



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 272 OF 2014

(BEFORE HON. JUSTICE HELLEN S. WASILWA ON 3RD DECEMBER, 2014)

JAMES ANG'AWA OKEYO CLAIMANT

-VERSUS-

KISUMU WATER & SEWERAGE CO. (KIWASCO) RESPONDENT

R U L I N G

The application before court is the one dated 8.10.2014. The application was filed under certificate of urgency and brought through a notice of motion brought under S. 3 and 12 of the Industrial Court Act 2011, Section 41, 43, 45, 49, 50 & 87 of Employment Act 2007, Article 41 & 50 of the Constitution of Kenya, Industrial Court Procedure Rules 2010 and all inherent powers of the court.

The applicant seeks orders that:-

1. **That this application be certified as urgent and be heard ex parte in the first instance and on priority basis.**
2. **That the honourable court issue an order restraining the respondents from disciplining, suspending, terminating and or dismissing the grievant pending determination of this application.**
3. **That the honourable court issue an order restraining the respondents from disciplining, suspending, terminating and or dismissing the grievant pending determination of the applicant's claim.**
4. **That the applicant be paid full salary by the respondent pending the hearing and determination of this application.**
5. **That the applicant be paid full salary by the respondent pending the hearing and determination of the applicant's claim.**
6. **That any suitable orders be granted for the ends of justice.**
7. **That costs of this application be provided for.**

The application is grounded on the annexed affidavit of James Ang'awa Okeyo the applicant herein and on the grounds that:-

- i. **That the applicant is/was an employee of the respondent**
- ii. **That the respondent has illegally, unlawfully and unfairly suspended and/or constructively dismissed the applicant.**
- iii. **That the respondent has constructively dismissed the applicant.**
- iv. **That the applicant has pursued the matter within the provisions of Labour Relations Act 2007 but without success.**

- v. **That the respondent has blantly refused/neglected to give a notice of suspension/dismissal to the applicant.**
- vi. **That the respondent action did not comply with the provision of Employment Act, 2007 on disciplinary matters hence unlawful.**
- vii. **That the respondents action contravene the provisions of termination/suspension of the applicant as contained in the contract.**

viii. That the grievant's suspension/constructive dismissal has denied him his employment rights and

the opportunity to enjoy fair Labour Practices guaranteed in the Constitution.

- ix. **That the grievant at all times relevant to this case has performed his duties properly, faithfully, diligently, professionally and without causing any loss to the respondent and without mishandling of any supplier.**
- x. **That the respondent has for no cause and in violation of labour and administrative rules and the rules of natural justice irregularly and illegally replaced the applicant's position in employment with Nicholas Moseti (an Assistant Head of Finance) to be the Head of Finance of the respondent.**

The applicant avers that he has not been subjected to a disciplinary process as envisaged by the Staff Manual of the respondent. He avers that any disciplinary process must commence with a committee being set up and under Article 10.2.1(a) & (b) of the said Manual, the said committee makes it's recommendations.

It is this committee which will deliberate on and recommend the duration of suspension and also receive and deliberate on matters involving disciplinary action on any staff member.

According to the applicant, he was given a show cause letter **Annex C-11** which he contends was not a show cause *per se* as he was suspended for 3 months with full pay whereas staffs on suspension are usually paid ½ pay.

On 24.10.2014, he was now terminated and this was before being given a notice nor any hearing.

The respondents opposed this application. They filed their replying affidavit on 27.10.2014. The affidavit is deponed to on 23.10.2014 by Evelyne Opiyo, the Head of Human Resource & Administration of the respondent. The respondents aver that the claimant was the Head of Finance of the respondents. That the claimant's employment was subject to the respondents Human Resource Policies and Procedures Manual 2010 and Clause 2.2 of respondent's terms and condition of employment and was also subject to performance appraisals at least twice a year. That when assesed, the claimant was found weak on meeting timelines and on quality of work output.

They aver that the applicant's suit is premature and is based on misconception of the contents of the letter dated 15.9.2014 and that the suit seeks to pre-empt the conduct of a normal disciplinary process that is by law permitted. They want the court to dismiss this application.

Upon hearing the submissions of the parties, the issue for determination is whether the court can grant the applicant orders sought? On 24.10.2014, following what the applicant avers are flawed disciplinary procedures, the respondent went ahead and terminated the claimant's services.

Can this court order reinstatement of claimant at this stage in a preliminary application? It is true that the respondents has it's disciplinary procedures which must be followed. It is also true that the disciplinary process which is an internal process should not be interferred with by the court unless it is shown that it is flawed. And after dismissal or termination, it will be unprocedural for this court to order reinstatement at this stage without according the parties a hearing. To grant the orders sought will also determine the main suit at a preliminary stage. I therefore find that the orders sought cannot be granted having been

overtaken by events. The case will proceed to a full hearing.

HELLEN S. WASILWA

JUDGE

3/12/2014

Appearances:-

Nyawiri for claimant

Njoga for respondent

CC. Wamache