



Koria v Cabinet Secretary, Ministry of Gender Culture Arts & Heritage & 6 others (Employment and Labour Relations Petition E215 of 2023) [2024] KEELRC 1023 (KLR) (18 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 1023 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E215 OF 2023
MN NDUMA, J
APRIL 18, 2024

BETWEEN

PETER GITAA KORIA PETITIONER

AND

CABINET SECRETARY, MINISTRY OF GENDER CULTURE ARTS & HERITAGE 1ST RESPONDENT
ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT
CHIEF OF STAFF & HEAD OF PUBLIC SERVICE 3RD RESPONDENT
OFFICE OF THE PRESIDENT 4TH RESPONDENT
CHAIRPERSON, BOARD OF BOMAS OF KENYA 5TH RESPONDENT
PUBLIC SERVICE COMMISSION 6TH RESPONDENT
ATTORNEY GENERAL 7TH RESPONDENT

RULING

1. The petitioner/applicant, filed amended notice of motion dated 21st November 2023 seeking for an order in the following terms:
 1. Spent
 2. Spent
 3. That in the interim and pending the hearing and determination of this petition, the honourable court be and is hereby pleased to make an order directing the 1st respondent to unconditionally lift the suspension of the applicant/petitioner from employment



communicated vide a letter dated 20th November 2023 and order for his immediate reinstatement.

4. That in the interim and pending the hearing and determination of this application and petition, this honourable court do make an order suspending and/or staying the decision of 2nd respondent contained in the letter dated 10th November 2023 directing the 1st respondent to suspend the applicant/petitioner herein.
 5. That in the interim and pending the hearing and determination of this application and petition, this honourable court do make an order of injunction restraining the respondents either by themselves, employees, servants and/or agents from terminating the employment of the applicant/petitioner based on the illegal suspension.
 6. That in the interim and pending the hearing and determination of application interparties, this honourable court be pleased to issue an order restraining the respondents, either by themselves or their agents/or staff or any person from interfering in any manner whatsoever, with the applicant/petitioner in performance of his duties as the CEO/GM of Bomas of Kenya in the guise of conducting investigations.
2. Which application is premised on grounds (a) to (e) on the face of the notice of motion and buttressed in the supporting affidavit of Peter Gitaa Koria the gist of which is that the 2nd respondent (EACC) vide a letter dated 10th November 2023 recommended that the 1st respondent, CS Ministry of Gender, Culture, The Arts and Heritage (CS) to suspend the petitioner/applicant as the CEO Bomas of Kenya which action the 1st respondent took, by suspending the petitioner for a period of twelve (12) months by a letter dated 20th November 2023 and a press release to that effect was issued on 16th November 2023 by the State House Spokesperson.
 3. That the suspension was done without due regard to process and procedures laid down in law in that the applicant was not accorded an opportunity to be heard thereby violating the principle of audi alteram partem despite the prejudice suffered by the applicant to his standing in the society as well as his welfare as a bread winner of his family.
 4. That the chairperson Board of Bomas of Kenya,(BOK) the 5th respondent was not involved by the 1st respondent in the process so as to get a comprehensive report of the situation.
 5. That a public state officer may only be suspended if charged before a court of law which is not the case and the 1st and 2nd respondents are involved in witch hunt to frustrate the applicant.
 6. That the applicant's right to equality before the law and fair administrative action and fair trial has been violated by the respondents.
 7. That the premature and unsubstantiated suspension will have profound and enduring ramifications on his potential trajectory, public perception and overall well-being.
 8. That the applicant has in previous investigations conducted by the 1st respondent been cooperative.
 9. That there is need to injunct the unfair, unwarranted and illegal actions by the 1st respondent to prevent the applicant from suffering irreversible harm.

That the application be granted with costs



Response

10. The 1st, 3rd, 4th and 7th respondents filed grounds of opposition to the amended application dated 21/11/2023 on 5/1/2024 to wit;
 1. That the instant amended application as instituted is an abuse of the court process, has no merit and is based on a misconception of law.
 2. That the instant application has already been overtaken by events since a Special Board Meeting had already taken place and as such the instant application has already been overtaken by events.
 3. That the honourable court cannot issue conservatory orders for events that have already taken place as was held in C.A. 366/1999 – Kenya National Examination Council vs Republic, where it was held that prohibition cannot quash a decision already made; it can only prevent a contemplated decision. In the instance case, the Special Board Meeting had already taken place.
 4. That public interest supersedes the private claims of an individual as held by Nyamu J (as he then was) in Kenya Guards & Allied Workers Union vs Security Guards Services and 38 others and another (IP) H.C. Misc. 1159 of 2023 and as such it necessitated the appointment of the Ag. Chief Executive Officer of the Bomas of Kenya to prevent hampering of services and operations of Bomas of Kenya.
 5. That the petitioner's/applicant's right should not be prejudicial to the rights of others
 6. That the instant application does not meet the threshold for grant of temporary injunction as it was held in Giella v Cassman Brown & Company Limited (1973) EA 358.
 7. That the instant application is an abuse of the court process with a view of circumventing the impending investigations.
 8. That it is not in the public interest to grant the orders sought therein.
 9. That the instant application lacks merit, is frivolous and vexatious and an abuse of the court process as they seek to curtail the constitutional and statutory mandate of the 1st respondent.
11. The 7th respondent, the Public Service Commission (PSC), filed a replying affidavit to the petition and the amended notice of motion dated 21st November 2022 and deposes, inter alia that the impugned suspension originated from a recommendation by the EACC dated 10th November 2023 to allow investigations. Pursuant to that recommendation, the Chief of Staff and Head of Public Service directed the suspension of the petitioner vide a press release issued at state house on 16th December 2023 by the state house spokesperson and the CS of the line ministry implemented the decision on 20th November 2023. The PSC deposes that it will only participate in the proceedings, on the petition itself by guiding on the applicable law with regard to the subject matter at hand.
12. The deponent outlines the legal requirements for suspension of a state officer in terms of section 42 of leadership and integrity Act which provides that:

'Section 42' laying of complaints and investigations

 - (7) subject to the constitution and any regulations for the enforcement of the code made under this Act, a state officer may be suspended from office pending



the investigation and determination of allegation made against the state officer where such suspension is considered necessary.”

12. That under the State Corporations Act Cap 446 of the Laws of Kenya as well as Mwongozo, the code of governance for state corporations, Chief Executive Officers/CEOs of state corporations are appointed by the respective Board of Directors and where necessary in consultation with the cabinet secretaries of the line ministry.
13. Accordingly, it is the responsibility of the Board of Directors to discipline a CEO of a state corporation whenever it is appropriate to do so.
14. In the instant case and pursuant to Regulation 25(1) (c) of the Leadership and Integrity Regulations 2015, it is clearly lawful for EACC to recommend the suspension of a public officer who is under investigations on allegations of corruption and economic crimes.

However, it is without the jurisdiction of EACC to recommend the period within which a public officer should be suspended as that is determined by the employer in line with the applicable discipline manual for the public service and other applicable laws.(emphasis added)

15. In terms of the Human Resource Policies and Regulation Manual for the BoK clause 2.4.5 provides that the general manager shall be appointed by the CS responsible for the Ministry of Tourism from a list of persons recommended by the Board on a contract of three (3) years renewable once.
16. That under section 51 of General provisions Act, Cap 2 of the laws of Kenya, power to appoint includes power to suspend, dismiss, discipline, to reappoint and so on.
17. That clause 10.15.4 of the BoK manual on suspension relates only to other employees of the corporation but not the general manager and so the provision is not applicable in the circumstances of this case.
18. That section 62 of ACECA provides for suspension of a public officer if charged before a criminal court. Any other suspension on grounds of necessity may be done in terms of section 42(7) of the Leadership and Integrity Act as read with Regulation 25(1) (c) of Leadership and Integrity Regulations, 2015 dealt with earlier in this ruling.
19. The PSC deposes in conclusion that suspension is part of disciplinary control and BoK being part of the public service, such disciplinary control actions should be done expeditiously and in conformity with Article 47 of the Constitution, the fair administrative action Act, 2015 and the Disciplinary Manual for the public service, revised 2022 which provides at section 4 thereof that a suspension should be commenced and concluded within a period of six months. As such “The one-year (12 months) period of suspension recommended by the EACC is unreasonably long and unlawful.” (emphasis added)

The PSC, concludes further,

QUOTE

That in view of the fact that under Mwongozo as read with the Bomas of Kenya manual, the recruitment of the CEO starts with the Board, then the process of the petitioner’s suspension being disciplinary in nature ought to have been initiated by the Board before action could be taken by the cabinet secretary.”

20. The chairperson of the Board Jane Kiptoo Chebaiba, the 5th respondent deposed to a further affidavit dated 16th February 2024, stating *inter alia* that the applicant was suspended from his position as CEO by a letter dated 20th November 2023 in terms of section 42(7) of the Leadership and Integrity Act



- No. 19 of 2012 and Regulation 25 of Leadership and Integrity Regulations of 2015 which apply to all public officers by dint of section 52(1) of the Leadership and Integrity Act as if they were state officers.
21. That the suspension was for a period of 12 months to safe guard the integrity of investigations. The suspension is on half pay, full house allowance and medical allowance pending investigations and determination of allegations made against him.
 22. The deponent states that,

"The Board of Directors of the Corporation took notice of the directive for suspension and adopted it and implemented it as it is obligated to under section 7(1) of the state corporations Act."
 23. The letter of recommendation dated 10/11/2023 stated that "the commission conducted investigations into allegations of procurement irregularity in the award of a tender for the supply of cutlery awarded to various companies where the Chief Executive Officer (CEO) Mr. Peter Gitaa Koria has been adversely mentioned since he oversaw the execution of the contract."
 24. That his continued being in the office will interfere with the smooth provision of documents and facilitation of persons who might be called upon as witnesses by the commission.
 25. The suspension was to be done in terms of section 42 (7) of the Leadership and Integrity Act No. 19 of 2012 (LIA) and Regulation 25 of the Leadership and Integrity Regulations of 2015 and section 52(1) of LIA which states that the Act, shall apply to all public officers.
 26. The chairperson deposes that it was thus necessary to suspend the applicant to preserve the integrity of the investigations.
 27. The chairperson further says that the Board has moved with haste to investigate and ascertain the veracity of the allegations levelled by EACC against the applicant by establishing an Ad-hoc Committee to investigate the matter. That the committee has held five (5) meetings so far between 13/12/2023 to 16/1/2024 and it interviewed cross-section of staff from various departments. That petitioner was invited to appear before the committee to shed light on the allegations made against him but the applicant declined to appear before the committee.

That the committee is currently preparing its final report which is anticipated to be ready end of February 2024 and the Board will in all likelihood be in a position to review the applicant's suspension in March 2024. (emphasis added)
 28. That if the court grants the interim orders sought it would effectively be curtailing the Board's exercise of its oversight mandate and would be limiting the Board's ability to investigate the allegations that were made by EACC. The applicant would be placed in a position to scuttle the work of the Ad-hoc Committee as there would be likelihood of interference with investigations. That court has no capacity to investigate the allegations made against the applicant which is the mandate of the Board. That no exceptional hardship has been occasioned the applicant who is suspended on half salary and allowances. That suspension will be lifted if the allegations are without merit.
 29. That justice will be served by declining the invitation by the applicant.

Further affidavit

30. The applicant deposed to a further affidavit dated 21/2/2024 in which it joins issues with the respondents and in particular points out that the chairperson of the Board admitted that the Board did not follow due procedure for suspension of an employee as laid out in the Human Resource Policies



and Regulation Manual under part 10.15.2 which shows that the applicant ought to have been issued with a show cause letter prior to the suspension. That the applicant cooperated with the investigators at all material times and did not obstruct the same. That blatant violation of a right cannot be a necessity. There is no justification for the illegal step taken by the respondents. That the applicant has a right to be presumed innocent until proved guilty. That AECA provides for automatic suspension of a public officer under section 62 upon being charged with a criminal offence before a court of law. The respondents should have awaited such an eventuality.

31. That the Ad-hoc committee is an afterthought after the fact and cannot be used to sanitize an unlawful process.

DETERMINATION

32. The parties filed written submissions which the court has carefully considered together with depositions by the parties and has delineated the issues for determination to be whether the applicant has satisfied the requirement for a mandatory injunction in public domain?
33. The locus classicus in this respect is the Supreme Court decision in Gatirau Peter Munya versus Dickson Mwenda Kithinji & 2 others [2014] eKLR as follows: -
 - (86) conservatory orders bear a more decided public law connotation for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court in the public interest. Conservatory orders, therefore are not unlike interlocutory injunctions linked to such private party issues as “the prospects of irreparable harm “occurring during the pendency of a case on “high probability of success” in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional value, and the proportionate magnitude, and priority levels attributable to the relevant causes.” (Emphasis added).
34. As the court stated in the case of Mike Sonko Mbuvi Gidion Kioko verses Clerk, Nairobi City County Assembly and 5 others [2020] eKLR,
 42. In determining whether or not the above criteria have been met by the applicant, the court is minded not to unduly delve on the substantive issues for determination upon hearing of the petition on the merits. In this respect the court defers to the findings by the East African Court of justice while determining an interlocutory application for an interim injunction in the matter of Mary Aliviza and Okoth Mondoh versus Ag Kenya and Secretary General of East African Community, application no. 3 of 2010, EACS 2005-2011 as follows:

“At this stage we must of course refrain from making any determination on the merits of the application or any defence to it. Decision on the merits or demerits of the case must await the substantive consideration of the facts and applicable law after full hearing of the reference.”
35. In the present matter, the court has not found disciplinary provision applicable to the CEO in the BoK Human Resource Policies and Regulation Manual, revised 2016. All the provisions under part 10.1.5 titled ‘Disciplinary Procedure’ relate to employees of BoK as opposed to the general manager/CEO.
36. The CS in the present matter and BoK simply paid deference to a recommendation of EACC vide their letter dated 10th November 2023 and to the press issue of the 3rd respondent, dated 16th November 2023.



37. A closer look at section 42(7) of LIA outlined above, read with Regulation 25 of Leadership and Integrity Regulations 2015 empowers a 3rd party being EACC in the present case to recommend suspension of a public employee to the employer if that 3rd party is conducting investigations.
38. As the public service commission in the replying affidavit aptly concluded, the suspension of the applicant being disciplinary in nature ought to have been initiated by the Board before the action taken by the Cabinet Secretary.

The court has observed the self-set timelines by the board of BOK for the conclusion of the investigations against the applicant as deposed to by the chairperson to have been finalization of the investigation report by end of February 2024 and possible lifting of the suspension by March 2024.

We are now in mid-April 2024.

39. Accordingly, following the principles enunciated in the Supreme Court decision in Gatirau Peter Munya (Supra), the inherent merit of the case, bearing in mind the public interest while cognizant of the need to protect the rights and fundamental freedoms of the applicant from being threatened or violated; considering that no criminal charges have yet been brought against the applicant in terms of section 62 of AECA, 2023 by the 2nd respondent; and keeping in mind that the suspension occurred on 20th November 2023 about five (5) months from the date of this ruling; the applicant has satisfied the threshold required for grant of the interim injunction sought and grants the following orders:-
- i. A mandatory injunction is granted directing the 1st and 5th respondents to unconditionally lift the suspension of the applicant/petitioner from employment communicated vide a letter dated 20th November 2023 and order for his immediate reinstatement, pending the hearing and determination of the petition.
 - ii. Costs be in the cause.

DATED AT NAIROBI THIS 18TH DAY OF APRIL, 2024

Mathews Nderi Nduma

JUDGE

Appearance:

Mr. Brian Khaemba and Dastan Omari for the petitioner/applicant

Mr. Gichuki & Wambugu for 2nd respondent.

Mr. Muchiri for 5th respondent

Mr. Kemboi, Court Assistant

