



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU
CAUSE NO. 291 OF 2014

JOHN OTIENO OBONYO..... CLAIMANT

v

KENYA UNION OF POST-PRIMARY

EDUCATION TEACHERS..... RESPONDENT

RULING

1. The Cause herein was filed before the Industrial Court in Kisumu on 28 October 2014. Together with the Cause, John Otieno Obonyo (applicant) filed a motion under certificate of urgency seeking
 - 2) *That pending the hearing and determination of this application inter-partes there be an order directing the respondent to release the applicant salary arrears withheld.*
 - 3) *That pending the hearing and determination of this suit there be an order directing the respondent to pay the applicant his entire salary as they fall due and all the arrears.*
2. Wasilwa J heard the motion *ex parte* on 28 October 2014 and directed that it be served for *inter partes* hearing on 13 November 2014.
3. On 13 November 2014, the Respondent filed a Notice of Preliminary Objection to the effect that the Court *lacked jurisdiction, the Respondent was non-suited, the motion was fatally defective and an abuse of Court process.*
4. On 13 November 2014, Wasilwa J granted prayer 2 of the motion and directed the Respondent to file a replying affidavit within 3 days. Hearing of the motion was adjourned to 19 November 2014.
5. On 18 November 2014, the Respondent filed its own motion seeking to have the orders granted on 13 November 2014 stayed or set aside. The Court certified the Respondent's motion urgent and directed that it be served upon the applicant to be argued together with the applicant's motion.
6. On 19 November 2014, Wasilwa J heard and dismissed the preliminary objection as lacking merit and directed that both motions be heard in Nakuru. I was told from the bar that Wasilwa J had proceeded on leave hence the temporary transfer of the Cause to Nakuru.
7. The motions were both argued before me on 2 December 2014.

Applicant's case/submissions

8. The applicant relied on the grounds on the face of the motion and his two affidavits sworn on 27 October 2014 and 26 November 2014.

9. Mr. P D Onyango for the applicant submitted that the applicant was the Executive Officer of the Respondent's Migori Branch and that in September 2014, the Respondent unilaterally reduced his remuneration from a net of Kshs 96,390/- to Kshs 34,300/- despite the fact that he was still working. He further submitted that the applicant had not been served with any suspension letter either by the Respondent or the Migori Branch. The applicant had not been called to any meeting to discuss his conduct.
10. In any case, Mr. Onyango submitted that the Respondent's Migori Branch had no power to suspend the applicant, which powers belonged to the Respondent's National Governing Council.

Respondent's case/submissions

11. Mr. Jaoko for the Respondent opposed the motion. He submitted that the prayers sought in the motion were the exact prayers sought in the main Cause and granting the motion would be tantamount to determining the Cause on the merits at the interlocutory stage and this would prejudice the Respondent's case.
12. Counsel further submitted that the applicant was not an employee of the Respondent and that it is the Respondent's Migori branch which met and resolved to suspend the applicant and that pursuant to the Respondent's constitution, the applicant having been suspended ought to have been placed on half salary, and this was communicated to the Respondent who implemented the same.
13. He also submitted that the applicant attended the meeting where it was resolved to suspend him and other officials and that the applicant was informed of the charges against him and his suspension.

Evaluation and Orders

14. It is correct as submitted by the Respondent that granting the prayers in the motion would determine the main Cause at the interlocutory stage. That would not be prudent to do.
15. Further, for this Court to delve into the merits of the applicant's motion, it is likely that it will be making determinations which should be left for the trial judge. That would likely fetter the hands of the trial judge.
16. But on the face of the Respondent's constitution, Article 21(i) appears to reserve the power of suspension of officials to the National Governing Council on the recommendation of a Branch. Article 21 (a) on its part envisages the National Governing Council communicating to the affected official of the decision to suspend him.
17. By dint of Article 8.10(iii), any of the Respondent's Branch Governing Council's shall initiate disciplinary process and make recommendations to the Secretary General.
18. The Notice calling the meeting at which the applicant's conduct was discussed was for a Special Branch General Assembly. The functions of the Branch General Assembly as set out in Article 8.8 of the Respondent's constitution do not expressly include disciplinary issues. The closest function is election of branch officials every five years.
19. I have looked at the documentation annexed to the respective parties' affidavits. I have not been able to see a notice to show cause addressed to the applicant. Neither is there any communication or recommendations from the Branch Governing Council. I have also not seen any notification from the National Governing Council addressed to him to inform him formally of his suspension.
20. In my view, the applicant has satisfied the test for temporary injunctive relief and further it would be in the interest of doing substantive justice based on the Respondent's constitution to order that the Respondent continue paying the applicant his full salary pending hearing of the main Cause on the merits.
21. But to do justice to the applicant as well, this Cause ought to be set down for hearing on a priority basis before the Court in Kisumu once the new judge reports early in the year.
22. In this regard, the Court directs and orders that
 - i. The Respondent to continue paying the applicant full monthly salaries pending hearing and determination of the Cause on the merits.
 - ii. The Respondent to file and serve a Response to the Memorandum of Claim and all documents to be

relied on or before 14 January 2015.
iii. The file to be transferred back to Kisumu to be mentioned before the Judge on 26 January 2015 to get a hearing date on an accelerated basis, or for directions.

23. Costs in the cause.

Delivered, dated and signed in open Court in Nakuru on this 11th day of December 2014.

Radido Stephen

Judge

Appearances

For Claimant Mr. Onyango instructed by P D Onyango & Co. Advocates

For Respondent Mr. Jaoko instructed by Nchoe, Jaoko & Co. Advocates