REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 210 OF 2015

EVANS WAFULA MAKOKHA **CLAIMANT**

v

UASIN GISHU COUNTY PUBLIC SERVICE BOARD **RESPONDENT**

RULING

1. Evans Wafula Makokha (applicant) commenced proceedings against Uasin Gishu County Public Service Board (Respondent) on 13 July 2015 contesting his interdiction.
2. Together with the Memorandum of Claim, the applicant filed a motion under urgency seeking some 6 orders. The Court certified the motion as urgent and directed that it be served for *inter partes* hearing. The Respondent filed its papers on 20 July 2015, and this prompted the applicant to seek and the Court granted him leave to file a further affidavit to respond to issues raised in the Respondent's replying affidavit.
3. The motion was eventually heard on 29 July 2015 and ruling was reserved to today. Pending the ruling, the Court ordered the Respondent to stop proceeding with the disciplinary process against the applicant.
4. The applicant serves as a Laboratory Technologist with the Respondent as well as the Chairman of Kenya County Government Workers Union, Uasin Gishu Branch.
5. On 15 June 2015, the Respondent interdicted the applicant mainly on the grounds of absenteeism from work during the period covering January 2014 to February 2015.
6. The interdiction letter informed the applicant that disciplinary action was being contemplated and requested him to make written representations within 21 days on the allegations of absenteeism.
7. On 30 June 2015, the Respondent invited the applicant to appear for a disciplinary hearing on 16 July 2015.
8. According to the applicant, the interdiction was unfair, unjustified, irregular, unprocedural and actuated by malice and based on unfounded and unsubstantiated allegations. He deposed that the real reason for the interdiction was his union activities as Chairman of the local branch of the Union.
9. He contended that the interdiction contravened the provisions of the Constitution, International Labour Conventions, the Employment Act, the Labour Relations Act, the Urban Cities Act, 2011 and the County Governments Act, 2012 and was contrary to the *audi alteram partem* rule.
10. The Respondent opposed the motion and relied on a replying affidavit sworn by its Secretary, Ben Samoei.
11. According to the Respondent, the applicant was seeking mandatory orders at an interlocutory stage but he had not met the threshold for grant of such orders and, further, that granting the orders sought would amount to determining the main issues in the Cause without hearing evidence.
12. The Respondent also contended that interdiction was part of a disciplinary process and not a final decision and that there is no contractual or statutory requirement for a hearing before interdiction.
13. The Respondent contended that the instant proceedings were meant to scuttle the disciplinary

process and that the applicant should appear before the disciplinary committee and make his case before the Committee.

14. Both parties filed authorities. The Court has considered the motion and affidavits, the authorities and submissions. It is not necessary, in the view of the Court to go into any detail into the authorities and submissions.
15. In *Kenya Plantation & Agricultural Workers Union v Finlays Horticultural Kenya Ltd* (2015) eKLR, I reviewed the case law on whether and when a Court can interfere in a disciplinary process.
16. I seek to be pardoned for repeating in *extenso* what I stated in that decision from paragraphs 21 to 41.

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.

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.

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.

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.

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).

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.

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.

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.

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.

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.

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.

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.*

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.

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.

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.

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.

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.

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.

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.

The decision in *Booysen 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.

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.

21. An extract of the Collective Bargaining Agreement between the applicant's Union and the Association of Local Government Employers effective 1 September 2012 was annexed to the applicant's further affidavit. It was filed outside the agreed timeline but the Court will consider it. The collective bargaining agreement provides that Regulation 23 of the Public Service Commission (Local Authority Officers) Regulations on discipline apply.
22. I have looked at regulations 23 and 24 of the said Regulations and the power to interdict an officer where proceedings which may lead to dismissal or criminal proceedings have been taken.
23. It is clear that if the Regulations cited by the applicant are applicable as envisaged by the Collective Bargaining Agreement, then the Respondent had contractual and statutory authority to interdict him.
24. The Court also finds that the applicant has not demonstrated exceptional circumstances to warrant

interdicting the disciplinary process or for the grant of the orders sought in the motion. The applicant also has effective remedies should the disciplinary process end up in unfair termination of employment.

25. The upshot is that the motion is dismissed with costs to the Respondent.
26. The Court further orders that the Respondent files its Response, witness statements and documents to the main Cause within the next 14 days.

Delivered, dated and signed in Nakuru on this 30th day of October 2015.

Radido Stephen

Judge

Appearances

For applicant Mr. Ayieko instructed by Onyinkwa & Co. Advocates

For Respondent Mr. Kenei instructed by Gumbo & Associates Advocates

Court Assistant Nixon