**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT MALINDI**

**ELRC APPEAL NO. E003 OF 2021**

**LAMU COUNTY GOVERNMENT**

**COUNTY SECRETARY, LAMU COUNTY.....APPELLANTS**

**VERSUS**

**MUHAMMED ALI SHEE.....RESPONDENT**

**(Being an appeal from the ruling and or Order of the Principal Magistrate's Court at Lamu (Hon. Maina Wachira) delivered and issued on the 16th day of April 2021 in Lamu Principal Magistrate's Court Employment and Labour Relations Cause No. E002 of 2021)**

**BETWEEN**

**MUHAMMED ALI SHEE.....CLAIMANT**

**VERSUS**

**1. LAMU COUNTY GOVERNMENT**

**2. COUNTY SECRETARY, LAMU COUNTY.....RESPONDENTS**

**JUDGMENT**

1. The Respondent in this appeal is employed by the 1st Appellant as its Internal Auditor 1. As the record shows, with effect from 25th August 2020 the 1st Appellant enhanced the Respondent's duties to include those of acting Head of Internal Audit.

2. By a letter dated 22nd January 2021, the County Secretary and Head of Public Service of the 1st Appellant interdicted the Respondent from duty. This was allegedly in order to pave way for an internal disciplinary process against the Respondent for alleged workplace malpractices which, in the view of the 1st Appellant, constituted acts of gross misconduct by the Respondent. It is this development that triggered the court process in Lamu PMCC ELRC Case No. E002 of 2021. In that cause, the Respondent in this appeal challenges the validity of the Appellants' decision to interdict him.

3. Alongside the Statement of Claim in the aforesaid case, the Respondent (in the current appeal) filed an application dated 26th January 2021. The application sought for orders to, among other things, bar the Appellants from interdicting the Respondent from

his duties pending the hearing and determination of the application and thereafter the main Claim.

4. From the record, on 28th January 2021 the trial court issued interim orders to bar the Appellants from interdicting the Respondent. The orders were later confirmed on 16th April 2021 after hearing all the parties. It is these orders that triggered the current appeal.

5. The appeal is premised on a Memorandum of Appeal dated 27th April 2021. It raises seven (7) grounds of appeal but which for purposes of submissions were condensed into three (3).

6. The appeal has come up for directions a couple of times. Throughout these sessions, the Respondent's Counsel has not attended court despite service.

7. On 4th October 2021, the Appellants took directions that the appeal be argued through written submissions. Although the Appellants' Counsel filed submissions, the Respondent's Counsel did not.

8. In their submissions, Counsel for the Appellants set out the consolidated grounds of appeal as follows:-

a. Whether or not the learned trial magistrate erred in law and fact in unreasonably, unjudiciously and wrongly allowing the Respondent's application dated 26th January 2021 which sought for an order of injunction against the Appellants.

b. Whether or not the learned trial magistrate erred in law and fact in failing to find that the Honourable Court had no jurisdiction to interfere with the disciplinary processes of the Appellants between an employer and employee.

c. Whether or not the learned trial magistrate erred in law and fact and fatally misconceived the law in making a further order suspending the letter of interdiction and reinstating the Respondent to full pay which orders were never sought in the application dated 26th January 2021.

9. At the outset, it is perhaps necessary to point out that at this stage, the appellate court must avoid going into the merits of the Claim that is pending before the trial court. That shall be determined by that court on the basis of the evidence to be presented at the trial. I shall therefore consider the three (3) grounds of appeal with this in mind.

10. Regarding the first ground, Counsel for the Appellants appears to subsume several issues into one global ground. First, Counsel addresses the question whether an injunction can issue against government in view of section 16 (2) of the Government Proceedings Act and whether proceedings against government can validly be commenced without issuing the 30 days statutory notice required under section 13A of the Government Proceedings Act.

11. According to Counsel, section 16 (2) of the Government Proceedings Act forbids courts from issuing injunctions against government. Therefore, to the extent that the trial court issued the impugned injunction, it acted in contravention of the law. Thus the resulting orders ought to be set aside. Further, Counsel argues that as the proceedings before the trial court commenced without first issuing a notice to the Appellants under section 13A of the Government Proceedings Act, they were invalidly commenced. Therefore, the injunction that issued there from was irregularly issued and ought to be set aside.

12. I have anxiously scrutinized the court record in search for arguments in respect of the foregoing contentions before the trial court but found none. These issues were not points of attack against the application for injunction before the trial court. They were neither pleaded in the grounds of opposition to the application nor raised in Counsel's submissions before the court.

13. In a nutshell, the trial court was not invited to consider these grounds in determining whether to grant the injunction sought. This being the case, I do not think that it is open to this court to determine the two points. I will say no more on this.

14. Second, Counsel addresses the need for an applicant for injunction to meet the minimum conditions for grant of the orders as set out in the case of ***Giella v Cassman Brown and Co Ltd [1973] EA 358***. In the Appellants' view, the Respondent did not raise a prima facie case before the trial court to warrant the grant of the order for injunction. And neither did he demonstrate that he would suffer irreparable loss that would not be adequately compensated by an award of damages if the orders sought did not issue. As a

consequence, the balance of convenience dictated against issuing the impugned injunctive orders.

15. I have considered this portion of the ground of appeal. On whether the Respondent established a prima facie case before the trial court, I can do no more than borrow from the reasoning in ***Eldo City Limited v Corn Products Kenya Ltd & another [2013] eKLR.*** Did the Respondent place before the trial court evidence which on its face was sufficient to warrant the grant of the orders" I think not. The Respondent seemed to suggest that since he had raised audit queries against a number of the 1st Appellant's officers, this necessarily triggered the Appellants' decision to interdict him. However, nothing on record suggests this. Other than conjecture, the Respondent does not draw any factual nexus between the letters he issued calling for pre audit information and the Appellants' decision to interdict him. On the contrary, the letter of interdiction mentions completely unrelated reasons as informing the decision to interdict the Respondent. What is apparent on the face of the record is that the Respondent was interdicted for the alleged failure to manage his docket well to obviate pilferage of public resources by officers under him. Consequently, I am unable to find that there was prima facie evidence to warrant the grant of an interim injunction.

16. The trial court appears to have held that because the Respondent was not granted a hearing before he was interdicted there were procedural flaws in the process leading to the interdiction which provided evidence of a prima facie case to warrant the grant of an injunction. However, I respectfully disagree with this finding.

17. As pointed out by the Appellants' Counsel, there was no evidence by the Respondent that he was entitled to a right which had been infringed by the Appellants. As I will demonstrate later on in the judgment, a preventive interdiction which is issued in order to facilitate a hearing does not violate any rights of an employee so long as the employee is ultimately heard on the charges that resulted in the interdiction. Such interdiction only serves to trigger the disciplinary process. In this case, the letter of interdiction was clear that it was the first step to an administrative process that would result in the Respondent being heard.

18. As regards whether the Respondent had demonstrated that if an order of injunction did not issue, he will suffer irreparable damage that would not be capable of reparation through an award of damages, the trial court found in his favour. Yet nowhere in the Respondent's submissions before the trial court did he directly address this ground. Not even the affidavit evidence in support of the application for injunction alludes to the probable loss the Respondent would suffer should the injunction not issue.

19. What the trial court appeared to do in respect of this ground is to shift the burden of proof onto the Appellants. The trial court appeared to have relied on the Appellants' submissions that the Respondent would not suffer loss in the event he succeeded in the cause because he was on half salary and would in any event be paid what would have been withheld to turn tables on the issue onto the Appellants. While disagreeing with the Appellants' argument, the court observed as follows:-

**'' As the respondent submitted, if the applicant succeeds in the disciplinary proceedings, he will be entitled to payment of the withheld salary and he would be back to work. Although it may sound simple, stopping or interfering with a person's source of income can have many consequences which may not be compensated by way of damages. Although it is submitted that the applicant would not suffer any irreparable damages that cannot be compensated by way of damages if the orders he is seeking are not granted at this moment, the balance of convenience lies on the part of the claimant rather than the respondent's side.''**

20. By this the court simply ignored the Respondent's responsibility to demonstrate the irreparable loss he would suffer if the orders sought were not granted. It disregarded the Appellants' submission that the Respondent had in any event not presented any evidence of the loss he would suffer should the orders not issue.

21. I respectfully think that the court erred in failing to find that the duty lay on the Respondent to demonstrate that failure to grant the orders would occasion him irreparable loss and that the Respondent had not provided this evidence. I therefore allow ground one of the appeal in so far as it relates to the failure by the Respondent to establish grounds for the grant of injunctive orders as set out in the ***Giella v Cassman Brown*** case.

22. The second ground of appeal relates to the court's jurisdiction to intervene in disciplinary proceedings against employees commenced by an employer. The Appellants hold the view that the court has no jurisdiction to intervene in the process. In their view, intervention by the court in the process interferes with the employer's prerogative to manage the workplace.

23. Whether courts have jurisdiction to intervene in an internal disciplinary process by an employer is, I think, a settled question. Courts have jurisdiction to do so.

24. However, this jurisdiction must only be invoked in the clearest of cases and usually as a last resort. The court will only intervene where it is clear that to permit the process to go on will result in manifest injustice to the employee where the process itself is being conducted in a manner that materially derogates from the law or internal regulations agreed on by the parties.

25. Employment law does not define the term ‘’interdict’’. In ordinary parlance, the term means to prohibit or forbid something. Therefore, in matters employment it may be used to denote the stoppage of an employee from working for a particular reason.

26. However, it is suggested that when referred to in employment contracts, the term has no fixed meaning and must be construed in the context it is used. For instance, in some instances, it is used to denote the fact of permanent termination of a contract of service. Yet sometimes, it is used to denote the fact of the temporary suspension of the contract of service pending some disciplinary process. It is in this latter context that the term is sometimes used interchangeably with the term ‘’suspension’’.

27. In considering whether an interdiction has the potential of materially prejudicing an employee, the court needs to draw a distinction between disciplinary/punitive and administrative/preventive interdictions. Where an interdiction is disciplinary/punitive it is critical that an employee is heard prior to the decision to interdict. However, where it is administrative/preventive pending further inquiry into the matter, the right to be heard at this preliminary stage is not absolute unless entrenched in statute or the contract of employment between the parties as the interdiction is only a precursor to an administrative process that will result into an eventual hearing of the dispute at a disciplinary session before the ultimate decision is rendered.

28. George Ogembo in his book, ***‘’Employment Law Guide for Employers,*** LawAfrica Publishing Ltd’’ makes this helpful distinction. In his view and which I agree with, the Kenyan employment law does not have specific provisions requiring a pre suspension/interdiction hearing before the decision to interdict is rendered. This is particularly so for preventive interdictions. According to him, one has to turn to either the contract of service between the parties or some other specific statute regulating the relationship between the disputants to determine whether a pre suspension/interdiction hearing must be held before one is placed on suspension.

29. This position is reiterated by Radido J in ***Kazungu Ngumbao Jeremiah & 3 others v Attorney General & 2 others [2015] eKLR.*** Referring to section 87 of the National Police Service Act as read with article 47 of the Constitution, the learned judge found that a police officer facing a disciplinary interdiction or suspension is entitled to a hearing before the decision to interdict or suspend is reached. But this is because section 87 of the National Police Service Act specifically requires that such disciplinary proceedings be subject to the dictates of article 47 of the Constitution.

30. In ***Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 others [2014] eKLR*** Mbaru J appeared to suggest that prior to any interdiction being handed down, the employer must hear the employee. This is a position I am respectfully not persuaded with.

31. I think that in reaching this decision, the learned judge relied on South African decisions which categorize suspensions/interdictions without prior hearing of the affected employee as unfair suspension or unfair disciplinary action within the meaning of section 186(2)(b) of the Labour Relations Act No. 66 of 1995 (South Africa). However, as mentioned earlier, the Kenyan employment statutes have no corresponding provision.

32. Notwithstanding this position, the learned judge was clear that a court should only intervene in an internal disciplinary process in very exceptional circumstances. Indeed in a latter decision (***Victor Sammy Mutiso v Teachers Service Commission [2017] eKLR***), the learned judge underscores the need to draw a distinction between preventive and punitive interdiction and goes further to clarify that while the former may be the subject of a post interdiction hearing, the latter would usually require a hearing before a decision is taken.

33. In the case before the trial court, the interdiction was issued to the Respondent pending further disciplinary hearing. Indeed, the Respondent was notified in the letter of interdiction to show cause in writing why he should not be terminated for gross misconduct. It was a preventive interdiction.

34. In my view, this kind of interdiction required no hearing prior to its issuance as the right of the Respondent to be heard during the disciplinary proceedings was not taken away. It was therefore not appropriate for the trial court to issue injunctive orders in the matter at this stage as to do so would only impede the Appellants' prerogative to manage and discipline the County staff. It is for this reason that I disagree with the learned trial magistrate's position that to fail to grant the Respondent a hearing at the pre interdiction stage provided a basis for holding that the Respondent had established a prima facie case to warrant the issuance of an interim injunction. Accordingly, this ground of appeal succeeds but only to the extent that the trial court's jurisdiction to issue an injunction at the preliminary stage of the case was wrongly invoked.

35. The last ground of appeal questions the propriety of the trial court's decision to issue orders suspending the interdiction and reinstating the Respondent to full pay pending hearing and determination of the case. Counsel argues that as the application dated 26th January 2021 did not pray for these orders, it was improper for the trial court to have granted them suo moto.

36. I have looked at the application filed on 26th January 2021. It sought for orders to restrain the Appellants and or their agents from proceeding with the interdiction proceedings against the Respondent pending the hearing and determination of the application and thereafter the case. At the time of filing the application, the Respondent had already been served with the interdiction letter dated 22nd January 2021. Indeed, the Respondent confirms this in the grounds and affidavit in support of the application dated 26th January 2021.

37. The second last paragraph of the letter of interdiction reads in part as follows:-

**''… it has been decided that you be and <u>are hereby interdicted</u> from exercising the duties of your office from the date of this letter pending finalization of your case.''** (Emphasis added by underlining).

38. The letter can only be understood as having taken effect on 22nd January 2021, the date it was authored and served on the Respondent. The Respondent was therefore effectively interdicted as at 22nd January 2021. There was no other interdiction process to forestall as was purported in the application dated 26th January 2021.

39. Therefore, the Respondent perhaps ought to have sought for the setting aside of the interdiction before seeking for an injunction to prevent any further interdiction based on the facts that are the subject of the court case. But he did not. Yet, the trial court went ahead to suspend the interdiction and reinstate the Respondent to his full pay.

40. I think that the trial court erred in proceeding in the manner it did in this respect. In effect, it granted orders without having given the Appellants the opportunity to comment on the propriety of granting them. The Appellants had no notice of the fact that the orders for suspension of the letter of interdiction and reinstatement of the Respondent's full salary would issue as they had not been expressly sought and were therefore not the subject of submissions before the court. This can only have resulted into an injustice against the Appellants. Indeed this position is appropriately set out by Ndung'u J in ***Elizabeth O. Odhiambo v South Nyanza Sugar Co. Ltd [2019] eKLR*** when the Honourable Judge said as follows:-

**''The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.''**

41. For the above reasons, I allow the appeal and set aside the orders of the trial court issued on 16th April 2021 and substitute them with an order dismissing the application for injunction dated 26th January 2021. Costs of this appeal are granted to the Appellants.

**DATED, SIGNED AND DELIVERED ON THE 18TH DAY OF NOVEMBER, 2021**

**B O M MANANI**

**JUDGE**

In the presence of:

……..for the Appellants

…….for the Respondent

**ORDER**

**In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.**

**B O M MANANI**