



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 1663 OF 2014

WILSON K. C. SHOLLEICLAIMANT

VERSUS

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSIONRESPONDENT

RULING

The Applicant herein Wilson K. C. Shollei filed a Memorandum of Claim on 24th September 2014 in which he prays for the following orders:

- i. An order of mandamus to issue compelling the Respondent to render a suitable and acceptable public apology to the Claimant.
- ii. An order of compensation do issue for violation of the Claimant's rights and an inquiry as to quantum be gone into.
- iii. An award of general damages for breach of contract.
- iv. An order compelling the Respondent to issue the Claimant with a certificate of service.
- v. Any such other or further appropriate relief or orders as the Court may deem fit.
- vi. An order that the Respondent pay the Claimant's costs of this claim plus interest thereon.

Together with the Memorandum of claim the Applicant filed a Notice of Motion dated 24th September 2012 under certificate of urgency in which he prays for the following orders:

1. Service of this application be dispensed with in the first instance.
2. This application be certified as urgent and be heard ex-parte in the first instance due to the urgency of the relief sought herein.
3. Pending inter partes hearing the Respondent be restrained from receiving and/or processing applications, short listing, interviewing, selecting, sourcing and or appointing any other person to undertake the duties of the office held by the Claimant pending the hearing and determination of

this suit.

4. Pending inter partes hearing an order of Certiorari do issue to temporarily quash the proceedings of 1st September 2014 and the letter dated 2nd September 2014 purporting to terminate the Claimant's employment and the status quo ante reverted to.
5. An inter partes hearing an order of Certiorari do issue to recall and quash the letter dated 14th August 2014 and the status quo ante reverted to.
6. At inter partes hearing an order of Certiorari do issue to recall and quash the proceedings of 1st September 2014 and the letter dated 2nd September 2014 purporting to terminate the Claimant's employment and the status quo ante reverted to.
7. Pending the hearing and determination of the suit herein, the Respondent be restrained from interviewing, sourcing or employing any other persons to undertake the duties of the offices held by the Claimant.
8. Such other or further orders as the Court may deem fit to grant.
9. The Costs of this application be in the cause.

The application is filed under section 1A and 1B of the Civil Procedure Act, Order 40 Rule 2, 4(1) and 4(2) of the Civil Procedure Rules and Rule 16 of Industrial Court (Procedure) Rules. It is grounded on the affidavit of the Claimant Wilson K. C. Shollei and on the following grounds:

1. The Claimant was employed by the Respondent as Deputy Commission Secretary/Deputy Chief Executive Officer (support Services) for a renewable contract term of five years with effect from 3rd September 2012.
2. The Respondent has brazenly violated the principles of Natural Justice, its own Human Resources and Disciplinary policy, the Constitution and the law in purporting to terminate the Claimant's employment and thereafter advertising his position as vacant and inviting applications from the suitable members of the public to fill the same.
3. The Respondent's actions are manifestly illegal, unfair, unjust and in bad faith.
4. The error of law is apparently ex facie
5. That the matters alluded to as reasons for the purported termination of the Claimant's employment appear to have been inspired/derived from Anti-corruption case No.16 of 2013 in which the Claimant is charged alongside 3 other officials of the Respondent. That case is pending before court and the Respondent as acted unfairly, unreasonably and capriciously against the Claimant by usurping the role of the court in that case and concluding the case against him in violation of his constitutional rights.
6. The claimant has a good case with high chances of success.
7. It is only fair and in the interest of justice that the claimant is granted the orders sought herein.
8. Service of this application be dispensed with in the first instance. The application is supported by the affidavit of the claimant sworn on 4th August 2014 and the grounds on the face of the application.

The Respondent opposed the application and filed a replying affidavit of Beatrice Sungura Nyabuto, the Acting Secretary/Chief Executive of the Respondent.

The brief facts of the case as stated by the parties in the pleadings and submissions are that the Claimant/Applicant was employed by the Respondent as Deputy Commission Secretary/Deputy Chief Executive Officer (Support Services) on 1st September 2012 by the Respondents letter of offer of employment dated 13th August 2012. The employment was on a renewable 5 year fixed term contract. The first 6 months of the contract were to be treated as probationary period. The Claimant was responsible for the Human Resources, Financial Services, Legal Services, ICT Services and Research and Development Services Directorates each headed by a director. On or about 30th October 2013 the Applicant was charged in the Anti-Corruption Court in case No. 16 of 2013. As a result of his being charged in court, the Claimant was suspended from duty on half pay on 1st November 2013.

On 14th August 2014 the Respondent wrote to the Claimant giving him notice of intention to terminate his employment on grounds of serious shortcomings in his department during the Claimant's assignment and specifically that there were serious problems of financial mismanagement resulting to a huge unauthorized over expenditure together with lack of financial control and discipline. The Claimant responded to the show cause letter on 28th August 2014 protesting that the show cause letter was omnibus, vague and ambiguous and that it lacked specificity, clarity and detail to enable him to respond adequately to the same.

On 2nd September 2014 the Respondent wrote to the Claimant terminating his employment. The letter stated that the Respondent considered fully his response and was not satisfied with it and that the Respondent had decided to terminate his employment in accordance with his terms and conditions of service. It is against this termination of employment that the Claimant has filed this suit.

The application was argued before me on 2nd October 2014. The claimant was represented by Mr. Sifuna instructed by Boss Shollei, Sifuna, Muturi & Company Advocates while the Respondent was represented by Mr. Mogere appearing with Mr. Mohamed Nyaoga instructed by Mohamed Muigai Advocates. Mr. Mogere argued the application on behalf of the Respondent.

Mr. Sifuna submitted that the procedure followed by the Respondent in terminating the Claimant's employment was not only illegal but also a violation of the Respondent's Human Resources and Administration Policies and Procedures Manual. He submitted that the manual provides for discipline at clause 10. He further submitted that the procedure adopted was in gross violation of the Employment Act as the notification and content of the notice as provided in Section 41 of the Act was not followed.

Mr. Sifuna submitted that the Respondent being a public body and the claimant a public officer, his removal violates Article 236(b) of the Constitution, which requires that the Claimant be subjected to due process of the law. Mr. Sifuna further submitted that the Respondent's actions were in violation of Article 47 on fair administrative action. He further submitted that the notification of the Claimant did not raise the merits of the termination of his employment and did not demonstrate fair procedure.

Mr. Sifuna submitted that the claimant's case fell under the exceptional circumstances where the decision of the Respondent ought to be quashed and the Claimant reinstated. That the Claimant cannot get any job due to the charges against him and that he would therefore suffer irreparable damages, that this is a case where damages cannot be sufficient.

In reference to the replying affidavit of Beatrice Sungura Nyabuto, Mr. Sifuna submitted that paragraphs 21, 22 and 23 thereof demonstrated that the Respondent became uncomfortable or inconvenienced by the claimant's absence from work by virtue of his suspension, that this is a creation of the law, that according to the Respondent's affidavit it would be cheaper to violate the law and come to court to say they will pay damages to the Claimant.

Mr. Sifuna submitted that the Replying affidavit attempted to give reasons for the termination of the claimant's employment. He submitted that the court is not the disciplinary organ of the Respondent and that those grounds ought to have been given to the Claimant.

On the allegation that the claimant had not been confirmed, Mr. Sifuna submitted that the Claimant's letter of appointment provided for confirmation within 14 days of completion of probation period. On the Respondent's averment in the replying affidavit that the Human Resources and Administration Policies and Procedures Manual had not been approved, Mr. Sifuna submitted that it is a requirement of the law to have the document.

Mr. Sifuna submitted that the Respondent made a bold decision to flout the requirements of the law and the Constitution and it should not be allowed to get away with it.

Mr. Sifuna referred the court to the case of **Olympic Sports House Limited v. School Equipment Centre Limited (2012) eKLR** where Justice Mabeya quoted with approval the Courts decision in **Loldiaga Hills Limited & 2 others V. James Wells & 3 others (UR)** in which it was held that:

“On the second limb of Giella – vs Cassman Brown, the Defendant has asserted that as a financial institution, it is capable of compensating the Plaintiff and therefore damages are an adequate remedy. As already stated above, I have never understood the law to be that a wronged party cannot obtain an injunction because the wrongdoer is capable of compensating such party with damages. More so, when the act complained of is an illegal act that blatantly flouts the law a court of equity cannot fold its hands and condone the flouting of the law on the basis that damages are an adequate remedy. Whilst I am Alive to the fact that the 2nd limb of Giella – vs- Cassman Brown is to the effect that an injunction will normally not be issued where damages are an adequate remedy, I venture to suggest that that principle is not couched in mandatory terms. The East African Court of Appeal in laying down the test in Giella – vs- Cassman Brown put the 2nd limb in a permissive form as opposed to the 1st limb. His Lordship Spry V.P delivered himself thus in Giella –vs- Cassman Brown (1973) EA 358 at 360:-

‘First an applicant MUST SHOW a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience’.

Mr. Sifuna urged the court to grant orders as prayed for by the claimant.

Mr. Mogere for the Respondent submitted that the Respondent opposed the application. He submitted that the Respondent has a sensitive mandate to handle elections which if done improperly would have serious consequences, that in order to do so the Respondent needed its full capacity which comprises human and other resources. That the Claimant had worked for barely a year of the 2 years in which he was in the employment of the Respondent before he was suspended, that the claimant's suspension followed the legal and mandatory consequences of his being charged in the Anti-corruption Court. That in the meantime the work of the Respondent must continue as the Respondent will have no excuse if it fails to deliver because this court does not allow it to operate at full capacity.

Mr. Mogere further submitted that one of the orders sought is an injunction to stop the Respondent from filling the Claimants position. He submitted that an injunction is defeated by delay, that having been terminated from employment on 2nd September 2014 and the advertisement for filling of his position published on 3rd September 2014 the Claimant did not explain why he did not come to court before the close of the period of applications on 24th September 2014, that the orders sought would have the effect of interfering with the rights of the Applicants to have their applications considered fully and finally, that an injunction should not lie where damages would be adequate remedy and that the Claimant had prayed for damages in his claim. He further submitted that there is no prayer for a permanent injunction.

On the prayer for certiorari Mr. Mogere submitted that such orders cannot lie as the prayers can only be granted with leave under the Civil Procedure Act. Mr. Mogere submitted the prayer for status quo is misplaced as the status quo is that the Claimant is on suspension. He submitted that it is against public interest for the important functions previously performed by the claimant to be left undone or unperformed until some other proceedings over which this court has no control have been concluded.

Mr. Mogere also submitted that the prayers of the Claimant amounted to seeking Judicial Review orders and the cardinal rule in such cases is that the court should not usurp the decision making power of the Respondent, that if at the end of the full proceedings the court should find the termination process insufficient, appropriate orders should be made, that the Claimant's contract had a termination clause which allows the Respondent to perform its duties and a decision of the court at this stage cannot make an order on how the process should be done.

Having summarized the facts and submissions of the parties, I have to determine whether the Claimant has made out a case to warrant the prayers sought. I will only consider arguments relevant for determination of the application before me. I will consider the constitutional issues raised in this case first.

The claimant alleges that his rights under Article 47 and 236(b) have been violated. Article 47 provides for the right to fair administrative action. Article 236 (b) protects public officers from dismissal, removal from office, demotion in rank or otherwise subjected to disciplinary action without due process of the law.

In my opinion both of these provisions are in the domain of public law. The case against the Respondent is however an issue of private law between an employer and its employee. Although the employer, that is, the Respondent is a Public body, the termination of the claimant's employment was not carried out under its domain as a public body, but in its private capacity as the employer of the claimant. I therefore find that the two articles of the constitution although relevant, do not impact directly on the issues raised by the facts of this case.

Turning to the main issues of this case, the Claimant seeks the orders on the face of his motion on the grounds that the procedure for termination of his employment was both illegal and a violation of the Respondents Human Resources and Administration Policies and Procedures Manual (hereinafter referred to as the Manual).

I will not go into considering the provisions of the Respondents Manual as the Respondent has denied that the Manual has been approved, and parties did not make any submissions on the validity or otherwise of the manual.

On whether the Respondent failed to comply with the procedure set out under Section 41 of the Employment Act, the Respondent did not contest the Claimant's assertion. Instead the Respondent only raised issues justifying the action taken against the Claimant.

At paragraph 19 of the replying affidavit the Respondent avers that it terminated the claimant's employment in accordance with the provisions of the IEBC Act and the Constitution. No specific section of the Act or Constitution was referred to. The Respondent did not deny that the Claimant's employment contract was subject to the provisions of the Employment Act. The Employment Act asserts at Section 3(6) that the terms and conditions of employment set out therein shall constitute the minimum terms and conditions of employment and any agreement to relinquish, vary or amend the terms in the Act shall be null and void.

Having not submitted any terms and conditions of employment applicable to the Claimant other than those in his letter of appointment and the disputed manual, the provisions of the Employment Act are applicable to the Claimant in so far as the Claimant's letter of appointment does not provide better terms. The provisions of Section 41 of the Act are therefore applicable to the Claimant.

There is no dispute that the claimant was sent on suspension following the charges against him at the Anti-Corruption court. There is also no dispute that the suspension was pursuant to the provisions of Section 62 of the Anti-Corruption and Economic Crimes Act under which the claimant was charged. Section 62 of the Act provides as follows:

(1) *A public officer who is charged with corruption or economic crime shall be*

suspended, at half pay, with effect from the date of the charge.

(2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.

(3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted.

(4) This section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed.

(5) The following shall apply with respect to a charge in proceedings instituted otherwise than by or under the direction of the Attorney-General:

(a) this section does not apply to the charge unless permission is given by the court or the Attorney-General to prosecute or the proceedings are taken over by the Attorney-General; and

(b) if permission is given or the proceedings are taken over, the date of the charge shall be deemed, for the purposes of this section, to be the date when the permission is given or the proceedings are taken over.

(6) This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.

(7) This section does not apply with respect to a charge laid before this Act

There is no dispute that the charges against the claimant are still pending in the Anti-Corruption Court and were so pending at the time of termination of his employment by the Respondent.

Further there is no dispute that the Claimant was issued with a letter notifying him of the intention to terminate his employment and after he responded to the letter, was terminated from employment without being taken thought the provisions of Section 41 of the Employment Act which provide as follows:

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

This being the case, the termination of the claimant's employment was unfair within the provisions of section 43 and 45 of the Employment Act as no valid reason was given for the termination of his employment, in addition to failure to adhere to the principles set out in Section 41 on the procedure adopted in terminating his employment.

The foregoing notwithstanding, it is my opinion that the termination of the Claimant's employment was also supposed to comply with the provisions of the Anti-corruption and Economic Crimes Act which

provides for termination of employment only after conviction as provided in section 63 of the Act. This is because this was the law under which the Respondent elected to handle his case.

The Section provides that:

(1) A public officer who is convicted of corruption or economic crime shall be suspended without pay with effect from the date of the conviction pending the outcome of any appeals.

(2) The public officer ceases to be suspended if the conviction is overturned on appeal.

(3) The public officer shall be dismissed if:

(a) The time period for appealing against the conviction expires without the conviction being appealed; or

(b) The conviction is upheld on appeal.

(4) This section does not apply with respect to an office if the Constitution limits or provides for the grounds upon which a holder of the office may be removed or the circumstances in which the office must be vacated.

(5) This section does not apply with respect to a conviction that occurred before this Act came into operation.

The Act does not provide for any other mode of handling a public officer who has been charged with an offence under the Act. The provisions of both Section 62 and 63 are couched in mandatory terms. The Act states that the officer **shall** be suspended at half pay with full allowances. Subsection 62(4) however allows the suspension without pay or dismissal of an officer who has been charged with an offence under the Act only if there is another law that provides for the same. The Respondent has not demonstrated that there is such other law or that it acted in accordance with specific provisions of any other law when terminating the Claimant's employment.

Section 63 also provides for dismissal only under the circumstances stated in subsection 3(a) and (b), that is, if the officer is convicted and the period of appeal has lapsed without him preferring an appeal or if he appeals and the appellate court upholds the conviction.

Section 62 (3) provides that the suspension ceases where an officer is acquitted or the charges against him are withdrawn.

Other than the provisions of the law enumerated above, the Respondent has not drawn the court's attention to any other provision for dealing with a public officer who has been charged with an offence under the Anti-Corruption and Economic Crimes Act.

The implication of the foregoing is that the Respondent having chosen to deal with the Claimant in the manner provided for under the Act, it is bound by the said provisions of the Act. Dealing with the Claimant in any other manner other than that provided in the Act is in contravention of the Act. Having been suspended in accordance with Section 62 of the Act, his suspension can only cease in the manner provided under Section 62 or 63 of the Act.

The termination of the Claimant's employment by the Respondent in the manner it did has the effect of denying the claimant the right to the lifting of the suspension should the case which is still pending before the Anti-corruption Court be withdrawn or should he be acquitted either in that case or in an appeal arising from the decision in the case. The upshot is that the termination of the Claimant's employment is null and void for failure to comply with the provisions of section 62 and 63 of the Anti-Corruption and Economic Crimes Act and Section 41, 43 and 45 of the Employment Act.

On the Claimants prayer to stop the Respondent from interviewing, sourcing or employing any other person to undertake the duties held by the Claimant, I agree with the submissions by Mr. Mogere that the

work of the Respondent must go on in spite of the suspension of the Claimant. Asking the Court to stop the filling of the position substantively held by the Claimant would be to stop the Respondent from exercising its mandate under the Constitution and the IEBC Act. As stated by Justice Rika in the case of **Joab Mehta Oudia V. Coffee Development Board of Trustees (2014) eKLR**, the employer is presumed to know that in so doing, there is a possibility that the Claimant may be acquitted of charges against him allowing the claimant to return to his substantive position. Justice Rika further stated that it is always advisable for the employer to have a contingency arrangement, in case such an order issues, particularly in jobs that are of a singular nature at the workplace, which is the case in the Claimants position.

I must however point out that I do not agree with Mr. Mogere's argument that the Applicant's for the Claimant's job following the advertisement of his position have any justiciable rights capable of being protected but this court which would militate against the court granting the orders prayed for by the claimant. An Applicant to a job does not acquire any rights until the Applicant has been awarded a contract for the job unless the claim is for discrimination in appointment under Section 5 of the Employment Act. In any event, the Applicants have not been enjoined in this suit and have not applied for preservation of their rights to be interviewed for the position.

Further, the rights of such Applicants would not supersede the rights of the claimant even if they were enjoined and had made such application.

For the foregoing reasons I make the following orders:

1. I declare the termination of the Claimant null and void and order that the status quo before the termination of employment prevails pending the conclusion of Anti-Corruption Case No. 16 of 2013.
2. The prayer to restrain the Respondent from interviewing, sourcing or employing any other persons to undertake the duties of the offices held by the Claimant is dismissed.
3. There will be no orders for costs.

Dated in open court this 18th day of November, 2014.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Sifuna for Claimant

Mogere for Respondent