



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO.70 OF 2015

EPHRAHIM MURIITHI KANGAGI.....PETITIONER

VERSUS

THE CHAIRPERSON TEACHERS

SERVICE COMMISSION.....RESPONDENT

EQUITY BANK (K) LTD KIMATHISTREET NAIROBI INTERESTED PARTY

RULING

1. The Petitioner filed his Petition and application through Notice of Motion all on 24th August 2014. The application is seeking the following orders;

1. *Spent*
2. *That the Court be and is hereby pleased to temporarily restrain the Interested Party from implementing the contents of the formal demand for payment/Ref.EBL KENYA/DRU/KIMATHI/303126028/MK dated 29th July 2015.*
3. *That the Court be and is hereby pleased to order the Respondent to immediately reinstate the petitioner's salary as from 30th January 2015 pending the hearing and determination of the petition.*

2. The application is supported by the annexed affidavit of the Petitioner and on the grounds that the Petitioner was unjustly prevented to resume service and his salary suspended without cause as the verdict delivered on 30th January 2015 stated that the Petitioner had not been dismissed. Other grounds are that the Petitioner had a loan secured from the Interested Party and secured by the pay slip of the salary and the unexplained suspension of the petitioner's salary by the Respondent had greatly disorganised his economic situation to the extent that he is unable to continue paying the Interested party. That the Petitioner deserves to be treated with dignity and as a human being who deserves fair treatment.

3. In his affidavit, the Petitioner avers that he has been the Principal Security Officer at the Respondent since 2002 and has diligently served. On 25th June 2013 he was interdicted and directed to report to the Respondent secretary for further directions but the secretary asked him to apply for early retirement which the Petitioner declined as his intention was to serve until retirement by age. His salary was stopped and no administrative action has been taken but his family has since been suffering and thus seek the reinstatement of his salary pending hearing of the Petitioner herein. The Petitioner also avers that he had taken a loan with the Interested Party using his pay slip and it now impossible to clear it and the Interested Party has since become anxious of the payment of the loan. The Petitioner is thus supporting his application seeking a reinstatement of the salary to enable him reorganise his life and be able to repay

the Interested Party the due loan.

4. In reply, the Respondent filed **Replying Affidavit sworn by Josephine Maundu on 23rd September 2015**. She avers that as the Human Resource manager and Development at the Respondent she has authority to reply herein. She thus avers that the Respondent as a constitutional commission recruits its officers pursuant to the provisions of article 252(1) (c) of the constitution. The Petitioner was recruited in May 2002 as a Security officer and assigned to the Respondent headquarters. The appointment of the Petitioner was governed by the Teachers Service Commission Act as repealed by Act no.20 of 2012, the Code of regulations for Secretariat Staff (Code) and Code of Conduct and Ethics for Secretariat Staff as well as labour laws in Kenya.

5. The deponent also avers that the Petitioner was in charge of secretary between November 2011 and 23rd May 2013 when the Respondent lost 30 CISCO access switches worth KShs.17, 648,406.00. Upon investigations, the Respondent reported to the police and in the internal investigation, it was recommended that administrative action be taken against the Petitioner among others for negligence resulting in the loss. Pursuant to regulation 56 of the Code, the Petitioner was interdicted. The Petitioner was asked to Respondent and by letter dated 19th September 2014 he denied the allegations against him. On 30th January 2015 the Petitioner was invited to present his case and upon deliberations, the Respondent reached a verdict that the Petitioner be retired with effect from 30th January 2015 and by letter dated 17th February 2015 the Petitioner was informed of this decision. The Petitioner appealed which was rejected as no new grounds had been raised.

6. The deponent also avers that it is not correct that the Petitioner undertook his duties diligently as during his course of work, property belonging to the Respondent got lost. The process of interdiction and retirement was procedural and it conformed to the rules and principles of justice. The Petitioner was informed of allegations against him; he was afforded a hearing; during interdiction the Petitioner continued to earn half salary in accordance with the regulations; and the Petitioner never asked for any documents that he may have required for his defence.

7. The notice of motion filed by the Petitioner is defective and wrongly brought before this Court and should be dismissed on the grounds that the reliefs sought against the Respondent and Interested Party do not arise from the same transaction and offends order 1 Rule 3 of the Civil Procedure Rules; there is no common question of law or fact in the suit against the Respondent and the Interested Party as the Respondent had a contract of employment with the Petitioner while the Interested Party had advanced credit. The reliefs thus sought can only be satisfied by an employer but the Interested Party not privy to the employment contract. The Petition does not disclose with precision the alleged contravention of rights under article 47 of the constitution. The application should be dismissed with costs to the respondent.

8. In reply, the Interested Party filed a **Replying Affidavit sworn by James Kirieri on the 10th September 2015**. He avers that he is the Credit Administrator of the Interested Party and avers that the petitioner's application is bad in law and made in bad faith and made to prevent the Interested Party from exercising its legal right to recover the outstanding loan arrears. The Petitioner took a loan with the Interested Party per letter dated 4th February 2011 amounting to KShs.1, 600,000.00 to be repaid in 72 months in instalments of KShs.34, 707.00 and the security was the salary from the Respondent where he was employed. The Petitioner was accused of negligence while on duty and the Respondent property got lost and was interdicted and salary stopped. The Petitioner alleges that his interdiction was illegal and unfair and he lodged his appeal to the Respondent on 13th April 2013 which was rejected on 3rd June 2015. As a result the Petitioner has not been able to honour his loan payments instigating the demand letter dated 29th July 2015 for KShs.1, 162,595.67 the outstanding loan balance. The letter offering the loan clearly stipulated the consequences of non-repayment under the default clause to which the Petitioner agreed to. Terminal dues were to be remitted to the Interested Party account in the event the Petitioner left his employment during the tenure of the loan account.

9. Mr Kirieri also avers that the main intention of the Interested Party is to recover its loan amount after the Petitioner was retired early in January 2015. The Interested Party has no interest in interfering

with the relationship between the Petitioner and the respondent. and the application against the Interested Party must therefore fail on account of misjoinder of parties, the application is in clear violation of agreed terms between the Petitioner and the Interested Party and should not be affected by the poor relationship with other third parties such as the respondent, and the orders sought would be against the banking laws in Kenya. The Petitioner must pay his debts and direct his Petition against the Respondent and not the Interested party.

10. Kirieri also avers that the Interested Party is hereby wrongly enjoyed as a Party and should be removed. The application herein should be dismissed with costs to the Interested party.

Submissions

11. In submissions, the Petitioner stated that his letter of interdiction dated 25th June 2013 put him under half salary pending his case of breach of the Respondent regulations and leading to loss of property. The position remained the same until 30th January 2015 when the Respondent stopped paying the half salary and nothing at all. The claimant was also issued with a warning letter dated 17th February 2015. That the allegations against the Petitioner are not true yet he was not given a chance to defend himself and due process was never followed in his case. The investigations required under the Respondent code and regulations were never adhered to. The loss of respondent's property was never investigated and linked to the Petitioner to warrant his interdiction and withholding of his salary or the warning letter. That the petitioner's rights under article 47 of the Constitution were violated.

12. The Respondent also submitted the list of authorities – case of **Mumo Matemu versus Trusted Society of Human Rights & 5 Others, Court of Appeal, Civil Appeal no.290 pf 2012.**

3. The Interested Party on their part submitted that they have been wrongly joined in the suit herein as they do not have an employer/employee relationship with the Petitioner and what exists is a borrower and lender. The Employment Act has defined who an employee and employer are at section 2, which definition does not apply to the Petitioner and the Interested Party as held in **Elizabeth Washeke & 62 others versus Airtel Network (K) Ltd & Another, Cause no.1972 of 2013.**

14. The Interested Party also submitted that they have a right to exercise its statutory power to recover monies owed by the petitioner. Parties to the loan facility were clear in the letter of offer that was accepted and all terminal dues should be remitted to the Interested Party as well as due amounts on the loan facility. The fact of owing the Interested Party is not disputed and thus the loan is due as held in **John Mwenja Ngumba versus Kenya Commercial Bank Limited & Another [2006] eklr.** The Interested Party has the right to recover monies owed to it.

15. In this case the Petitioner does not qualify for a grant of injunctive orders sought as he has not met the principles set out in the case of **Giella versus Cassman Brown and Co. [1973] EA.** The Petitioner does not have a *prima facie* case with a probability of success as reaffirmed by the Court of Appeal in the case of **Mrao Ltd versus First American Bank of Kenya Ltd & 2 others [2003] eklr.** There must be an infringement of a right for the grant of injunctive orders in the nature sought by the Petitioner but in this case the Petitioner has admitted owing the Interested Party and thus should not be granted the orders sought to enable the Interested Party recover such owed monies. There is a contractual obligation that should be met and all what the Interested Party is keen on is to recover its monies.

Determination

Is there a misjoinder of parties?

Should the injunctive orders sought issue?

16. The Petitioner in his Petition and application has submitted that the Respondent is sued in the representative capacity of the constitutional commission, the Teachers Service commission who were his employers. The Interested Party is sued by virtue of advancing the Petitioner a loan which was secured by

the salary the Petitioner received from the Respondent and this was affected by the action of the Respondent that terminated the salaries and hence he is unable to repay his loan to the Interested party. The Petitioner seeks only one order that is;

That the Court find unconstitutional, illegal and unprocedural the petitioner's dismissal from service, and do reinstate the Petitioner to his position as Principal Security officer at the TSC with all associated benefits.

17. The nexus thus between the Petitioner and the Respondent is clear that far. The Petitioner is seeking for orders against the respondent, which orders are specific and arise from the dismissal of the Petitioner by the respondent. The Interested Party only appears within the Notice of Motion application where the Petitioner is seeking to *restrain the Interested Party from implementing the contents of the formal demand for payment/Ref.EBL KENYA/DRU/KIMATHI/303126028/MK dated 29th July 2015*. The basis of these prayers is that the Petitioner had secured a loan facility by the use of his pay slip and salary which has since been stopped by the respondent. Therefore, had such salary and employment not ceased, the Petitioner would not have to file the application herein. Once the interim orders are granted, there is nothing more left for the Interested Party to defend as the Petitioner is not about the Interested party, rather the issues in question relate to the Respondent and the Petitioner who had an employment relationship.

18. As held by this Court in the case of **Kizito Lubano versus KEMRI Board of Management & Others, Petition No.47 of 2015** and held that;

... The nature of proceedings before this Court are that in labour relations, the Court should not overly rely on technicalities at the expense of substantive justice. ...

19. Noting the unique cases filed before this court, the Court in the above case went on to cite the tests to apply when assessing the suitability of a Party to processings the case of **Werrot and Company Ltd & others versus Andrew Douglas Gregory & Others, HCCC No. 2363 of 1998, LLR 2828;**

For determining the question of who is a necessary Party there are two tests; (i) there must be a right to some relief against such a Party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.

20. There must be a demonstration by the Petitioner that there is a direct and real interest in the reliefs sought against the listed respondents and thus necessary parties herein. That nexus is crucial as without it, for the Court to issue orders against a Party that is not ultimately targeted at enabling the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit is an inherent injustice.

21. In this case, the Petitioner has submitted that he is challenging his dismissal from service by the respondent. Such a determination does not bring into question the relationship between the Petitioner and the Interested party. Such are matters between the Petitioner and the Respondent as parties who enjoyed an employment relationship. Had such a relationship subsisted, the addition and or inclusion of the Interested Party herein would have been unnecessary. The determination of the issues in the Petitioner will still be determined without the Interested Party presence.

22. On the second issue and on the question as to whether the injunctive orders should issue, the Court set the basis in the case of **Esther Mbinya Musau versus National Bank of Kenya Ltd, Cause no.989 of 2015** thus;

Unlike in ordinary contracts, an employment contract is founded on special circumstances that are regulated by statute unlike the ordinary law of contract. An employment contract has its foundational basis under the provisions of article 41 of the Constitution and where an employee cites the violation of their rights, such rights must be assessed under the applicable law as well as under the constitution. To thus cite an unfair practice; a wrongful termination of an employment

contract; or the illegal termination of an employment contract, special attention must be gone into the allegations and circumstances of such stated wrongful action; illegal practice/s for the Court to make a finding as to the unfair conduct.

23. Therefore, noting the principles set out under **Giella versus Cassman Brown Co. Ltd case** as being important and that the rationale in the case of **Mrao Limited Case** as set out by the Court of Appeal are factors important for this Court to consider, inherently, employment disputes are not based on ordinary contract to be simply assessed as under the Law of Contract and general rules of procedure under Common Law. An employment relationship is governed by article 41 of the Constitution as well as a specific statute of application, the Employment Act. What is paramount, separate and distinct under the employment contract is the concept of *fair labour practice/s* and the concept of *fairness*. Such standards, principles and or concepts have to be applied in the context of each case as unlike in an ordinary contract for supply of good, sale of goods or as the case may be. An employment contract affect the livelihood of a human person, the offer of human labour for which a person has to eke a living a support himself so as to lead a dignified life.

24. With regard to the case between the Petitioner and the respondent, the letter dated **17th February 2015** comes into focus. This is the letter that precipitated this petition. The Techers Service Commission officer wrote to the Petitioner thus;

17th February 2015

RE: WARNING

I am directed by the Teachers Service Commission to say that the Commission carefully considered your case on 30th January 2015 and determined that it will not on this occasion dismiss you. You have however been found guilty of the following allegations:-

(i)...

(ii)...

The Commission has therefore decided to warn you with effect from 30th January 2015.

You are directed to report to the Secretary, TSC for further advice.

N.B. you will be retired under the 10/50 year rule with effect from 30th January 2015.

[Signed]

G.M. CHEMOS

FOR: SECRETARY/CHIEF EXECUTIVE

TEACHERS SERVICE COMMISSION

25. Such is the letter issued to the petitioner. It is a warning. There is a finding that he will not be dismissed. There is a finding of guilt. There is a finding that he should report to the TSC Secretary for further advice. There is also a direction to the Petitioner that he has been retired under the 10/50 year rule with effect from 30th January 2015.

26. Without going into the merits of the petition, the letter dated 17th February 2015 on the face of it, raise serious questions of procedure, diligence, fairness, as well as questions of context and application. I shall call this letter a *mixed bag*. It gives and then takes away. It raises serious questions as to its intention, purpose, motive and why it had to be a warning letter yet it ends up sending the Petitioner on

retirement under the 10/50 year rule and then backdated to 30th January 2015. Can it then be said that the Court can appreciate the intentions, purpose, motive and the rationale of its author at this point? Evidence would be required to be gone into for the Court to make such an appreciation. Otherwise to stop at this point and on the basis of this letter, serious questions of law, Constitution and the practices at the Respondent would have to be assumed. This is not the purpose of this court. As a Superior Court of record, such a letter must be put into scrutiny at the hearing. It is however not lost to the Court as to what the Petitioner was supposed to do once he received this letter dated 17th February 2015. Was he to assume he was not dismissed? Was he to take it that he had been found guilty? Was he to report to the TSC secretary for further advice or was he to take it he had already been retired under the 10/50 Rule? Such are questions that beg to be addressed at a full hearing. There is useful data that should be analysed especially annexures “JM2” and “JM6” both in the Supporting Affidavit of Josephine Maundu dated 21st September 2015.

27. Due to the ambiguities in the communication issued to the petitioner, I find a *prima facie* case set out to warrant the Court to direct as appropriate and in the interim. The issues set out above are both set out in law in terms of due process as well as established under constitutional safeguard in terms of fair labour practices. These are principles keenly addressed in the **Mrao Limited Case**. Equally, questions of due process in employment and labour relations are grounded under the Employment Act. I find the Petitioner at this point has set out the foundational basis for the grant of the orders sought in his application against the Respondent in the interim.

I therefore order and direct as follows;

- 1. The Interested Party is herein wrongly enjoined and shall be expunged from the record.**
- 2. The Respondent to immediately reinstate the petitioner’s full salary as from 30th January 2015 pending the hearing and determination of the petition.**
- 3. The Respondent shall be at liberty to give the Petitioner further advice on his duties within 14 days from the date hereof.**
- 4. Costs in the cause.**

Orders accordingly.

Dated signed and delivered in open Court at Nairobi this 12th day of November 2015.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant.