



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 12/2014

(Before Hon. Justice Hellen Wasilwa on 1st July, 2014)

JUDITH MAKOKHA
CLAIMANT

-VERSUS-

1. THE COUNTY GOVERNMENT OF KAKAMEGA
2. THE KAKAMEGA COUNTY PUBLIC SERVICE BOARD RESPONDENTS

RULING

The application before court is the one dated 4th February 2014. The application was filed by the claimant herein and brought under certificate of urgency. It was filed through a Notice of Motion and brought under S.3A and 63(c) and (e) of the Civil Procedure Act and Order 40 Rules 2, 3, 4 and 8 and Order 52 Rules 1, 2, 3 and 4 of the Civil Procedure Rules 2010.

The applicant sought orders that pending the hearing and determination of this claim, this court do issue a mandatory injunction restraining the respondents from continuing with the disciplinary proceedings currently commenced against the claimant and/or instituting any other disciplinary action and/or proceedings based on facts arising herein.

The application was supported by the affidavit of Judith Makokha the claimant applicant herein and on the grounds that:-

(a) The claimant was purportedly disciplined by being surcharged and warned by the respondents after employing the claimant by virtue of the County Government Act for alleged misdeeds carried out by the claimant when she was an employee of the defunct Malava Town Council.

(b) The respondents have again purported to issue a fresh notice purporting to institute fresh disciplinary action against the claimant on same facts which were concluded as aforesaid.

(c) The purported disciplinary action was arbitrarily made without according to the claimant a chance to make any representation and defend herself contrary to the governing laws and thus without following due process of the law.

(d) The respondents ignored the protest by the claimant and proceeded to enforce their arbitrary decision without any regard to the rights of the claimant.

(e) The respondents action is in violation of the County Government Act, Public Service Regulations, the Employment Act and the Constitution of Kenya.

(f) The entire process employed by the respondents is fundamentally flawed, unconstitutional and contrary to the principles of natural justice.

(g) If the orders sought are not granted the claimant will suffer undue hardship, untold suffering, prejudice and double jeopardy.

It is the applicant's case that she previously worked for the defunct Malava County Council and was entitled to due process when being disciplined. Her major complaint is that she has been subjected to a disciplinary process flout with illegalities rendering the whole process a nullity.

It is her contention that vide a memo dated 2.9.2013, the respondents notified her of their decision purportedly made following investigations into employment of casuals of the defunct Malava Town Council that she had been found liable for making payments to four casual workers irregularly and was surcharged a total of Ksh 88,365/=. Details of the surcharge are exhibited in her annexure **JM-3** copies of her relevant payslips. This decision had however been made without according her any hearing in the first instance and her reply to the decision which was in fact exonerating her from the blame was ignored. Vide a letter dated 27th January 2014 and annexed as **JM-5**, she was informed that the second respondent's Board had purportedly rescinded its earlier decision pending further investigations and she was required to show cause why disciplinary action should not be taken against her based on the same allegations upon which disciplinary action had already been taken against her within 14 days of receipt of the letter.

It is the applicant's contention that the decision to rescind their earlier decision and subject her to another process is prejudicial to her and she stands to suffer double jeopardy as she will suffer twice on same facts by the same body which acted after investigations and concluded the matter. It is further her contention that the action of the respondents raises substantial issues with regard to the Constitution, Article 50, 47 and 236, the Employment Act S. 18 and 19, County Government Act S. 76 and Public Service Commission Regulation 2007, regulation 26 and 33.

The respondents opposed this application. They filed their replying affidavit sworn by **Christabel Ashiono**, the Legal Officer of the respondents on 24th March 2014. It is the respondents submission that the claimant acted contrary to regulations and reinstated sacked staff to the payroll. They also aver that the surcharge of the claimant relates to normal obligations of the claimant in relation to loan and school fees obligations. Further, they aver that the applicant appealed against the respondents decision to surcharge her to the Ministry of Public Service and Administration vide her letter dated 12th September 2013. It is upon this appeal and request for facts review that the Public Service Board decided to set aside the surcharge decision dated 2nd September 2013. The letters in relation to this appeal are annexed as **CA(a), (b) and (c)**. That it is this appeal that is the basis for fresh disciplinary process.

Having considered the submissions from both parties, the issue for determination are and fold:-

- 1. Whether the applicant was subjected to a disciplinary process.**
- 2. Whether she appealed to the Public Service Commission Board.**

On the 1st issue, it is evident that the applicant faced some disciplinary process. This process though skewed is evident from applicants exhibit **JM-2** where she was informed that she was going to be surcharged for a total of Ksh 88,368 being the amount the County lost through payment of salaries.

Her pay slips exhibits **JM-3** shows that the surcharge was effected on her September and October 2012 payslips in 2 equal instalments of 44,184/=. Following this decision the applicant made an appeal that the surcharge be set aside. The letter was however directed to the Minister for Public Service and Administration Kakamega County Government. The appeal was however not directed to the Public Service Commission as envisaged under S. 77 of the County Government Act 2012 as the respondents

have submitted. In fact the letter notifying the applicant of the rescinded decision states as follows:-

“I wish to convey the decision of the County Public Service Board that the earlier rulings on your disciplinary case with three others be rescinded pending further investigations ---”

There is no indication that this decision was reached following her appeal and neither are the appeal proceedings annexed to show that the process took place. It is apparent that the applicant's money surcharged were also not returned to her following this decision.

It therefore follows that the applicant was indeed subjected to a skewed disciplinary process and surcharged accordingly. The decision to rescind the same and subject her to another process is prejudicial to her and I make an order that:-

1. **Pending the hearing and determination of this claim, a mandatory injunction do issue restraining the respondents from continuing with the disciplinary proceedings currently commenced against the claimant and/or instituting any other disciplinary action and/or proceedings based on facts arising herein.**
2. **Costs of this application will be in the cause.**

HELLEN WASILWA

JUDGE

1/7/2014

Appearances:-

Gomba h/b Amasakha for claimant present

Khasoa for respondents absent

CC. Wamache