



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA
AT NAIROBI
CAUSE NO. 423 OF 2014

PATRICK KIBUI NYINGI.....CLAIMANT/APPLICANT

VERSUS

NAIROBI CITY WATER & SEWERAGE COMPANY LIMITED.....1ST RESPONDENT

NAIROBI CITY COUNTY.....2ND RESPONDENT

RULING

1. What is for determination is the Notice of Motion Application by the Claimant/Applicant dated 19th March 2014. It is supported by the Claimant/Applicant's Affidavit sworn on 19th March 2014 and a Further Supplementary Affidavit of the Claimant/Applicant sworn on 12th May 2014 and filed on 13th May 2014. The Claimant/Applicant had been an employee of the 1st Respondent and was dismissed from employment on 15th August 2013. He was suspended on 7th May 2013 and the disciplinary process was conducted on 10th July 2013. He submits that he was a bona fide employee of the 2nd Respondent seconded to the 1st Respondent. The Claimant submits that he was suspended beyond the time provided under the 1st Respondent's Human Resources Policy and Procedure Manual. He submitted that the half salary and allowances were withheld from 8th May 2013 to 14th January 2014 a period of 9 months. In closing his submissions he acknowledged the letter dated 6th November 2004 which detailed the formalising of the transfer of services/employment from the 2nd Respondent to the 1st Respondent. He relied on the cases of **Banking, Insurance and Finance Union v Co-operative Bank of Kenya Limited [2014] eKLR**, **Walter Ogal Anuro v Teachers Service Commission Cause No. 955 of 2011**, **Samuel Kaberere Njenga v Attorney General & Another [2014] eKLR**, **Charles Kibiru v. Nairobi Water & Services Co. Ltd [2013] eKLR**.
2. The Respondents were opposed and filed Grounds of Opposition on 5th May 2014 and a Replying Affidavit on 30th May 2014. In the grounds the Respondents stated that the Claimant/Applicant was seeking final orders at interlocutory stage and that the Claimant/Applicant had not satisfied the conditions under Section 49(4) of the Employment Act for reinstatement. It was also the position of the Respondents that the employment of the Claimant/Applicant was terminated

lawfully for gross misconduct and/or corrupt conduct detrimental to the Respondents. The Respondents submitted that the Claimant/Applicant was a former employee of the City Council of Nairobi and his services were transferred to the 1st Respondent and was employed by the 1st Respondent on 6th November 2004. The Claimant/Applicant worked for the 1st Respondent in various capacities and in April 2013 was implicated in fraudulent dealings for signing a proposed adjustment without the knowledge of the Finance Coordinator. The Claimant/Applicant was served with a show cause notice vide a letter dated 22nd April 2013 and another one on 25th April 2013 and on 7th May 2013 he was suspended from duty. The Claimant/Applicant was summoned for a disciplinary hearing vide a letter dated 10th July 2013 inviting him to a hearing on 19th July 2013. The Claimant/Applicant was dismissed on 15th August 2013. He appealed on 27th August 2013 and he was summoned to the 1st Respondent's Corporate Appeal Committee on 13th November 2013 and the Committee rejected his appeal on 14th January 2014. The Respondents submitted that the Claimant/Applicant was not entitled to the orders he sought or even the reinstatement as he had been accorded a fair and just disciplinary procedure before his summary dismissal. The Respondent submitted that the Claimant was given all the procedural and legal safeguards provided for in the Employment Act Section 41 and the Claimant/Applicant was dismissed in accordance with Section 43 and 44 of the Employment Act. The Respondent thus submitted that the Claimant/Applicant was not entitled to any of the orders sought. The Respondent relied on the case of **The Motor Vessel Lilian 'S' v Caltex Oil (K) Ltd [1989] KLR 1**, **Bahadurali Ebrahim Shamji v Al Noor Jamal and Others [1997] LLR 6665 (CAK)** on material non-disclosure, **Alfred Nyungu Kimungui v Bomas of Kenya [2013] eKLR**, **Professor Gitile Naituli v University Council Multimedia University College and another Cause No. 1200 of 2012**, **Dalmas B. Ogoye v K.N.T.C Ltd. [1996] eKLR**, and **Gladys Boss Shollei v. Judicial Service Commission [2013] eKLR**.

3. These decisions have been considered and even where I do not delve into each of them they have informed the decision I am about to make.
4. The Claimant/Applicant disavows his employment with the 1st Respondent asserting he was an employee of the 2nd Respondent. Let me disabuse him and others who may have similar views of that notion. The Nairobi City County is NOT a successor of his former employer the Nairobi City Council. The Nairobi City Council was set up by Royal Charter prior to independence. The Nairobi City County is established under the Constitution of Kenya 2010 and though they have similarity in terms of seat of power, the acronym and perhaps a similar crest (coat of arms) the two are as distinct as coffee and tea. The Nairobi City County is a decentralised unit of Government duly elected by persons residing within the Nairobi City County. In all the years of its existence the Mayor of the Nairobi City Council was not elected by universal suffrage unlike the Governor who is the chief executive of the Nairobi City County. As the Nairobi City Council ceased to exist when the new system of government came into existence there is no successor to the Claimant's erstwhile employer the Nairobi City Council. The 2nd Respondent has never been an employer of the Claimant and there is absolutely no nexus between the two of them.
5. It is not disputed that the Claimant/Applicant was suspended on 7th May 2013 and his dismissal followed on 15th August 2013. Under the 1st Respondent's Human Resources Policy and Procedure Manual, the Claimant/Applicant while on suspension was entitled per the provisions of Clause 8.24 to all allowances. The material part of the clause reads as follows:-

An officer may be suspended from duty only if he/she commits a gross misconduct. Where an officer is suspended, he/she shall not be entitled to basic salary. The officer shall however, be eligible for all allowances due to him/her being taken against him/her.

6. From the foregoing it is clear only allowances were due during the period of suspension. Suspension is defined by the **Black's Law Dictionary Ninth Edition** as:

The temporary withdrawal from employment, as distinguished from permanent severance.

The Claimant/Applicant's employment was severed by dismissal on 15th August 2013.

7. The Claimant/Applicant has thus made out a case for payment of his allowances during his suspension. He was entitled to draw the allowances the position he held attracted. The basic pay was not part of the dues he could obtain. As regards the reinstatement sought, the Court is guided by the decisions on the matter including the case of **Shollei v. JSC** (supra) and the provision of Section 12 of the Industrial Court. As the matter has not been heard then the Court would not be in a position to determine the issue.
8. In the final analysis, the Application by the Claimant/Applicant is partly successful and the orders that commend themselves to be made are:
 - a. The Claimant/Applicant be paid his allowances for the period 8th May 2013 to 15th August 2013
 - b. Each party to bear their own costs.

Orders accordingly.

Dated and delivered at Nairobi this 17th day of June 2014

NZIOKI WA MAKAU

JUDGE