



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NYERI

CAUSE NO. 110 OF 2013

JOSEPH NDERITU CHEGE.....CLAIMANT

VERSUS

POSTAL CORPORATION OF KENYA.....RESPONDENT

JUDGMENT

1. By memorandum of claim filed in court on 30th September, 2013, the claimant sought orders against the respondent that a declaration issue that his suspension from the respondent was unfair and an order stopping all disciplinary process arising out of the suspension and an order that no disciplinary action should be taken against the claimant on issues arising from the aforesaid lease of Karatina Post Office open space.
2. Concurrent with this suit, the claimant filed under certificate of urgency, a notice of motion under rule 16 of the court seeking to stay his suspension by the respondent contained in a letter dated 24th September, 2013 and a further stay of disciplinary process against him pending the hearing and determination of the main claim.
3. The motion was supported by the depositions in the claimant's affidavit and on grounds that the suspension letter was issued without the claimant being given a chance to be heard hence contrary to rules of material justice. Further, that the allegations that he irregularly leased an open space at Karatina Post Office and without due process showed that the respondent had already passed judgment against him and this was unfair and discriminating as other leases of similar nature had been signed in the past in the central region.
4. When Mr. Wahome for the claimant/applicant appeared before me ex-parte, on 1st October, 2013, I was persuaded after perusing the application and hearing submissions that the application was urgent and that his client had demonstrated that he had a prima facie case meriting the grant of interlocutory order which I proceeded to grant ex-parte at the first instance and directed that the matter be held interpartes on 17th October, 2013. However on 4th October, 2013. Mr. Olembo for the respondent appeared before me with an application seeking the discharge of the orders made on 1st October, 2013. I however directed him to serve the application and to canvas the same on the 17th October, 2013 when the claimant's application was scheduled for interpartes hearing. The matter got adjourned severally thereafter for various reasons advanced by either the claimant's counsel or the respondent's.
5. On 17th November, 2013 when the matter came up for hearing Mr. Wahome for the claimant and Mr. Olembo for the respondent upon taking directions from the court agreed that the interlocutory motion as well as the main suit would be disposed of in one judgment. That is to say the determination of issues

raised in the Notice of Motion dated 30th September, 2013 by the claimant and the one dated 3rd October by the respondent will have the effect of determining the entire suit finally.

6. In support of the motion, the claimant deponed in his affidavit sworn on 30th September as follows:

(a) That I have worked with the Postal Corporation of Kenya for more than twenty three (23) years and have risen through the ranks to my current position of the Regional Manager, Central Region where I was posted on 13th January, 2013.

(b) That when I reported to Nyeri I found in place a leasing and renting committee consisting of the Human Resources Manager Procurement Manager, Regional Accountant, AM Operations and facilities (Building foreman).

(c) That I also found that the Central Region had leased an empty space at Kagio Post Office and a lease agreement entered into and signed by the previous Regional Manager Central and the tenant. I annex hereto a photocopy of the lease marked IJ/756/I.

(d) That under my performance contract appraisal for the year 2012/2013 which was duly approved by the Post Master General, I clearly indicated that in order to achieve the region's revenue target of Kshs.32,269,278 I would lease open spaces in Mweiga, Othaya, Nanyuki and Kangema Post Offices amongst others. I annex hereto a photocopy of the performance appraisal and form marked IJ/756/II.

(e) That the leasing committee received an application to lease open space at Karatina Post Office and approved the same and before I signed the lease, I called the Manager Facilities, ROSE MUSYIMI who had no objection to the same and therefore signed an agreement leasing part of the space at Kshs.30,828 per month for a period of five (5) years, three (3) months w.e.f. 1st March, 2013 and the Corporation started receiving rent from the tenant. I annex hereto a photocopy of the application from and the lease dated 14th May, 2013 marked IJ/756/III and IJ/756/IV.

(f) That on 26th September, 2013 without prior notice or chance to be heard, I received a suspension letter on the ground that I had irregularly leased out and executed a lease agreement of Karatina Post Office plot without following due process. I annex hereto a photocopy of the suspension letter dated 24th September, 2013 marked IJ/756/V.

7. In defence of its action, the respondent through its acting Human Resource General Manager, Mr. John Tonui, deponed as follows:

(a) That following a report dated the 13th of February, 2013 (annexed hereto and marked "J.T.-") investigations were launched into the leasing of office spaces and idle land belong to the respondent.

(b) That while the Respondent's internal audit was carrying out its audit work it became aware that the Claimant herein had irregularly leased the Respondent's property without following due process.

(c) That on the 24th of September, 2013 in order to facilitate further investigations and as per the guidelines provided to employees vide the Human Resources Circular Number 7 'B' of 2009, which provides that employees who breach their service regulations as stipulated in their terms of employment, they shall be suspended with immediate effect, which is what happened in this case (annexed hereto and marked "J.T.-2 and J.T.-3" are copies of the letter of suspension dated 24th September, 2013 and the Human Resource Circular).

(d) That the service regulations of the Respondent provide for disciplinary procedures which are drawn from both the Postcode and the provisions of the Employment Act.

(e) That once the Claimant was suspended from duty he is forbidden to attend duty to pave way for independent investigations after which an urgent report on the matters under investigation is made. Once the report finds that there are matters for which a charge needs to be drawn then a charge is drawn and the Claimant would be given an opportunity to respond in writing and also orally before the disciplinary Committee.

(f) That in the event that the Disciplinary Committee finds that the Claimant breached the service regulations and he is dismissed from service he has a right of appeal to the Appeals Committee or the Board of Directors.

(g) That the claimant herein was only issued with a suspension letter, he has not been dismissed from service.

(h) That it is my contention that the filing of the Claim is premature as investigations have not been concluded and charges drawn against the Claimant.

(i) That it is my further contention that the filing of this Claim is also premature as the Respondent intends to give the Claimant all the opportunity to be heard both in writing and orally.

(j) That the claimant had already undergone another disciplinary process for a different matter in relation to the flouting of procurement procedures during the repair of a lorry registration number KAJ 616 S and for which the Board of Directors in their resolution of 27th September, 2013 resolved to dismiss the Claimant (annexed hereto and marked "J.T-4" is a copy of the charges that were drawn against the Claimant, and the Claimant's response to the said charges).

8. The claimant in a further affidavit sworn on 8th November, 2013 further deponed that when the matter was still pending in court, the respondent on 4th November, 2013 appointed him as the Secretary, PCK Internal "Huduma" Project Committee and also transferred him to Nairobi. He attached letters in support of this disposition.

9. Mr. Wahome who argued the matter on behalf of the applicants relied on the supporting affidavits recited above and further submitted that one of the respondents strategy was to lease out open spaces in various Post Offices in Central Region. It was pursuant to this strategy that the open space in Karatina, the subject matter of this suit was leased. According to counsel, the leasing was approved by a leasing committee following which a lease was drawn. Mr. Wahome submitted that this was not the first lease in the region. Counsel submitted that the first lease was on 9th July, 2012 when the applicant was not yet in the region yet no disciplinary action was taken against the regional manager then. According to counsel, his client was suspended on account of a similar lease in Karatina, the subject matter of the instant suit. The suspension letter, counsel submitted, did not detail the irregularity. It did not state the procedure the applicant failed to follow. He further submitted that the letter did not ask him to show cause. The letter merely suspended the applicant and discontinued his salary. According to counsel, denial of salary was a grave matter which could only be done upon a finding of guilt. He therefore submitted that the suspension letter prejudged the applicant.

10. Regarding the dismissal letter attached to the affidavit in support of the motion dated 3rd October, 2013 (JT3), counsel submitted that the letter had never been delivered to his client.

11. With regard to suspension, counsel further submitted that whereas the letter dated 24th September, 2013 which prompted this suit suspended the applicant, another letter dated 8th October, 2013 sent the same applicant on compulsory leave with full salary. This, according to counsel was contradictory and are signs that the Human Resource Manager may have been prompted by vendetta. Further, counsel submitted that by the claimant's affidavit filed on 11th November, 2013, the claimant was appointed the Secretary PCK Internal "Huduma" Project while the instant suit was pending, and consequently transferred to Nairobi. Thus, counsel submitted, was a further contradiction on the part of the respondent in dealing with the claimant.

12. Mr. Olembo for the respondent on his part submitted that the orders granted to the applicant had the effect of preventing the respondent from continuing with a disciplinary process.
13. According to counsel there were other disciplinary processes against the applicant, apart from the one he was complaining about. He further submitted that the affidavit of J. Tanui sworn on 17th October, 2013 (JT4) contain details of the charges against the applicant and his response thereto. Further that annexure JTA laid the ground for disciplinary process. According to Counsel, the applicant was complaining about due process yet he had through the court stopped the due process.
14. Regarding salary, counsel submitted that the New Disciplinary Procedures issued on 27th August, 2009 provided that salary was not payable until suspension was lifted and that the applicant was aware of this regulation.
15. Regarding the issue of charges, counsel submitted that no charges had been drawn against the claimant. He had merely been informed of allegations which needed to be investigated and that once the investigations were complete a charge would be preferred against him in respect of which he would be required to defend himself. Counsel therefore submitted that the claimant should have waited to raise his defences once the charge was presented to him. According to counsel, the claimant would be given a fair hearing before the disciplinary panel and if dissatisfied he could appeal. By initiating the court proceedings, the claimant had therefore stalled the disciplinary process.
16. Mr. Olembo further submitted that the issue of whether the applicant followed due process was a matter for investigation. According to him, all employees are bound by the terms and conditions of employment and rules and procedures at workplace.
17. Counsel submitted that suspension issued by the letter dated 24th September, 2013 related to leasing of property without due process and that compulsory leave was provided for in the regulations.
18. Regarding dismissal, counsel submitted that this related to a different disciplinary process. According to counsel, the allegations against the applicant which culminated in his dismissal were different and subject of a different disciplinary process. In that case, the allegations against the applicant and his responses thereto were considered and it was decided that he should be dismissed.
19. Regarding transfer, counsel submitted that the claimant was a manager and had to be transferred in order to allow the region to be managed by another person.
20. Mr. Wahome in response to Mr. Olembo's submissions stated that annexure JT4 which Mr. Olembo submitted was a charge against the claimant, was in fact an internal audit report and not a charge. According to counsel, no report had been filed or exhibited to the court, that led to the claimant's suspension vide letter dated 24th September, 2013.
21. Having perused the pleadings in this matter as well as annexures and further having listened to submissions by both counsels, I am of the view that two main issues emerge which if resolved, this dispute would have been adequately determined by the court. First, question is: was the suspension letter dated 24th September, 2013 issued to claimant procedural and in accordance with the rules of natural justice? Second, what was the effect of the dismissal letter dated 27th September, 2013, letter of compulsory leave dated 8th October, 2013, letter of appointment to PCK "Huduma" Implementation Project dated 4th November, 2013 and letter of official transfer dated 1st November, 2013 on the claimant's suspension letter dated 24th September, 2013 which triggered the current litigation?
22. The question of an appropriate order to make and costs will abide the outcome of these two questions and prayers sought by the claimant in his memorandum of claim.
23. To answer the first question, Mr. Wahome in his submissions before the court complained that the suspension letter did not detail the irregularity his client was being accused of in that it failed to state the

procedure the applicant failed to follow. In other words, and according to Mr. Wahome, the letter neither charged the claimant nor asked him to show cause. From the foregoing it would seem that Mr. Wahome did not dispute the right or justification on the part of the respondent to suspend the claimant in appropriate cases.

24. Annexure JT1 dated 27th August, 2009 is the New Disciplinary Procedures issued by the respondent. The clause on suspension provides as follows:

Pursuant to the Act employees who breach their service regulations as stipulated in their terms of employment shall be suspended with immediate effect. The types of offences that attract suspension include;

- ***Absenteeism without leave.***
- ***Intoxication during working hours rendering on incapable of work.***
- ***Neglect to perform his duties, or carelessly performing them.***
- ***Is abusive or uses insulting language to superior or his employer.***
- ***Knowingly fails or refuses to obey a lawful order.***
- ***Arrested for a offence and not released within 14 days either on bond or bail or unconditionally.***
- ***Commits an offence against the employer.***
- ***When convicted by a Court of Law of an offence which is likely to lead to his dismissal.***
- ***When involved in serious offence of gross negligence of duty or dishonesty occasioning massive loss of official funds or property and dismissal action is considered appropriate.***

Where an employee has been placed on suspension no salary shall be payable until the suspension is lifted.

25. The rubric of grounds for suspension set out above while may not be exclusive, present broad grounds upon which an employee may be suspended. That is to say, the reason for suspension may be specific however it ought to fall generally within the parameters set out under the suspension clause.

26. The suspension letter dated 24th September, 2013 accused the complainant of irregularly leasing out and executing a lease agreement of Karatina Post Office plot without following the due process. From the list of the grounds that can lead to suspension of members of staff set out above, the closest the accusation contained in the suspension letter comes to is ground number 3, to wit "Neglect to perform his duties, or carelessly performing them". To this extent, the court is persuaded that the respondent correctly invoked the clause on suspension against the claimant. As submitted by Mr. Olembo, the New Disciplinary Procedures issued on 27th August, 2009 pursuant to which the claimant was suspended were in force at that time. Besides, he did not dispute knowledge of them either by way of affidavit or submission by counsel.

27. The suspension was to enable investigations after which the suspension could either be lifted or sustained and the claimant presumably accorded an opportunity to respond to allegations against him. For this reason, whether the claimant irregularly leased or signed leases in respect of the respondents premises was a matter that required to be investigated as communicated to the claimant in his suspension letter. His defence that such leasing was not the first and further that it was done according to respondent's policy ought to have abided the outcome of the investigation as communicated in his suspension letter.

28. Mr. Wahome complained that the suspension was drastic since its implication was that the claimant lost salary for as long as it lasted. Whereas the court agrees with counsel on the drastic nature of the suspension clause to the extent that it deprived an employee of his salary during its currency, the court cannot rewrite a contract voluntarily entered into by parties provided it conforms to relevant statutes and the constitution and substitute therewith one containing the courts own notion of fairness. Freedom of contract must be respected by the court and only interfered with in exceptional and appropriate cases. The court however does not hesitate to observe that the deprivation of an employee's salary while on

suspension as contained in the respondent's New Disciplinary Procedures, appear not to conform to the Human Resource practice where employees on suspension are more often placed on half salary during the period of suspension. The logic here being that an employee on suspension is not dismissed hence ought not to be deprived of his employment benefits and rights save for those aimed at effecting the suspension. To this extent, the court concludes that the claimant's suit was premature.

29. The second question which the court now embarks on is the effect of the dismissal letter dated 27th September, 2013; letter of compulsory leave dated 8th October, 2013; letter of appointment to PCK "Huduma" Implementation project dated 4th November, 2013 and letter of official transfer dated 1st November, 2013, on the claimant's letter of suspension dated 24th September, 2013.

30. Concerning the dismissal letter dated 27th September, 2013, it may well be that this was arrived at after the conclusion of a totally different disciplinary process in respect of which the claimant may have been accorded an opportunity to defend himself as submitted by Mr. Olemba for the respondent. However the court would not delve much into this letter since as conceded by Mr. Olemba, this letter had not been delivered to the claimant nor its contents communicated to him. If the letter could have been delivered or communicated to the claimant it would have had the effect of rendering inconsequential, the suspension letter dated 24th September, 2013.

31. Regarding the letter dated 8th October, 2013 sending the claimant on compulsory leave, this letter makes reference to the claimant's letter dated 19th June, 2013 and a charge letter dated 14th June, 2013 and his subsequent appearance before the Board on 20th September, 2013. There is therefore a relationship between this letter and the undelivered dismissal letter dated 27th September, 2013 (annexture JT3) since they both make reference to the claimant's letter of 19th June, 2013 (which was not exhibited before the court) and a charge letter dated 14th June, 2013 which also was not exhibited before the court. It therefore means that these two letters had nothing to do with the suspension letter dated 24th September, 2013. They were concerned with allegations of breach of procurement procedures and not the leasing of respondent's Karatina Plot. What is curious however, and in respect of which this court requires to render an interpretation and implication is why on 24th September, 2013 the respondent suspends the claimant and three days later (27th September, 2013 to be exact) dismisses him from service and approximately ten days later (8th October, 2013) sends him on compulsory leave. Whereas the court has noted that the dismissal letter was neither delivered nor contents thereof communicated to the claimant, the fact that it evidences an intended action by the respondent raises a lot of questions about fairness and good faith on the part of the respondent. To suspend, dismiss and send on compulsory leave, an employee within a space of two weeks is quite some charade if not evidence of vendetta.

32. The court therefore cannot help but reach the conclusion that there must have been more than meets the eye in the relationship between Mr. Tonui (the acting Human Resource Manager) who signed the above referenced three letters, and the claimant. It is inconceivable that the said Mr. Tonui could be so undecided that in a span of two weeks he suspended, dismissed and sent on compulsory leave the same person to wit the claimant. It may well be possible that these letters were written without the full authority of the respondent's decision making organs. This perhaps explains why despite the charade, the claimant by a letter dated 4th November, 2013 was still being appointed to PCK "Huduma" implementation team and by a letter dated 1st November, 2013 being transferred to headquarters in Nairobi.

33. In conclusion the court comes to the finding that the purported suspension of the claimant communicated by the letter dated 24th September, 2013 was unprocedural and unfair and further that the actions by the respondent after the issuance of the purported suspension letter, especially his appointment to PCK Huduma Project and transfer to Nairobi by the self-same respondent rendered superfluous and inconsequential the claimant's purported suspension.

34. As a result, the court grants the prayers sought in the claimant's memorandum of claim to the extent that it is hereby declared that the claimant's suspension was unfair and an order hereby issues rescinding the same.

35. The court however declines to issue an order stopping all disciplinary processes arising out of the lease of Karatina Plot and further declines to order that no disciplinary action should be taken against the claimant on issues arising from the lease of Karatina Post Office open space. For avoidance of doubt, the court hereby orders that any disciplinary action against the claimant if necessary must be carried out with procedural fairness, good faith, natural justice and in accordance with the laid down internal disciplinary mechanism.

36. The claimant shall have the costs of the suit.

37. It is so ordered.

Dated at Nyeri this 24th day of January, 2014.

NELSON ABUODHA J.

JUDGE

Delivered in open court in the presence of Mr. Wahome for the Claimant and in the presence of Mr. Olembo for the Respondent.