



Case Number:	Cause 1189 of 2015
Date Delivered:	11 Jul 2016
Case Class:	Civil
Court:	Employment and Labour Relations Court at Nairobi
Case Action:	Ruling
Judge:	Hellen Seruya Wasilwa
Citation:	Lilian Maina v Llyod Masika Limited [2016] eKLR
Advocates:	Abidha Nicholas for Claimant Applicant- Present
Case Summary:	-
Court Division:	Employment and Labour Relations
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Cause allowed
History County:	-
Representation By Advocates:	One party or some parties represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 1189 OF 2015**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 11<sup>th</sup> July, 2016)**

**LILIAN MAINA .....CLAIMANT**

**VERSUS**

**LLYOD MASIKA LIMITED .....RESPONDENT**

**RULING**

1. Before the Court is a Notice of Motion dated 7<sup>th</sup> July 2015 under Article 28, 41 (2) (b), 50 (1) & 159 (1) & (2) of the Constitution of Kenya, 2010; Section 18(2) of the Employment Act; Section 3, 12 and 20(1) of the Industrial Court Act, 2011, Rule 16 of the Industrial Court (Procedure) Rules 2010, Inherent Powers of the Court and all other enabling laws. The Claimant Applicant is seeking Orders:

**1. *That this application be certified as urgent and the service thereof be dispensed with in the first instance for purposes of ex parte hearing order 2 hereunder.***

**2. *That the Honourable Court be pleased to compel the Respondent to release the Claimant's salary for the months of February 2015 to June 2015 or part thereof pending the hearing and determination of this application inter-parties.***

**3. *That the Honourable Court be pleased to compel the Respondent to release the Claimant's salary, allowances and other benefits for the months of February 2015 to June 2015 pending the hearing and determination of the substantive claim.***

**4. *The costs be provided for.***

2. The application is supported by the annexed affidavit of Lillian Maina on the following grounds:

1. *That the Claimant was employed by the Respondent on the 1<sup>st</sup> of November 2007, but later on promoted and as of December 2014, was earning a basic salary of Kshs 50,000 plus allowances of 11,000 and a bonus of Kshs 30,000.00.*

2. *That on the 11<sup>th</sup> of February 2015, the Respondent purported to suspend the Claimant vide a letter dated 4<sup>th</sup> February 2015 while at the same time seeking for explanation on certain issues specified therein which the Claimant responded to.*

3. *That since February 2015 up to date the Respondent has not conducted any disciplinary proceedings neither has it responded to the Claimant's demand to know her employment status.*

4. *That during her service with the Respondent the Claimant obtained loan advances from Standard Chartered Bank Limited and Dhamini Sacco Society which have been mounting pressure on the Claimant as the Respondent has refused to remit the deductions which prior to the suspension of the Claimant it used to remit.*

5. *That the Respondent's conduct is geared to treat the Claimant in inhumane manner contrary to the provisions of the Constitution of Kenya particularly of fair labour practices.*

6. *That there being no disciplinary proceedings subsequent to the suspension of the Claimant it is only fair and just that the Claimant be paid her salary, allowances and other benefits for the*

**months of February 2015 to June 2015 to enable her defray the arrears outstanding at the aforesaid lenders.**

**7. That it is in the interest of justice that the orders sought herein are granted pending directions upon hearing of the Court.**

3. The Respondent has filed a Replying Affidavit dated 16<sup>th</sup> March 2016 deponed to by Josephine Mugo the Human Resource Manager of their organization.

4. The Claimant was employed on a one year contract from 2007 until 2012 when she was issued with an employment letter for indefinite time making her eligible for the pension scheme. She was also issued with letters of improvement of remuneration and a confirmation letter on the 9<sup>th</sup> of October 2013 and 9<sup>th</sup> of April 2014 respectively.

5. The Claimant was deployed at the Standard Chartered Bank offices as a property officer whose duties and responsibilities were well explained to her and was to undergo ant-bribery training where she was assigned.

6. The Respondent received complaint from their Client that the Claimant was bordering on integrity and breach of duty and she was sent on leave pending investigations. She was fully paid during the period of December 2014 to January 2015 as she was on administrative leave.

7. She was sent on further leave in February of 2015 as it became necessary to conduct investigations into her conduct and was written a suspension letter by email where she was directed to sign her response so that it could form a basis for the investigations, she declined to do so.

8. She has not communicated to the Respondent nor has she visited their offices. She was entitled to her salary during suspension but did not show up after she was requested to do so to show cause by the letter of suspension.

9. The Respondent therefore treated the Claimant as having absconded from duty from the 9<sup>th</sup> of February 2015 when she did not appear at the Claimant's office.

10. The Claimant's refusal to cooperate crippled the investigations as they now could not be properly conducted until she was able to participate in the disciplinary process.

11. The Claimant was issued with a laptop and other company equipment which she has declined to return even after several requests for them.

12. The Respondent categorically states that the Claimant was earning a salary of Kshs. 50,000.00 with bonus only due in December but at the discretion of the employer.

13. For the foregoing reasons, the Respondent prays that the application be dismissed with costs.

#### **Claimant's submissions**

14. The Claimant submits that she was employed by the Respondent earning at the time of her suspension a monthly Salary of Kshs. 50,000.00 and travelling allowance of Kshs. 11,000.00 a month as well as a yearly bonus of Kshs. 30,000.00.

15. The Claimant submits that she received a letter dated 4<sup>th</sup> of February 2015 where she was suspended from employment with immediate effect pending investigations. However she sought explanations to several questions that were posed therein.

16. The Claimant submits that she visited the Respondent's offices severally but the Human Resources Manager indicated that the Managing Director had not given any indication on the way forward.

17. She therefore submits that she remains on suspension that is yet to be lifted as it was open and not limited in any way or time. To this end they rely on the case of **Dan Aguko v Kibos Sugar and Allied Industries Ltd [2014] eKLR** where the Honourable Court held that:

***“An employee could not be accused of absconding duty before the employer lifted suspension. They pray that to this end, the Court finds that the suspension imposed on the 4<sup>th</sup> of February 2015 as not lifted and the Claimant cannot therefore be said to have absconded duty”.***

18. The Claimant further submits that she is still entitled to her salary during the suspension period and all her benefits and the Respondent should therefore release her pay for the months prayed until the hearing and determination of this suit. Costs of the application should also be provided for.

### **Respondent's submissions**

19. The Respondent submits that they had every intention to pay the Claimant pending investigations but it was her disappearance and failure to cooperate that led them to believe that she had absconded and therefore not deserving pay. She had been paid at her first suspension and received her salary for December 2014 and January 2015 even while she was on administrative leave.

20. The Respondent submits that they have filed a counterclaim against the Claimant which she is yet to respond to.

21. They submit that it remains a contested issue as to whether the Claimant's interpretation of suspension extended beyond the 9<sup>th</sup> of February 2015 when she ceased communication with the Respondent and as distinct positions are taken by the parties, they submit that it would be fair if neither party is given any advantage against the other until a hearing is undertaken to determine the position.

22. They submit that the question of suspension and the accruing rights to either employer or employee is not expressly provided for in the Employment Act. They ask the Court to look at the position of Justice Byram Ongaya in Paul Ngeno vs. Pyrethrum Board of Kenya Limited [2013] eKLR in which the Court held that:

***“Whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable”.***

23. The balance sought is to have each party maintain its position until such a time a decision is reached on the dispute.

24. The Respondent submits that the Claimant has prayed for remedies in her claim which included such damages as may have been occasioned to her even during suspension period. If the Claimant were to succeed she stands to suffer no prejudice because there are remedies prayed for which are adequate to compensate her. In view of that and the counterclaim, they should not have to pay her before the claim is heard and determined.

25. For the foregoing reasons they pray that the application be dismissed with costs.

26. Having considered the parties submissions, I refer to the letter of suspension issued to the Claimant Applicant dated 4.2.2015. The letter indicated that there were investigations being conducted against the Applicant and she stood suspended immediately.

27. She was required to give an explanation within 14 days thereof. She must have done her reply on explanation to these queries as per her Appendix LM 4 on 18/2/2015.

28. The Respondent's HR officer wrote to Applicant an email asking her to sign her reply which had not been signed. It is not clear whether this email was received by Applicant or not as she was on suspension and the address used is the one for the Respondent's work place.

29. That notwithstanding, there is an email from Applicant dated 18.2.2015 attaching her response to the questions asked on her suspension. No further communication was received from the Respondents and it is assumed that since then, the Applicant is still on suspension.

30. The question then is for how long an employee can be put on suspension pending investigations. This Court has time and again pronounced itself on this issue in various case law: See

**Pius Mutuku Mweke vs. Managing Director, Kenya Broadcasting Corporation & another Pet No. 34/2015 and Philip Karanja Karungu vs. Senior Board of Discipline Kenyatta University & others Cause No. 411/2015**: where the Court held that:

***“suspension for over 6 months is unduly unreasonable and therefore the Respondents having kept the Applicant on suspension for over 1 year, the Applicant is entitled to the prayers sought and I allow the application and order that the Respondent pay the Applicant all outstanding salaries and allowances since the suspension todate and continues to do so until this case is heard and determined.***

31. Costs in the cause.

Read in open Court this 11<sup>th</sup> day of July, 2016.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Abidha Nicholas for Claimant Applicant- Present

No appearance for Respondent



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