



REPUBLIC OF KENYA



**Nyagena v Mwilu & another (Petition E051 of 2021)
[2021] KEELRC 914 (KLR) (20 September 2021) (Ruling)**

Theresiah Bosibori Nyagena v Philemona Mbete Mwilu & another [2021] eKLR

Neutral citation: [2021] KEELRC 914 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E051 OF 2021
NZIOKI WA MAKAU, J
SEPTEMBER 20, 2021**

BETWEEN

THERESIAH BOSIBORI NYAGENA PETITIONER

AND

**THE HON. JUSTICE PHILEMONA MBETE MWILU AG. CHIEF JUSTICE AND
PRESIDENT OF THE SUPREME COURT OF KENYA 1ST RESPONDENT
JUDICIAL SERVICE COMMISSION 2ND RESPONDENT**

RULING

1. The petitioner/applicant filed a Notice of Motion application dated 8th April 2021 seeking to be heard for orders:
 - i. Spent.
 - ii. That pending the hearing and determination of this application, the Honourable Court do issue an order directing the Respondents to pay the Petitioner all salaries, allowances and all other due contractual and statutory benefits withheld throughout the suspension period until further orders of the court.
 - iii. That pending the hearing and determination of this main Petition, the Honourable Court do issue an order directing the Respondents to pay the Petitioner all salaries, allowances and all other due contractual and statutory benefits withheld throughout the suspension period until further orders of the court.
 - iv. That pending the hearing and determination of this Application, a temporary injunction do issue prohibiting and restraining the Respondents by themselves, their officers or agents from implementing the decision contained in the 1st Respondent's letter dated 7th January, 2021



and from taking any adverse action or commencing any disciplinary proceedings against the Petitioner pursuant to the said decision.

- v. That pending the hearing and determination of the main Petition, a temporary injunction do issue prohibiting and restraining the Respondents by themselves, their officers or agents from implementing the decision contained in the 1st Respondent's letter dated 7th January, 2021 and from taking any adverse action or commencing any disciplinary proceedings against the Petitioner pursuant to the said decision.
 - vi. That pending the hearing and determination of this application, the Honourable Court do issue an order directing the Respondents to reinstate the Petitioner to her employment to the position she held prior to her suspension.
 - vii. That pending the hearing and determination of the main Petition, the Honourable Court do issue an order directing the Respondents to reinstate the Petitioner to her employment to the position she held prior to her suspension.
 - viii. That costs hereof be provided for.
2. The Application is made on the grounds that on or about 13th January 2021, the 1st Respondent illegally, unlawfully and unprocedurally issued a suspension letter dated 7th January 2021 to the Petitioner who was on duty. That the decision to suspend the Applicant was malicious since it was tactfully calculated to await the exit of the then Chief Justice who had not found any reason to suspend the Applicant or take any disciplinary action against her when the said allegations of Gross Misconduct were raised. That the Respondents are now about to commence disciplinary proceedings against the Applicant based on the illegal and irregular suspension letter, and unless they are restrained by an order of this Court, they will proceed to unlawfully terminate the Applicant's employment. The Applicant also asserts that the Respondents have deliberately refused and/or declined to pay her any salary or the alimentary allowance alluded to in the suspension letter and which action is unlawful, discriminatory and unconstitutional. Further, that due to lack of income she is currently unable to meet her obligations including feeding her family and paying for a loan she took on the strength of her salary and approved by the employer.
 3. The Petitioner/Applicant depones in her Supporting Affidavit that the 1st Respondent unilaterally made a decision and concluded that the acts alleged in the letter dated 7th January 2021 amount to gross misconduct, and which letter also required her to show cause why she should not be dismissed from office. She deponed that she was consequently suspended effective the date of the said letter with no salary but on an alimentary allowance equivalent to one third ($\frac{1}{3}$) of her basic salary. That she was also required to hand over all Judiciary stores in her custody with a detailed hand over report and on condition that she reports to the Head of Station, Kiambu Law Courts every last Friday of the month until finalization of her. She further avers that the Respondents suspending her from duty when there was no criminal conviction against her and without any proceedings for dismissal taken against her as required under Paragraph 17 of Part IV of the Third Schedule to the Judicial Service Act subjected her to unfair labour practice and denied her the right to a fair administrative action and the right to fair hearing. It is the Applicant's assertion that while the Suspension letter is dated 7th January 2021, the 1st Respondent assumed office as the acting Chief Justice on 11th January 2021 and could not therefore have signed the letter. She avers that the Respondents' cruel and discriminatory treatment and deliberate refusal to pay her salary is purposely intended to frustrate her, subject her to cruel and inhumane treatment and to cause her and her family psychological and mental torture.



4. The Petitioner/Applicant also filed a Further Affidavit dated 26th April 2021 averring that sometime on or about 15th April 2021 after she had filed the Petition and Application herein, she learnt that the 2nd Respondent had paid her alimentary allowance for the months of February and March, 2021 totalling to Kshs. 96,100/- and that the said amount was immediately retained by her bank to recover the loan which continues to be in arrears and the bank proceeded to then issue her with a demand notice for payment of the outstanding loan arrears. She depones that other than the alimentary allowance, she has not received any salary payment from her employer since her suspension to sustain her and her family and being a judicial officer, she cannot have any other gainful employment or business. She beseeches this Court to grant the orders sought forthwith as no prejudice will be suffered by the Respondents.
5. The Respondents filed a Replying Affidavit sworn on 26th April 2021 by Anne Amadi on behalf of the 2nd Respondent. She depones that the Petitioner is not deserving of any of the Orders sought in both the Application and Petition as she seeks to challenge a statutory and constitutional duty of the Respondents. Further, in addition to the Constitution and the Judicial Service Act, the Respondents are guided by the HR Manual which sets out the principles, guidelines and procedures for the smooth functioning of the Judiciary's human resource and management. She further avers that after the 1st Respondent granted the Petitioner/Applicant's request for more time to respond to the allegations in her Notice to Show Cause and Suspension Letter, she eventually responded on 26th January 2021 and that the Petitioner's response was considered and the 1st Respondent escalated the matter to the 2nd Respondent who thereafter decided to institute disciplinary proceedings against the Petitioner/Applicant. That since the Chief Justice has power to suspend a judicial officer then the 1st Respondent was well within the 6 months' timeline to act as the Chief Justice and to consequently suspend the Petitioner/Applicant. She deponed that under Clause D7.2 of the HR Manual, proceeding on leave or days off prior to obtaining approval, absence from duty without leave for more than 24 hours, habitual lateness and absenteeism are gross misconduct offences which if proved could lead to dismissal. That the law allows for suspension as long as other proceedings that may lead to dismissal are being conducted as in the present case. She asserts that suspension being part of a chain of disciplinary actions, the 1st Respondent properly exercised her discretion after considering the allegations against the Petitioner/Applicant and on the basis of prima facie knowledge and information by the Head of Station, advocates and litigants, that there was some misconduct which warranted suspension.
6. She further avers that an officer on suspension is only entitled to an alimentary allowance on such terms as the Respondent may by regulations determine and that the 2nd Respondent has paid the Petitioner alimentary allowance pursuant to the law and will do so until the disciplinary proceedings are finalized as required by the law. Further, that an order directing the Respondents to pay the Petitioner all salaries, allowances and all other contractual and statutory benefits will therefore be contrary to the law. She asserts that since the disciplinary process has thus far been conducted in accordance with the law, this Honourable Court should shun the invitation to interfere with the ongoing process. That the disciplinary prerogative of the Respondents can only be impeached on grounds of unreasonableness and the Petitioner has so far not demonstrated that the Respondents' actions are outside the band of reasonableness. She avers that an order of prohibition or injunction permanently restraining the Respondents from taking any adverse action or commencing any disciplinary proceedings against the Petitioner is absurd.
7. In response, the Petitioner/Applicant filed a Further Affidavit averring that whereas the Ag. Chief Justice is allowed by law to act and perform functions of the Chief Justice, it is not intended that she shall undo, reverse, review decisions of the former Chief Justice to the detriment of the subject affected judicial officers. She avers that the said HR regulation has been declared unconstitutional and courts have now put officers on suspension on half pay of their gross pay, and which fact is well within the



knowledge of the Chief Registrar of the Judiciary and the Ag Chief Justice. She denies having been contacted and informed of any developments in the matter as alleged or having been supplied with the documents annexed to the Replying Affidavit. She asserts that whereas the court may not as a general rule interfere, it must intervene when one's rights have been breached as in the instant case where she is being sacrificed following a tribal campaign to represent her colleagues at the JSC which she appealed against.

8. The Petitioner/Applicant submits that this Court has the discretionary and statutory power to stop the flawed disciplinary proceedings that are marred with irregularities against her. She submits that Courts have severally held they will interfere with the internal disciplinary action only when the process is flawed and marred with irregularities, as demonstrated in the cases of *Mulwa Msanifu Kombo v Kenya Airways* [2013] eKLR and *MTM v KJE Limited & Another* [2020] eKLR. She submitted that in Cause No. 1684 of 2015 – *Anne Wambui Kamuiru v Kenya Airways*, it was held that the Court will also interfere if satisfied that the process is stage managed towards dismissal and will interfere not to stop the process altogether but to put the correct process on course. The Applicant submits that the suspension letter was issued to her without following due process and procedure of the law set out under Section 32 of the *Judicial Service Act* read together with Paragraph 15 of the Third Schedule to the *Judicial Service Act* (“the Act”); Section D.7.5.2 of the Judiciary Human Resource Policies and Procedure Manual; and Section 45 of the *Employment Act*. She submits that the decision to suspend her also violated and infringed on her rights and fundamental freedoms protected under Articles 41, 47 and 50 of the *Constitution*. Further, that firstly, under the Judiciary Human Resource Manual 2014, it is the Chief Registrar of the Judiciary and not the Chief Justice who has authority or mandate to issue the show cause notice and that the show cause notice vide letter dated 7th January 2021 by the 1st Respondent was thus issued irregularly, unprocedurally, unlawfully and without authority. Secondly, there was no disciplinary proceedings taken against the Applicant prior to the impugned suspension and thirdly, the conditions to hand over and report to Kiambu Law Courts until the case is finalised are not provided for under paragraphs 15 and 17 of the Third Schedule. She further submits that under Paragraph 25 of the Third Schedule to the Act, it is instructive that proceedings for dismissal envisaged under Paragraph 17(2) of the Third Schedule to the Act are undertaken only after the Chief Justice has laid before the Commission copies of the statement of the charge or charges and the reply, if any, of the officer and the Commission has decided whether or not the disciplinary proceedings should continue. That as the 1st Respondent did not exhaust these procedural requirements, her suspension is rendered unfair and unprocedural and which was the finding of the court in *Bryan Mandila Khaemba v Chief Justice and President of the Supreme Court of Kenya & Another* [2019] eKLR. That similarly in *NML v Judicial Service Commission & Another* [2019] eKLR, Radido J. noted that the respondents did not produce any material to suggest that inquiries, as contemplated by Section 25 of the Third Schedule of the *Judicial Service Act*, were made. It is the Applicant’s submission that the Respondents should therefore be restrained from commencing any disciplinary proceedings against her based on an unlawful, illegal and irregular suspension letter or at all.
9. The Petitioner/Applicant submits that Paragraph 16 (3) of the Third Schedule to the Act provides that an officer suspended from exercising the functions of their office shall be granted an alimentary allowance in such amount and on such terms as the Commission may by regulations determine and that the Commission has not set out any regulation prescribing the amount of alimentary allowance to be paid to an officer on suspension and the 1st Respondent did not indicate or demonstrate how she arrived at the alimentary allowance of a third of the Applicant’s salary. She asserts that the 1st Respondent could thus have erred in law by unilaterally coming up with a figure not provided for in law and without such regulation, she is entitled to full salary or utmost half of the salary. The Applicant urges the Court to enhance the salary entitled to her to full pay or three quarters of the salary



considering she is still an employee and the alimentary allowance goes directly to the bank to service her loan. She relies on the case of Bryan Khaemba above where the Court stated that for payment of officers during the period of suspension, the 2nd Respondent may be guided by parliamentary enactments which may not be binding but sufficient; such as Section 71(3) of the *Public Service Commission Act* 2017 which provides that a public officer who has been suspended shall receive a half basic salary, full house allowance and medical allowance or remittance of medical insurance premium, but other benefits shall be withheld. She submits that since she is at the peak of her career with a calling to serve as a judicial officer, her reinstatement to continue serving the people of Kenya pending the hearing of the Petition will not occasion the Respondent any prejudice. This is because her reinstatement will only benefit the tax payers who will have to pay the withheld salaries from the date of suspension until payment in full if the Petition succeeds. It is her submission that she is ready to resume duty and continue serving the people of Kenya at any station she will be posted. The Petitioner/Applicant submits that although the traditional conditions precedent for grant of interim injunction were enunciated in the locus classicus case of *Giella v Cassman Brown Company Ltd* [1973] EA 358, the law and courts in labour relations have appreciated the fourth element of fair labour practice that a court of law must consider in determining such questions – see *Mulwa Msanifu Kombo v Kenya Airways* [2013] eKLR. She submits that she has extensively demonstrated in her Supplementary Affidavit the extent of malice and motive that actuated her suspension from service and that the instant Application satisfies all the three limbs for grant of interim injunction orders.

10. The Respondents rely on the case of *Republic v Disciplinary and Ethics Committee of the Kenya Pharmaceutical Association & Another Ex-Parte Issac Ndungu Kiguru* [2016] eKLR where G V Odunga J. (as he then was) stated that the courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It is the Respondents' submission that this Honourable Court cannot interfere with the disciplinary process as no evidence of unreasonableness has been adduced and therefore the disputed contentious facts ought to be preserved to be heard and determined by the said Panel. They submit that Paragraph 15 of the Third Schedule to the Act states that the powers of the Judicial Service Commission to interdict, suspend or reprimand an officer are delegated to the Chief Justice. Further, that Paragraph 17(2) of the Third Schedule to the Act as read together with Clause D.7.5.2 of the Judiciary HR Manual provides that where proceedings for dismissal have been initiated, the Chief Justice has the power to suspend the Judicial Officer in question. That the 1st Respondent having been appointed Acting Chief Justice pursuant to Section 5(4) of the Judicial Service Act, she was well within the law when she exercised the aforementioned delegated powers to issue a suspension letter to the Applicant. Further, that according to Paragraph D.7.3 of the HR Manual suspension is one of the actions that can be taken against a judicial officer before investigations of gross misconduct commence. They submit that upon considering the Applicant's response, they faithfully adhered to Section 25(2) and (3) of the Third Schedule to the Act as well as Articles 47 and 50 of the Constitution. The Respondents cite the cases of *Joshua Muindi Maingi v National Police Service Commission & 2 Others* [2015] eKLR and *John Kinyanjui Gateru v Family Bank Limited* [2016] eKLR where the Courts opined that the employer is justified to suspend an employee pending the outcome of a criminal process or investigations by the employer on allegations of gross misconduct against such employee. Further, the Respondents rely on the finding in *Hosea Kipkorir Serem v Moi Teaching and Referral Hospital* [2017] eKLR, where Marete J. cited with approval the Canadian Supreme Court of Appeal case of *Industrial Alliance Life Insurance Company v. Gilbert Cabiakman (indexed as: Cabiakman v. Industrial Alliance Life Insurance Co.* 2004 SCC 55) where it was held that: "The flexibility and malleability of an individual contract of employment enables the parties to provide in the contract that the employer has the power to suspend, and to establish the conditions on which it may do so." The Respondents also urge the Honourable Court to consider the holding in *Davis Gitonga v Judicial Service Commission* [2019] eKLR on whether the



interdiction without prior investigations was unlawful and construe the same mutatis mutandis to the present suit to the effect that suspension is a chain disciplinary action in the disciplinary process, which the 1st Respondent initiated upon exercising her discretion to allow for full investigation of gross misconduct. On the issue of alimentary allowance, the Respondents submit that under Paragraph H.14 of the HR Manual, “The Chief Registrar of the Judiciary shall grant an officer or staff on suspension an Alimentary Allowance for subsistence. The rate of payment is one third of the basic pay.” The Respondents submit that the Petitioner/Applicant has not satisfied the threshold for grant of interlocutory injunction. As to whether the Applicant has a prima facie case with a probability of success, they submit that in line with the principles established in *Giella v Cassman Brown* (supra) and the Court of Appeal decision in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] eKLR which stated that for a prima facie case, it is not sufficient to raise issues but that the evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. They submitted that the Court of Appeal in *Barclays Bank of Kenya Ltd v Banking Insurance & Finance Union (Kenya)* [2019] eKLR cited with approval the case of *Habib Bank AG Zurich v Eugene Marion Yakub*, C.A. No. 43 of 1982 (unreported) which defined ‘probability of success’ to mean that the court is only to gauge the strength of the plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage. The Respondents submit that in light of the decision in *Mrao* above, the suspension of the Petitioner/Applicant by the 1st Respondent was lawful and none of her rights were infringed. Further, the Respondents submit that the Petitioner has not demonstrated that the disciplinary process was initiated and/or has been conducted contrary to the law and that the prima facie test also fails in the absence of any proof of infringement of constitutionally protected rights. The Respondents submit that in any event, the reliefs sought herein are final in nature and that a cursory look at the pleadings indicates that the orders sought in the Application are the same as those sought in the Petition and that granting the orders sought in the Application will therefore consequently determine the entire Petition at the interim stage. It is submitted that for instance, the Petitioner's prayer of reinstatement cannot be granted at this interim stage while the disciplinary process is ongoing and that if there is no proof that the disciplinary process at the present stage is unprocedural and unfair, an order for reinstatement will have the effect of usurping the constitutional powers of the Respondents to discipline judicial officers. That it is therefore only fair and just that the parties' arguments are heard before most of the prayers sought in the Application which are substantive and final can be issued.

11. The Respondents submit that the Applicant having failed to establish a prima facie case, the other limbs need no consideration as was stated by the Court of Appeal in Malindi Civil Appeal No. 4 of 2015-*Lucy Wangui Gachara v Minundi Okemba Lore* [2015] eKLR where the Court held that if prima facie case is not established then irreparable injury and balance of convenience need no consideration. That nevertheless, the Applicant has not demonstrated that she will suffer irreparable harm which cannot be compensated by an award of damages if the orders sought are not granted. That on the Respondents' part, the 2nd Respondent will suffer the greatest harm if the orders sought are granted as it will be unable to exercise its constitutional mandate to discipline judicial officers; and the orders to pay all salaries, allowances and contractual and statutory benefits will be contrary to the provisions of the law.
12. The Applicant is a Judicial officer who has been suspended and is receiving an alimentary allowance from the Judiciary at the rate of $\frac{1}{3}$ of her salary. The Respondents oppose the grant of interlocutory relief asserting that the Applicant is seeking final orders at the interim stage. The Court is bound to consider the basis for grant or denial of interlocutory relief by casting the Petitioner's claim in the prism of *Giella v Cassman Brown Company Ltd* (supra) and *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (supra). The Petitioner/Applicant was bound to demonstrate the following:-



- a) An Applicant must show a prima facie case with a probability of success;
 - b) 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;
 - c) If the Court is in doubt of the two above principles, it will decide an application on the balance of convenience.
13. It is not doubted that the court in exercising the jurisdiction to intervene in an administrative disciplinary procedure must proceed with caution so as to protect the employer's right to fairly discipline an errant employee or terminate the employment relationship where there is cause to do so. This was famously stated by Rika J. in the case of *Alfred Nyungu Kimungui v Bomas of Kenya Limited* [2013] eKLR thus:- The Industrial Court should be cautious in exercising its jurisdiction, so as not to appear to take over and exercise managerial prerogatives at workplaces. Grant of interim orders that have the effect of limiting genuine exercise by management of its rights at the workplace, should be avoided. Termination of employment, and initiation of disciplinary processes at the workplace, are presumed to be management prerogatives. The court should be slow in intervening, particularly at interlocutory stages, otherwise the Court would be deemed to be directing the employers in regulation of their employees.
14. In the case of *Mulwa Msanifu Kombo v Kenya Airways* (supra), Mbaru J. stated as follows:-
20. The conditions precedent to the grant of interim injunction are that a party must satisfy the court at the first instance that there is a good prima facie case with a probability of success, there is danger to suffer irreparable injury which cannot adequately be compensated by an award of damages and where the court is in doubt as regard the these two conditions, then apply the convenience rule. In cases of labour relations, the court is also invited to ensure the rule of fair labour standards are applied to both parties in pursuance to the provisions of article 41 of the Constitution as not bringing the fair labour practices into play in cases of labour relations, even where the traditional rules for granting interim injunctions apply, the point in labour peace and harmony will be lost. The court here must therefore look at the provisions of the Employment Act as well as the administrative disciplinary procedures at play in this case.
 21. Questions relating to disputes of administrative disciplinary proceedings or actions pending before employers properly fall within the boundaries of this court as established in accordance with the provisions of the Constitution. The disputes relating to pending administrative disciplinary actions by employers fall within the jurisdiction of the court as provided for under section 12 of the *Employment Act, 2007*. The Act under subsection 12(3)(i) empower the court to make interim preservation orders including injunctions in cases of urgency. The possible interim orders would include the preservation of a status quo or rights and obligations in the employment relationship as may emerge in an administrative disciplinary procedure. Where the court decides to make preservative orders, the court does not thereby usurp or participate in the right of the employer to discipline the concerned employee nor does the court thereby become part of the administrative disciplinary process.
 22. The court in exercising the jurisdiction to intervene in an administrative disciplinary procedure must proceed with caution so as to protect the employer's right to fairly discipline or terminate the employment relationship. In *Miguna Miguna – versus- Permanent Secretary, Office of the Prime Minister and the Attorney General* (2011) eKLR the Court held that the employer was entitled to commence disciplinary proceedings against the employee and it was the duty



of the employee to justify in the administrative disciplinary process the continuation of his employment. The court further stated that its duty would be to stop a process started with ulterior motive or one based on outright illegality or one which is defective ab initio. In *Muthusi and 2 others -versus- Gathogo and 2 others* (1990) KLR 90 the Court held that it would be futile for the court to involve itself in the day to day running of a union which had its own governing rules. Thus, similarly this court would be reluctant to involve itself in a disciplinary process commenced by the employer unless in an appropriate case it is established that the disciplinary process has been commenced or is continuing unfairly.

15. The matter before me relates to the discipline of an employee and if there is basis, I can interfere with the process. However, in balancing the interests of the parties before me I must remain alive to the foregoing. The Petitioner asserts that she has a prima facie case and reflecting this against the Respondent's position, it is clear the 2nd Respondent had the authority to commence disciplinary process against the Petitioner. It was asserted by the Petitioner that the decision to suspend the Applicant was malicious since it was tactfully calculated to await the exit of the then Chief Justice who had not found any reason to suspend the Applicant or take any disciplinary action against her when the said allegations of Gross Misconduct were raised. There was no demonstration of bias in the issue of the letter by the Acting Chief Justice and I see no lacuna in issuing the letter dated 7th January 2021 by the Acting Chief Justice Hon. Lady Justice Philomena Mwilu, MGH as the Deputy Chief Justice and Vice President of the Supreme Court of the Republic of Kenya had authority to so act. As this was the linchpin in the attack against the issuance of the letter of suspension, the prima facie element of the Petitioner's assertions that the Respondents acted ultra vires or without any legal basis falls flat. The disciplinary process the Respondents initiated is before the 2nd Respondent for determination and should the process be ultimately found to have been unfair or the punishment meted unjustified the Court will have basis to intervene. As there is no basis to interfere with the ongoing disciplinary process the prayers in the motion are denied albeit with no order as to costs. The Petition may be progressed to its conclusion sans any interim relief.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2021

NZIOKI WA MAKAU

JUDGE

