



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2174 OF 2014**

**NEWTON MUNGALLA.....CLAIMANT**

**VERSUS**

**COUNTY SECRETARY AND**

**HEAD OF COUNTY SERVICE BOARD.....1<sup>ST</sup> RESPONDENT**

**NAIROBICITY COUNTY GOVERNMENT.....2<sup>ND</sup> RESPONDENT**

Mr Kithi for respondent/objector

M/s Guserwa for claimant

**RULING ON PRELIMINARY OBJECTION**

1. Serving before court is a notice of motion application dated 3<sup>rd</sup> December 2014 seeking the following orders;
  - a. that this application be certified as urgent to be heard *ex-parte* in the first instance.
  - b. that pending hearing and determination of the Application an order of injunction be issued against the Respondents to restrain them from convening its disciplinary committee on any scheduled date or at all in order to discuss the matters touching on the Applicant pending the hearing and determination of this Application.
  - c. that pending the hearing and determination of this Application an injunction be issued to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from taking any step, decision, action, proceedings or consideration or doing anything in relation to the conduct of the applicant pending the hearing and determination of this matter.
  - d. that the Honourable Court be pleased to order the stay of the suspension of the Applicant by the Respondents pending the hearing and determination of this matter.
  - e. That in the alternative the court holds that the said suspension was lifted and/or vacated by the letter dated 5<sup>th</sup> November, 2014 ordering the Applicant to resume duty.
  - f. That the costs of this application be provided for.
2. The applicant relies on the following grounds in support of the application;
  - i. That the 1<sup>st</sup> Respondent has suspended the applicant on invalid reasons/malicious grounds without according him a hearing or at all.

- ii. The respondents are about to take drastic disciplinary action against the applicant without following procedural requirements.
  - iii. The decisions, actions and omissions of the 1<sup>st</sup> and 2<sup>nd</sup> respondents violate the applicant's constitutional rights and freedoms
  - iv. The applicant is apprehensive that unless the suspension of the applicant is lifted the Applicant is bound to suffer a violation of his constitutional rights to a fair hearing and fair working conditions.
3. The applicant is the Deputy Director Litigation, Legal Affairs Department of the 2<sup>nd</sup> Respondent. He was suddenly suspended from employment on 30<sup>th</sup> October, 2014 and alleges the suspension was without notice, basis, justification or otherwise supported by tangible facts. The allegations set out in the letter of suspension were not put to him before the disciplinary action was taken against him.
4. That the applicant responded to the allegations but has not received any feedback. The applicant denies all allegations made against him and relied on the supporting affidavit of the applicant sworn on 3<sup>rd</sup> December 2014 and supplementary list of documents filed in court on 17<sup>th</sup> March 2015.
5. Leave to amend the application so as to cite Nairobi city county public service Board was granted and an amended application was filed on 17<sup>th</sup> March 2015.

## **Response**

6. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a replying affidavit sworn by Lilian W. Ndegwa on 26<sup>th</sup> February 2015 in opposition to the application. The nub of the response is as follows;
- i. that the court lacks jurisdiction to entertain the application.
  - ii. that the applicant seeks to injunct the Respondents from carrying out their duty as enshrined in law and specifically under the County governments Act, no. 17 of 2012.
7. That the office of the county secretary and that of the county public service board are established under sections 44 and 59 of the County governments Act, no 17 of 2012 respectively.
8. That section 44(3) (a) provides that the County Secretary shall be the head of the county public service. That the County public service board is established under section 57 of the Act and the functions of the county public service board are set out under section 59(1) and include to;
- a. establish and abolish offices in the county public service;
  - b. appoint persons to hold or act in office of the County public service including in the boards of cities and urban areas within the county and to confirm opportunities;
  - c. exercise disciplinary control over and remove persons holding or acting in those offices as provided for under this part;
  - d. prepare regular reports for submissions to the county assembly on the execution of the functions of the Board.
9. The respondents therefore submit that the 1<sup>st</sup> Respondent has powers to appoint, exercise disciplinary control over and remove persons holding or acting in those offices as provided for within the County government Act, no. 17 of 2012.
10. Furthermore, the County governments Act, under section 76 allows the carrying out of disciplinary proceeding and in so doing observe the principles of natural justice.
11. That a person aggrieved by a disciplinary action of the County public service board may appeal to the public service commission.

12. Therefore, the applicant has jumped the gun in approaching the court prematurely and the application does not meet the threshold required to grant an injunction against the Respondents.

13. That the suspension was with notice. The applicant was given reasons for the suspension in the letter itself and he was required to show cause pending a final disciplinary hearing as per the law and rules of natural justice. The respondents pray that the application be dismissed with costs.

14. **Determination**

(i) whether the court has jurisdiction to entertain this suit.

15. Guided by the authority in the case of **the owners of motor vehicle Lillians Vs Caltex Oil (Kenya) Ltd Civil Appeal No 50 of 1989**, the court is bound to determine the issue of jurisdiction at the outset.

16. Generally speaking a dispute regarding suspension from employment by a public or private employer is a matter that squarely falls within the jurisdiction of this court.

17. The claimant/applicant challenges the action by the Respondents to suspend him from employment on the grounds that the grounds for the suspension are invalid and the suspension is based on malice.

18. The claimant/applicant deposes to an affidavit stating that he is apprehensive that unless the suspension is lifted, the claimant/applicant will suffer injury incapable of adequate remedy by way of damages.

19. The jurisdiction of this court is founded on Article 62(2)(a) of the Constitution as read with section 12 of the Employment and Labour Relations Act of 2011 (as amended)

20. Section 12(1) of the Act reads thus;

*“12 (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—*

*(a) disputes relating to or arising out of employment between an employer and an employee;*

*(b) disputes between an employer and a trade union;*

*(c) disputes between an employers’ organisation and a trade unions organisation;*

*d) disputes between trade unions;*

*(e) disputes between employer organisations;*

*(f) disputes between an employers’ organisation and a trade union;*

*(g) disputes between a trade union and a member thereof;*

*(h) disputes between an employer’s organisation or a federation and a member thereof;*

*(i) disputes concerning the registration and election of trade union officials; and*

(j) *disputes relating to the registration and enforcement of collective agreements.*”

21. The necessary element to found jurisdiction before this court is primarily that there be a dispute between an employee and an employer on matters relating to employment and labour relations. The applicant apprehends violation of his constitutional right to a fair hearing and fair working conditions.

22. The respondent on the other hand states that this suit is meant to unlawfully preempt the mandate of the Respondent to initiate and conduct disciplinary action against the claimant/applicant for misconduct.

23. The respondent has relied on case of **Republic Vs Registrar of Companies Ex-parte Edwin Wamba and Regent (2015) eKLR** where the court relying on the earlier court of Appeal decision in **Speaker of the National Assembly Vs Karime Civil Application No 92 of 1992** was of the view that;

*“there is considerable merit in submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of parliament the procedure should strictly be followed. Accordingly the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures”*

24. The respondent further relies on the decision of Hon. J A. Makau in **Stanley Mungathia David & Others Vs Honourable Cyprian Kingo & Others [2013] eKLR** where the court held that;

*“it has been stated constantly that where there exists sufficient and adequate mechanism to deal with a specific issue of dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanism has been exhausted”.*

25. The respondent therefore submit that the court has no jurisdiction to injunct a statutory disciplinary process but may only deal with the matter once the process has been concluded.

26. The claimant/applicant on the other had submits that the fact that the Respondents are empowered to discipline their employees does not mean that the respondents should do so without following the prescribed procedure and for valid reasons.

27. That the court has requisite jurisdiction to intervene in a matter where it is obvious a party intends to breach legal requirements in order to achieve its goals. That the respondents have not placed before the court any material evidence to support their contention that the claimant was notified or was aware of the reasons for his suspension.

28. It is the courts considered view that the constitutional and statutory powers of this court to issue interim relief by way of injunctions and conservatory orders are only fettered by the requirements set out in the case of **Giella Vs Cassman Brown & Co Limited [1973]E.A 358 – 360** that the claimant/applicant must show;

- i. a *prima facie* case with a probability of success;
- ii. that the Applicant will suffer loss incapable of adequate remedy by way of damages if relief sought is not granted;
- iii. the balance of convenience favours the grant of the interim relief.

29. The supervisory role of the court remains alive at every stage of the exercise of constitutional and statutory mandate by public organs. However, the court would rarely interfere with exercise of such mandate and especially before the constitutional or statutory machinery has

been fully exhausted and in most compelling of cases in line with the reasoning in the case of **Cassman Brown (Supra)**.

30. To my mind, the court has due jurisdiction to entertain the application and the main suit and to grant appropriate orders if merited.

31. The preliminary objection is not upheld. The *ex parte* interim orders remain in place.

**Dated and Delivered at Nairobi this 20<sup>th</sup> day of November 2015**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**