles of natural justice and fundamental to fair procedure. It is underpinned by the principle that both sides should be heard. The right to fair hearing has been used by Courts as a basis on which to build a kind of fair administrative procedure comparable to due process of law. Bodies entrusted with legal power cannot validly exercise such power without first hearing the person who would suffer by the exercise of that power ... where natural justice is violated it is no justification that the decision was in fact correct.”

28. Further Lord Denning MR in the case of Abbot vs. Sullivan (1952) LKB 189 at page 189 stated that:-

“...bodies which exercise monopoly in important sphere of human activity with power of depriving a man of his livelihood must act in accordance with elementary rules of justice. They must not condemn a man without giving an opportunity to be heard in his own defence and any agreement or practice to the contrary would be invalid.”

29. The separation mechanisms contained in the Employment Act 2007 are couched along these fundamental principles of natural justice. For instance in section 41(2) of the Act, before summarily dismissing an employee an employer must hear and consider any representations which an employee may make on the grounds for which dismissal is being contemplated. The claimants herein asked for more information on the allegations against them through their counsel. This letter could not by any means of interpretation be construed as a refusal to respond or a response to the fleet of allegations against the claimants.

30. The respondent has argued that even if the Court were to find that termination of the claimants was wanting in reason and procedure, damages would adequately compensate them hence injunction should not be granted. The Court however is not of the view that simply because damages can adequately compensate a person an injunction cannot issue in appropriate cases.

31. Such a scenario would mean that provided a person is rich enough to pay damages he or she can go ahead and act contrary to procedures laid down by himself and or act contrary to substantive and procedural fairness. This in the Court's view is an erroneous interpretation of the principles governing grant of injunctions. The Court in appropriate and compelling circumstances can grant an injunction even where damages would suffice if the wrong complained about is eventually proved.

32. Employment relationship though in most cases is regarded as a contract for personal services to which it may not be practicable to oblige two unwilling parties to remain in, the Court must not lose sight of the fact that in modern times employees dedicate and spend most of their useful and productive lives serving their employer. This scenario creates some measure of legitimate expectation on the part of the employee that his services will continue to be needed by the employer and in the event that he has to be separated from his employment, it should be done for valid reasons and using a fair procedure in

conformity with the contract of employment or in absence, the Employment Act and rules of natural justice generally.

33. Justice Ojwang in the case of **Menginya Salim Murgani v. Kenya Revenue Authority HCCC No. 1139 of 2002** aptly observe as follows:-

“...In so far as the employee spends the bulk of his or her time in the service of the employer, there is little other livelihood, in employee outside the framework of the employment relationship. Of this fact, this Court takes judicial notice; and it must then be considered that the status of employment relationship inherently vests in the employee both normal rights and legitimate expectations.”

34. The foregoing have been said this Court makes the following orders in respect of this application and the applications dated 18th and 24th February, 2015.

(a) the respondent by itself, servant, agents or howsoever acting is hereby restrained from terminating the claimants services pending the hearing and determination of the suit herein.

(b) the respondent shall not advertise and or substantively fill the positions left vacant by the claimants pending the hearing and determination of the suit herein.

(c) under escort of respondent’s security and personnel responsible, the claimants where applicable shall be allowed access to their offices or places of work to collect their personal belongings.

(d) the claimants suspension shall remain in force but on half salary with effect from 4th of February, 2015 pending the hearing and determination of the suit herein.

(e) parties herein will go through pretrial procedures within 60 days of this Ruling.

(f) this matter will be mentioned on 24th September, 2015 for directions on hearing of the main claim.

(g) Costs in the cause.

35. It is so ordered.

Dated at Nairobi this 10th day of July 2015

Abuodha J. N.

Judge

Delivered this 10th day of July 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge