



**Oruma v Central Rift Valley Water Works Development Agency
(CRVWDA) & another (Employment and Labour Relations Petition
E009 of 2024) [2024] KEELRC 1518 (KLR) (4 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1518 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS PETITION E009 OF 2024**

HS WASILWA, J

JUNE 4, 2024

BETWEEN

ENGINEER SAMUEL KIPAMPI ORUMA PETITIONER

AND

**CENTRAL RIFT VALLEY WATER WORKS DEVELOPMENT AGENCY
(CRVWDA) 1ST RESPONDENT**

**CABINET SECRETARY, MINISTRY OF WATER, SANITATION AND
IRRIGATION 2ND RESPONDENT**

RULING

1. This ruling is in respect of the Petitioner/ Applicant’s Notice of motion dated 26th February, 2024, brought pursuant to Article 23, Article 159 of *the Constitution* of Kenya 2010, Rule 20 and Rule 23 of the Protection of Rights and Fundamental Freedoms Practice and Procedure Rules and All enabling Provisions of the law, seeking for the following Orders; -
 1. Spent.
 2. That pending inter-partes hearing and determination of this application a temporary prohibitory injunction be issued stopping the 1st Respondent from proceeding with disciplinary process against the Petitioner/Applicant.
 3. That pending the hearing and determination of the Petition herein this Honourable Court issue temporary injunction stopping the Respondents from proceeding with any disciplinary process against the applicant.
 4. That pending hearing and determination of the petition herein, this Honourable Court do issue a conservatory order ante the letter and Notice to Show Cause dated 19th February 2024.



5. That the costs of this application be provided for.
2. The Application herein is based on the grounds on the face of the application and the undated supporting affidavit of the Applicant. In it the Applicant stated that he is the Chief Executive Officer of the 1st Respondent. He gave the chronology of events of how he became the CEO and stated that, he was initially appointed as such on 30th April, 2021 in acting capacity for a period of one-month effective 1st May, 2021, which was extended for another period of 5 months to 31st October, 2021 or until a substantive CEO was appointed.
3. He stated that when the position of CEO of the 1st Respondent was eventually advertised, he put in his application, got shortlisted and attended interview, where he emerged the best and officially appointed on 6th January, 2022 as the CEO for a term of three years effective 26th October, 2021 to 25th October, 2024.
4. He stated that he served diligently, that he was given a letter of commendation for exemplary performance for the year 2021/2022 on the 16th January, 2023. He stated that it was not until February, 2023 that his woes began. He gave the chronology of the event as follows;
 - i. On 10th February, 2023 the 1st Respondent was served with a petition No. 1 of 2023 filed in Nakuru High Court by the erstwhile CEO Eng. Hosea K Wendot, but that he was named as a respondent.
 - ii. on 14th February, 2023 the Honourable Court issued ex-parte final orders in the petition, inter alia, reinstating Engineer Hosea K. Wendot to the position of the Chief Executive Officer, but without revoking the appointment of the petitioner.
 - iii. Aggrieved by the Court's decision, the applicant moved court for orders of stay and setting aside the orders of 14th February, 2023. In addition, the 1st Respondent also moved the court for similar order of stay and setting aside of the Orders.
 - iv. That after protracted legal battles before the High Court, the Honourable Court acceded to the 1st Respondent's counsel's objection to the jurisdiction of the court and ordered the matter to be transferred to the Employment and Labour Relations Court for hearing and disposal.
 - v. The file was then transferred to this Court and given a new number ELRC Petition No. E005 of 2023 and given a hearing date for 27th April, 2023 and judgement slated for 25th May, 2023, where the Court dismissed the case with costs.
 - vi. Prior to the delivery of judgement, On 23rd May, 2023, the petitioner received a letter from the Ethics and Anti-Corruption Commission requesting for documents and information, Ref No. EACCC6 8/5 VolLIV(38) in respect to Tender No. CRVWWDA/LVS/AFDB/KTSWSSP =/W/BOMET/2019-2020 for construction of water supply and sanitation system for Bomet, Longisa and Mulot Towns.
 - vii. On 24th May, 2023 the petitioner responded to the letter pledging full cooperation and compliance and on 17th August 2023, the petitioner received yet another letter from the Ethics and Anti-corruption Commission on the same subject, Ref EACC.6/8/5 VOL. IV (81) inviting a number of persons for interview and statement recording and once again the petitioner pledged full cooperation.
 - viii. On 1st September, 2023, the petitioner received yet another letter from the Ethics and Anti-corruption Commission, Ref. EACC.6/8/5 VOL. IV (87) inviting another set of persons from



the 1st Respondent for interview and statement recording and again the Petitioner pledged and ensured cooperation.

- ix. While the Ethics and Anti-corruption commission was still undertaking its investigations and while no one had complained about interference with the ongoing investigations, the Head of Public Service wrote a letter dated 22nd September, 2023 under Reference Number OP/CAB.9/201/11 directing the Board of Directors to take action to have the Chief Executive Officer vacate office.
- x. The letter by the Chief of Staff and Head of Public Service, Honourable Felix K. Koskei was followed by a press release from the state House Spokesperson, Hussein Mohammed on 23rd September, 2023, reiterating the directive to have the petitioner and another Chief Executive Officer of another state Agency suspended.
- xi. He states that the action by the Chief of Staff and Head of Public service, was unprecedented and was described in the mainstream media as “uncharacteristic” since such action would only have been expected from the parent ministry concerned with the agency.
- xii. Following the directive from the Chief of Staff and Head of Public Service the 1st Respondent through the chairperson of the board of directors wrote to the Cabinet Secretary, Ministry of Water, Sanitation and Irrigation a letter, Ref. No. CRVWWDA, Vol. 111/01 dated 25th September 2023 requesting for approval of Special Board Meeting to be held on 27th September 2023.
- xiii. That the then Cabinet Secretary, Ministry of Water, Sanitation and Irrigation, the Honourable Alice Wahome wrote back on the same day 25th September 2023, a letter RefNo. MWSIWTR/ADM/CS/Vol 11/47, approving the request for a Special Board Meeting. Subsequently, the petitioner was notified of the Special Board meeting as the Secretary to the Board and he was asked to notify all the Board members, which the petitioner did.
- xiv. On 26th September, 2023, while the petitioner was in his office, he was ambushed and told that there was a Special Board Meeting that very morning. Nonetheless, that he organized the board room for the impromptu meeting and attended the said meeting as the secretary of the Board until he was asked to leave the board room to allow the members to discuss the matter which was touching on him. The petitioner obliged and he retreated to his office to continue undertaking his duties.
- xv. A few minutes later, he was summoned by the chairperson of the 1st Respondent, and verbally informed of his suspension and he was asked to wait for a letter to that effect. The Affiant stated that when he was summoned to the board room, there was a battery of journalists waiting in the board room to take his photographs as if the information had already been leaked to them.
- xvi. He avers that while that was still unfolding, a contingent of police officers had already barricaded the institution and armed officers were on hand to forcefully evict him from the office, when he was not resisting. Consequently, he was arrested and manhandled out of the said office. Contemporaneous with the police barricade, a press podium had been assembled and mounted to announce the petitioner’s suspension from office.
- xvii. Later that day, he was handed another letter of 26th September, 2023 placing him on compulsory leave and on the same day, the chairperson of the 1st Respondent led fellow director for a presser which was later carried in the standard newspaper of 28th September, 2023 titled



“Tender charges that saved state shilling 14 Million and landed the CEO in trouble”. This was despite the chairperson indicating categorically that no money was lost by the 1st Respondent.

- xviii. He stated that in spite of the Respondent’s chairperson confirming that no money was lost, he was interdicted by the letter of 19th February, 2024 and on the same day, he was served with Notice to show cause for gross misconduct and negligence of duty.
5. The petitioner avers that the issue of variation and adjustments was explicitly provided for in the contract itself at clause 13 and the procedure thereof. In any case that the variation and adjustment was preceded with a written request for approval as contemplated under the contract. Further that the request for approval for variation and adjustment was not the sole decision of the petitioner but rather the issue was discussed and approved at the multi-sectoral team meeting held at Maji house on 3rd August, 2023. Therefore, the petitioner has done or did nothing wrong regarding the contract in question.
6. It is his case that while the report of investigation by the Ethics and Anti-Corruption Commission is not yet out or is yet to be made available to the petitioner, the 1st Respondent, in yielding to the external pressures decided to initiate disciplinary proceedings against the petitioner.
7. He contends that no objective and fair disciplinary process can take place under the watch of such a board beholden to external forces and which is completely devoid of independence and the process is just but a charade designed engaged in as a fait accompli.
8. The Applicant urged this Court to intervene and stop the illegal process.
9. The Application is opposed by the 1st Respondent who filed a grounds of opposition dated 28th February, 2024 based on the following grounds; -
1. That the Notice of motion dated 26th February, 2024 is bad in law.
 2. That the Notice of motion and the Petition forming the basis thereof dated 26th February, 2024 run a foul the now established doctrine in Kenya that Constitutional Petitions must set out with reasonable precision that which is complained of the Constitutional provisions which have been infringed and the manner of infringement. This requirement was set out in the celebrated case of Anarita Karimi Njeru Vs the Republic [1976-1980] KLR 1272 and reinforced in the Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.
 3. That the Notice of Motion and the Petition dated 26th February, 2024 offend the well-known doctrine of Constitutional avoidance which requires parties to seek reliefs through other legally appropriate forums as opposed to invoking the Constitutional jurisdiction of the Court in the first instance.
 4. That the matters raised in the petition are ordinary employment matters and there are internally provided mechanisms for addressing such grievances which the 1st respondent has followed in the case of the Petitioner.
 5. That the allegation by the Petitioner that he has not been provided with an investigation report is a pre-emptive allegation since all that is required of the Petitioner at this point is for him to respond to the Notice to show cause and only when a decision is made to continue with the process thereafter can he be entitled to such a report(s).
 6. That in addition, the Petitioner has not made any request for information from the 1st Respondent that he might deem necessary to respond to the Notice to show cause and the



same has been denied for him to allege a violation or a threatened violation of his right. The claim is thus speculative and is of no basis in law.

7. That the disciplinary process has been initiated against the Petitioner based on credible allegations of misconduct and he has been afforded an opportunity to answer to the allegations through a very credible process and hence the contention that the process is characterized by a pre-determined outcome is nothing but a threadbare cliché that has often been used by persons who want to avoid an otherwise legal process.
 8. That Constitutional Petitions must not be allowed to be used to usurp the roles and powers of other institutional processes legally established to deal with matters falling within their competence.
 9. That the matters in dispute between the Petitioner and the 1 Respondent are strictly contractual and they should be handled as such without hiding behind a constitutional petition to evade a valid process for dealing with the matters in issue.
 10. That the respondent is a public institution established and sustained by public funds and as such considerations of public interests should override private rights of individuals.
 11. That since the Petitioner's rights are founded on contract, there are well known remedies which can avail to the petitioner in the unlikely event that he is successful.
 12. That the entire petition forming the basis of the Notice of Motion application is nothing but a conjecture of falsehoods and speculation and the same does not meet the threshold of a constitutional petition.
 13. That the entire petition and the Notice of Motion application are brought in bad faith and with the sole aim of frustrating a legitimate process from taking place.
10. In addition to the grounds of opposition, the 1st Respondent filed a replying affidavit sworn by Hon. Samuel Nderitu, the chairperson of the 1st Respondent's board, on 7th March, 2024. In the affidavit, the affiant stated that he was appointed vide Gazette Notice Number 7028 (VOL. CXXVNO.126) of 2nd June, 2023 and therefore has authority to swear the affidavit.
 11. He stated that the petitioner is the Chief Executive Officer of the 1st Respondent herein but that he is currently on interdiction awaiting a disciplinary process.
 12. He avers that the circumstances leading to the interdiction of the Applicant is that the 1st Respondent was the Lead Agency in the contract of the construction of water supply and sanitation system for Bomet-Longisa-Mulot towns.
 13. That the contract had other stake holders to wit; the Lake Victoria South Water Works Development Agency; the Bomet water company and the County Government of Bomet. Further that the project was being financed by the African Development Bank (ADB), while the Contract was awarded to the China Railway NO. 10 Engineering Group, a corporation incorporated under the Laws of China with its Subsidiary Offices in Nairobi Kenya.
 14. He states that the contract Number was: CRVWWDA/LVS/AFDB/KTS WSSP/W/ BOMET/2019-2020 and the contract amount was Kshs. 1,783,260,806= (One Billion Seven Hundred Eighty Three Million Two Hundred and Sixty Thousand Eight Hundred and Six only. Additionally, that under the contract, the Chief Executive Officer of the Lake Victoria South Water Works Development Agency, was designated as the Engineer (herein after called "the Engineer").



15. The affiant stated that the contract was explicit that steel pipes were to be used in the project and also had a provision for variations and adjustments at clause 13 which variation could be initiated either by the Engineer or the Contractor as the case may be and that when the contractor initiates a variation, a written request must be made to the Engineer for consideration and the Engineer may accept or reject the request. However, in case the Engineer accepts the request for variation, s/he then makes recommendations to the Employer, but in case the Engineer rejects the request she/he returns the request to the Engineer's Representative who then transmits it to the contractor.
16. It is stated that upon receipt of the recommendations approving variation from the Engineer, the Employer is required to forward the report to the Contract Implementation Team (CIT) for analysis and recommendations. If CIT is in agreement with the variation recommendations, then the Employer must forward the report to the financier, in this case, the African Development Bank (AfDB) for "No Objection and in the event that the CIT gives its approval to the request and the financier equally approves the request by signing a "No Objection" the Employer then forwards the proposal to Engineer for onward transmission to the contractor for implementation.
17. It is stated that in this case the Contractor made a request for variation of steel pipes to Glass Reinforced Pipes "GRP" pursuant to clause 13.2 of the General Conditions of the Contract on 28th May, 2022 as per attached variation proposal marked "SNMS". Then the Engineer's Representative analyzed the request and forwarded its recommendations to the Engineer, essentially advising against the proposal as per attached forwarding letter and recommendations dated 11th June, 2022.
18. On 23rd June, 2022, the Engineer's, Representative wrote to the contractor advising that steel pipes be maintained in the project and on 30th June, 2022 the Engineer responded to the proposal for variation and rejected the request. In the intervening period on 24th June, 2022 the contractor sent an invite to the Employer, the Engineer and the Engineers Representative to make a formal visit to GRP manufacturing factory in Turkey which trip was illegal for the following reasons: At the time, variation from steel pipes to GRP had not been approved for such a visit to be necessary. That notwithstanding the anomaly, the petitioner herein and the contractor travelled to Turkey and inspected the GRP pipes as confirmed in the attached letter dated 8th December, 2022.
19. On 31st October, 2022 the contractor re-submitted its proposal for variation to the Engineer's Representative but since the re-submitted proposal was similar to the earlier proposal, the Engineers Representative responded on 14th November, 2022 informing the Contractor that the proposal failed for not answering to the fundamental concerns raised by the Engineer in his earlier letter of 30th June, 2022.
20. That undeterred by the Engineer and his representative's responses the contractor wrote to the Employer directly on 8th December 2022 seeking approval for variation from steel pipes to GRP and on 10th January, 2023, the petitioner herein in his capacity as the Chief Executive Officer of the 1st Respondent unilaterally gave approval.
21. On learning of the "approval" by the petitioner of the proposal from the contractor, the Engineer's Representative wrote on a letter dated 16th January, 2023 outlining conditions to be fulfilled by the contractor before implementing the "approval".
22. In compliance, on 5th May 2023 the contractor submitted; Revised designs; Method statement for the construction of pipes and GRP specifications and on 23rd May, 2023 the Engineer's Representative forwarded the documentation received from the contractor to the Engineer for review and advise.



23. After reviewing the Contractor's submitted documentation, the Engineer drew attention to the requirement of a "No Objection" from the financier (AfDB) for the proposed variation to be implemented. Consequently, on 13th June, 2023 the Engineer's Representative wrote to the petitioner herein requesting for a no objection letter from the financier (AfDB) to the proposed variation.
24. That On 15th June 2023, the petitioner sent an email to the Engineer asserting his authority as the Chief Executive Officer of the 1st Respondent but without availing the requested letter.
25. In the meantime, on 23rd March, 2023 the financier (AfDB) had written an email to the project coordinator, Mr. Charles Murage informing him of a complaint it had received that the contractor had sought approval for change from steel pipes to GRP and the bank requested for the evaluation report leading up to the approval.
26. On 6th and 20th April, 2023, the project coordinator wrote to the financier (AfDB) assuring it that he would soon send the report but none was send and on 22nd August, 2023 the financier wrote a letter outlining its frustrations concerning the requested information.
27. On 11th September, 2023, the Director General of (AfDB) African Development Bank for Regional Development and Business Delivery office, East Africa, wrote a letter to the permanent Secretary, Ministry of Water and Sanitation, State Department for Water noting the following observations: That the steel pipes be used in the project ,the project completion date lapsed on 3rd July, 2023 without any request for time extensions, time extension approval for all prior review contracts is mandatory, there was patent violation of governance in the financial agreement. That non-compliance with procurement or financial management guidelines would lead to suspension of disbursements for the program and that the bank would suspend all works and services on the program by 31st October, 2023 unless all the necessary documentation and information was received by the bank.
28. He stated that while all this was going on, the Ethics and Anti-corruption Authority became seized of the matter and commenced investigations into the alleged violations by the petitioner since he is the one in charge of the day today operations of the 1st Respondent and none of the issue herein had been brought to the attention of the board until the 12th September, 2023 when the Permanent Secretary Ministry of Water and Sanitation wrote to the Board of Directors of the 1st Respondent that the board became aware of the issues surrounding the project.
29. He avers that when the issues were brought to the attention of the Board of Directors, it was decided that a board meeting be constituted to discuss the matter and a request was made to the Cabinet Secretary concerned and approval was given for the meeting. Subsequently, the meeting was convened to discuss the issues surrounding the said project and it was resolved to send the petitioner on compulsory leave pending investigations. Soon thereafter, following intensive internal investigations it was resolved that the petitioner be interdicted and a disciplinary process be initiated against the petitioner as per the letter dated 19th February, 2024.
30. Afterward, the Applicant was issued with a Notice to show cause outlining all the alleged violations and particulars thereof for response. Therefore that there was enough reasons to take disciplinary action against the Applicant.
31. The affiant maintained that there has been no violation or threatened violation of petitioner's rights at all in this process. That the assertion that the Board of Directors of the 1st Respondent is not independent is patently false since had that been the case, the petitioner would have been suspended and interdicted much earlier when the Ethics and Anti-Corruption Authority commenced investigations against the petitioner.



32. That contrary to the assertion by the petitioner that the disciplinary process is being undertaken without any investigation report, the Board conducted its own internal investigations and it is on the basis of that investigation that the board decided to interdict the petitioner. Additionally, that the absence of an investigative report is not in any way prejudicial to an employee who is called-upon to respond to a notice to show cause.
33. He avers that there is no requirement that an investigative report must be given to an employee together with a Notice to show cause letter. Further that the petitioner did not make any assertion that he made a request for the report and the same was denied for his right to information to crystallize under Article 35 of *the constitution*.
34. On the assertion that the Chairperson of the Board of Directors of the 1st Respondent issued a presser confirming that no losses had resulted from the variation from steel pipes to GRP, it was stated that the information was based on what was supplied to the board by the petitioner as the C.E.O of the 1st Respondent who unknown to the Board had been withholding very vital information concerning the whole issue from the board.
35. The affiant stated that the petition does not meet the threshold for constitutional petitions as stated in the famous Anita Karimi case. Equally, that it does not meet the test of ripeness for determination by this Honourable Court.
36. He contends that Constitutional Petition No. E005 of 2023 had nothing to do with the case, as the former was instituted by the erstwhile CEO seeking to be reinstated to his position but that the Court dismissed that suit. Therefore, that the same is not related at all to this case.
37. The 2nd Respondent also filed grounds of opposition dated 5th March, 2024, on the following grounds; -
 1. That the petitioner has failed to demonstrate with reasonable precision or to adduce any evidence before this Court to prove the allegations against the 2nd Respondent.
 2. That the Notice of Motion dated 26th February 2024 and Petition dated 26th February 2024 are bad in law in that the matters raised in the Petition are purely employment matters and there are internally provided mechanisms for addressing such grievances with the 1st Respondent which the 1st Respondent has also reiterated in paragraph 4 of their Grounds of Opposition dated 28th February 2024.
 3. That the 2nd Respondent believes that the said disciplinary process initiated against the Petitioner is based on credible allegations of misconduct as stated by the Respondent in their Grounds of Opposition and the Petitioner has been afforded an opportunity to answer to the allegations through a very credible process and the petitioner's contention that the process is characterized by a pre-determined outcome is nothing but sentiments not based on any evidence adduced before this Honorable Court.
 4. That the Petitioner has filed this Notice of Motion Application and Petition dated 26th February 2010 to try and force this Honorable Court to interfere and usurp the roles and powers of other institutional processes legally established to deal with matters employment falling within their competence.
 5. That the entire Petition and Notice of Motion application are brought in bad faith and with the sole aim of frustrating a legitimate process from taking place.
38. On 6th March, 2024, the 2nd Respondent filed another set of grounds of opposition based on the following grounds; -



1. That to the extent that the Petitioner has not appeared and/ or made representations before the Board of the 1st Respondent, his claims of a biased Board and external interference / influence are unsupported and speculative. They are mere apprehensions that should not form the basis for granting the interim orders sought.
2. That the Petitioner seeks to prematurely impeach a disciplinary process under the primary jurisdiction of the 1st Respondent's Board thereby violating the doctrine of exhaustion and deference. The issues raised by the Petitioner are not ripe for determination by this Court.
3. That the Petitioner's claims are not based on any cogent evidence or known legal concepts but are based on innuendos, nebulous and vague notions incapable of being proved in law or by way of evidence. To wit: - allegations of lack of independence of the 1st Respondent's Board; allegations of political witch-hunt; allegations of discrimination based on ethnicity and political affiliation and allegations of investigation reports of organizations and individuals who are not parties to these proceedings and alleged ouster bids by external forces.
4. That to the extent that the Petition, as filed herein, is not supported by a Supporting Affidavit as is required under Rules 11(1) & (2) of the Mutunga Rules, the same is fatally defective and cannot sustain the granting of the interim orders. The Petition is defective for want of an affidavit.
5. To the extent that the exhibits 'SKO-11', 'SKO-14', 'SKO-15', 'SKO-22' and 'SKO-23' as annexed to the Petitioner's Affidavit in support of the Application are documents that belong to the 1st Respondent; they were obtained in contravention of Section 80 of the *Evidence Act*, Cap. 80 Laws of Kenya and the *Access to Information Act*, 2016 and are therefore inadmissible ad initium and it follows that they are incapable of advancing the Petitioner's claims herein. The 2nd Respondent seeks, on a preliminary, to have these documents expunged from the Record.
6. Further that exhibit 'SKO-23' contains incomplete, unsigned and unverified minutes and therefore does not constitute evidence of the corporate act of the Ministry of Water, Sanitation and Irrigation approving the change and use of the GPR Pipes instead of the contractually stipulated steel pipes, which is under active investigations by the Ethics and Anti-Corruption Commission.
7. That to the extent that exhibits 'SKO-12', 'SKO-13' and 'SKO-18' are newspaper articles and cuttings with no evidentiary value, the same are incapable of advancing the Petitioner's claim herein.
8. That paragraph 17 of the Supporting Affidavit to the Motion, is an invitation of this Court to substitute its processes / decisions with those of the 1st Respondent's human resource function without a demonstration on part of the Petitioner that the disciplinary process is manifestly unconstitutional or unfair.
9. That in toto the Motion filed herein is unmerited and an abuse of this Court's processes. The interim orders sought should be declined and the same should be dismissed with costs to the 2nd Respondent.

Applicant's Submissions

39. The Applicant submitted on one main issue; whether the Application is merited. The Applicant cited the case of *Mulwa Msanifu Kombo Vs Kenya Airways* [2013] eKLR where the court was of the view



- that it will only interfere with disciplinary process in cases where the process has commenced or is continuing unfairly. To reinforce its position, the Applicant cited the case of Geoffrey Mworira Vs Water Resources management Authority & 2 others [2015] eKLR.
40. It was submitted that the Respondent is mandated under Article 232 of *the Constitution* to protect, promote, uphold and observe the principles of Public Service. Further that the 1st Respondent's Human Resource policy and procedure Manual, provides that the state corporation shall be guided by National values and principles stipulated under Article 10 and 232 of *the Constitution*. Therefore, that the disciplinary process ought to comply with these values and the provisions of Article 47 of *the Constitution*.
 41. From the foregoing, the Respondent submitted on whether the 1st Respondent was proper in commencing disciplinary process, when EACC investigations were going on and argued that the board was devoid of jurisdiction as the matter has been referred to EACC for investigation, therefore that the matter ought to await the outcome of the investigation of EACC before further action can be taken in line with 1st Respondent's clause 10.39.
 42. On whether the Applicant's right to fair hearing in the disciplinary process has been violated or not, it was submitted that the Applicant was placed on compulsory leave and then interdicted without being accorded any hearing. It was argued that no charges had been leveled against him before he was interdicted. In any case that the meeting held on 26th September, 2023 was not sanctioned by law as the same was not approved by the cabinet secretary as is required under the law. To emphasize on the need to promote the right to fair hearing, the Respondent cited the case of Kenny Kinako Vs Ringer Kenya Limited [2016] eKLR.
 43. Accordingly, it was submitted that the Applicant was not granted the right to fair hearing because he was invited to a impromptu meeting which he had not been given prior notice to be able to respond to any queries adequately.
 44. The Applicant submitted further that before an employee is interdicted, the same must be based on fair reason and implemented on fair procedure as was stated by Justice Monica Mbaru in ,Fredrick Saundu Amolo Vs Principal Namanga Mixed Day Secondary School & 2 Others [2014] eKLR.
 45. On whether the interdiction for indefinite period was in violation of fair labour practices , it was submitted that the Applicant was send on compulsory leave on 26th September, 2023 and interdicted on 19th February, 2024, more than 7 months down the line with no end on sight. He argued that since no timelines of the disciplinary process was given, the same was unfair and may amount to constructive dismissal as stated in Charles Gatheru Ndirangu Vs Presybeterian Foundation (Sued on behalf of PCEA Mihuti Parish) [2016] eKLR, Joseph Ndungu Vs Mastermind Tobacco (K) Ltd [2014] eKLR and the case of Banuel Mariera Vs Awanad Enterprises Ltd [2014] eKLR.
 46. The Applicant submitted also that the 1st Respondent's Regulations only prove for interdiction and compulsory leave but does not give the timelines, however, that the Public Service Commission's Regulations 2020, under Regulation 62 provide for compulsory leave and interdiction to be done within a period not exceeding 30 days. Further that before such a public officer, is interdicted, the committee should seek approval of the Public Service Commissions, which was not sought in this case.
 47. The Applicant also submitted that the letter by Hon, Felix Kosgei, the chief of staff and head of Public Service, prompted the process for his interdiction, as he expressly directed in his letter of 22nd September, 2023 at paragraph 3 that the Applicant should be placed on leave and vacate the office immediately. He argued that unless the application is allowed and the entire disciplinary process halted, the process is not guaranteed to be objective. Further that the fact that the meeting purposed for



27th September, 2023 was brought forward to 26th September, 2023 without any reason, leaves more questions than answers as to the objective of the committee, which should be construed against the Respondents. In support of this, he relied on the case of Waruinge Vs Chuna Co-operative & Credit Society [2023] KEELRC 2730(KLR).

48. On whether the Board was independent, it was argued that the board succumbed to pressure to have the Applicant vacate office pursuant to direction of the Chief of Staff and head of Public Service, in breach of fundamental principle of independence of the Board. Further that the move by the Board violated the laid down best practices of Corporate Governance as espoused by the Mwongozo Protocol (The code of Governance for State Corporations) 2015, on independence of the Board, as the board did not apply their minds independently on the validity of the allegations against the Applicant and whether they warranted the disciplinary sanctions demanded by the chief of staff. To support this, the Respondent relied on the case of Waruinge Vs Chuna Co-operative & Credit Society(Supra). Furthermore that the pre-determined decision taken by the board offended the basic tenets of natural justice as was held in Munir Sheikh Ahmed V Capital Markets Authority [2019] eklr.
49. On whether there are valid reasons to subject the Applicant to disciplinary process, it was submitted that the Respondent subjected the applicant to disciplinary process on basis of alleged contract variation on purported loss of 14 Million, which loss, the chairperson of the 1st Respondent confirmed that no money was lost. Further that the investigations had not completed as such the basis for disciplinary action had not crystalized. Also, that the variation of contract was done by the contractor and several other people, aimed at cutting costs of the project and meeting the project timelines among other benefits.
50. On whether the 1st Respondent observed the legal provisions and standards on fair administrative action when subjecting the Applicant to disciplinary process. It was submitted that the Respondent committed fundamental breaches of the legal provisions on Fair Administrative Action in the impugned disciplinary process initiated against him contrary to the provisions of Article 47 of *the Constitution* as read with section 4 of the Fair Administrative Actions Act. It was argued further that the Applicant was not given information, material and evidence the committee used in making the decision to interdict him in violation of his right guaranteed under Article 35 of *the Constitution*.
51. On whether the Applicant's right to dignity was violated, it was submitted that the Applicant was treated in inhuman manner in the way in which he was hounded out of his office and manhandled by a contingent of police officers in the full glare of the cameras contrary to Article 28 and 10 of *the Constitution*. Additionally, that interdiction process was aired in both print and television stations eroding the presumption of innocence of an accused person. In support of this, the Applicant relied on the case of Fredrick Saundu Amolo Vs Principal Namanga Mixed Day Secondary School & 2 Others [2014] eklr.
52. In Conclusion, the Applicant submitted that he has demonstrated that he deserves the Orders sought and prayed for the Application to be allowed with costs.

1st Respondent's Submissions

53. The Respondent herein submitted on ten issues, Whether the Petition meets the threshold for constitutional petitions, Whether issues raised in the petition are justiciable, Whether the Board has jurisdiction/mandate to initiate and undertake disciplinary proceedings against the petitioner herein, whether the it was within the 1 Respondent's prerogative to suspend and initiate disciplinary proceedings against the Petitioner, Whether the suspension of the Petitioner before Notice to Show cause was illegal in law, Whether the Petitioner was sent on indefinite suspension and whether



the Petitioner's rights were violated, Whether this Honourable Court should intervene in a matter involving internal disciplinary Proceedings, Whether the Petitioner's right to fair hearing has been violated, Whether the illegally obtained evidence should be expunged and who should bear the costs of the application.

54. On whether the petition meets the threshold for constitutional petitions, it was submitted that the Petition fails to adhere to the now established doctrine in Kenya that constitutional petitions must set out with reasonable precision that which is complained of; the constitutional provisions which have been infringed and the manner of infringement. In support of this, the Respondent relied on the case of Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272 and the case of Mumo Matemu vs Trusted Society 5 Others [2013] eKLR.
55. On that note it was submitted that the petition referred to several Articles of *the Constitution* in its title. However, that the body of the petition did not provide particulars as to the allegations and the manner of the alleged infringements. Therefore it fell short of the very substantive test.
56. The Respondent also relied on the case of Dr. Rev. Timothy Njoya Vs The Hon. Attorney General and Kenya Review Authority HC Constitutional and Human Rights Division Petition No, 479 of 2013, where the court stated;

“The Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which *the Constitution* has been violated by whom and even state the Article of *the Constitution* that has been violated and the manner in which it has been violated.”

57. It is the Respondent's submissions that the petitioner's submissions raise issues that are not specific to the violations he alleges in the petition. It is clarified that issues such as jurisdiction of the board, the right to fair hearing, violation of right to fair labor rights and the independence of the board were not pleaded with the necessary specificity making it difficult for the Respondent to respond with accuracy and specificity. Additionally that the said submissions is a departure from the petition contrary to the rule that a party is bound by the pleadings as was held in the cases of Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR and the case of Raila Amolo Odinga & Another vs. IEBC & 2 Others [2017] eKLR. Hence the petition has failed to satisfy the test set out in the case of Anarita Karimi(Supra).
58. On whether the issues raised in the petition are justiciable, it was submitted that pending the completion of the internal disciplinary process, the petition is not justiciable and the petitioner is only inviting the court to issues which are not ready for determination and to premature adjudication in total disregard of the doctrine of ripeness. In support of this, the Respondent relied on the case of Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others [2016] eKLR where the court expressed itself as follows:
- “Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.”
59. He also relied on the case of Coalition for Reform and Democracy(CORD) & 2 Others Vs Republic of Kenya & Another HCCP 628 of 2014 [2015] eKLR, and the case of Jesse Kamau & 25 Others Vs



Attorney General Mis. Application No. 890 of 2004 the court dedicated a great part of the judgment to the doctrine of justiciability and rendered itself as follows:

“On Ripeness pp 80 - 81 Tribe says: “In some cases the constitutional ripeness of the issues presented depends more upon a specific contingency needed to establish a concrete controversy than upon the general development or underlying facts. For example, litigants alleging that a government action has effected an unconstitutional “taking” without just compensation” are normally obliged to exhaust all avenues for obtaining compensation before the issue is deemed ripe” Still even in situations where an allegedly injurious event is certain to occur, (a court) may delay resolution of constitutional question until a time closer to the actual occurrence of the disputed event when a better factual record might be available” The court considered several authorities and discussed the question whether there was a justiciable dispute in the case. It was said that even in a case where a rule gave the court a wide discretion, it cannot still make justiciable disputes which are not justiciable.”

60. It was submitted that the dispute between the Petitioner and the 1st respondent are strictly contractual, that should be handled without hiding behind a constitutional petition to evade a valid process for dealing with the matters in issue. It was argued that the issues raised in this petition should be adequately dealt with administratively as already initiated by the 1st respondent. In support of this, the Respondent relied on the case of *Albert Chaurembo Mumba & 7 others sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme v Maurice Munyao & 148 others suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme [2019] eKLR*, where the court held that:

“Of precise relevance to this case is *Bethwell Allan Omondi Okal v Telkom K Ltd Founder & 9 others [2017] eKLR*. In that case, the appellants who were former employees of Telkom (K) Ltd felt aggrieved and discriminated against following the implementation of what was referred to as “Trivial Pension Payout”, by the Authority which they accused of fraud, corruption and mismanagement and for paying some categories of retirees less increments in their pension payments than others. The trial court made a finding that since the complaints were against the Authority, that there were other statutory inbuilt administrative dispute resolution mechanisms under the RBA Act that ought to have been followed before recourse to the High Court. He opined that any dispute should have been referred to arbitration in the first instance pursuant to Rule 36 of the Consolidated Deed of Trust and Rules, made under the RBA Act and that the appellant was dissatisfied with the decision of the arbitrator, then he could appeal to the Retirement Benefits Appeals Tribunal established under the RBA Act. On Appeal, the Court of Appeal dismissed the appeal stating that, the Appellant might want to argue that he has a constitutional right of access to justice and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given, that the appellant’s petition lacked merit and was for dismissal.”

61. Based on the cited authorities, it was submitted that the Petitioner undermines the role of its Board whose role is to hear and determine disputes.



62. On whether the Board has jurisdiction to handle disciplinary matters, it was submitted that the Board has jurisdiction to conduct investigations on any allegations or complains against an employee and conduct disciplinary proceedings as stipulated in the Human Resource Policy and Procedures Manual, 2021. Further that the investigations by the E.A..C.C were on its own volition pursuant to *Ethics and Anti-corruption Commission Act* and not pegged on any invitation by the Board. Moreover, that the assertions that the Board lacked jurisdiction since it had referred the matter to the E.A.C.C lacks merit and is an actual acknowledgement that the Board had jurisdiction and further mandate to refer matters to other relevant bodies in case of need for further investigations. In any event that it is inconceivable that it could employ the petitioner to be its chairperson but lack the jurisdiction to exercise disciplinary control.
63. Regarding whether it was within the 1st Respondent's prerogative to suspend and initiate disciplinary proceedings against the petitioner, it was argued that there are reasonable grounds to initiate a disciplinary process against the Petitioner for which he should answer. Further, that it was within its prerogative to undertake the suspension, interdiction and the intended disciplinary process which are all in compliance with the applicable employment laws, rules of procedure as well as its own internal regulations. In support of this, the Respondent relied on the case of Chrispus Ileli Kunuva Vs County Government of Kitui & another [2020] eKLR and the case of Galgalo Jarso Jillo Vs Agricultural Finance Corporation [2021] eKLR.
64. On whether the Petitioner's rights have been violated. The Respondent cited the case of Khaemba Vs The Supreme Court of Kenya & another Petition 100 of 2019 [2019] KEELRC 917 KLR where the court held that suspension is indefinite in the absence of the required safeguards, however that in this case, the Applicant was placed on suspension for a definite time as such, the suspension cannot be said to be unfair
65. As to whether this Honourable Court should intervene in a matter involving internal disciplinary processes, it was submitted that internal disciplinary process initiated against the Petitioner was based on credible allegations of misconduct and the Applicant has been afforded an opportunity to answer to the allegations through a very credible process, therefore that there is nothing that requires the Court's intervention. In support of this, the Respondent relied on the case of Jackson Buti a versus Eastern Produce Kenya Limited Industrial Court Case No.335 of 2011 and the case of Miguna Miguna Vs The PS Office of the Prime Minister & AG JR Case No.188 of 2011, where the court held that, the court will only intervene in an employer's administrative action if it established that the procedure relied upon offends fairness and due process; such should be in exceptional cases; a suspension will be lifted where there are compelling reasons; but the employer retains the prerogative to take disciplinary action against an employee.
66. As to whether the Petitioner's Right to fair hearing has been violated, it was submitted that the right to fair hearing only crystallizes where investigations reveal that the employer has reasons to believe that an employee has committed gross misconduct. On that basis, It was stated that compulsory leave was not a disciplinary action but the beginning of investigations to the allegations and the notice to show cause was only issued after the Board concluded its own independent investigations to accord the petitioner an opportunity to be heard as is the requirement in the *Employment Act*. As such the suspension was not in violation of the right to fair hearing. In support of this, they relied on the case of Humphrey Makokha Nyongesa & another versus Communications Authority of Kenya & another JR No.4 of 2018 and the case of Anthony Mkala Chitavi v Malindi Water and Sewerage Company limited [2013] eKLR.



67. As to whether the Petitioner's Right to information was violated, it was submitted that its Board conducted its own investigation which formed the basis of the decision to interdict the petitioner. He clarified that the absence of an investigative report is not in any way prejudicial to the Petitioner and the fairness of the process is determined based on the consistency of the allegations throughout the process. In any case that it is not a requirement under the employment laws or any other laws that such a report must first be availed to the person affected before action can be taken on the report. In support of this, the respondent cited the case of Wilson Mutabari Mworira Vs Barclays Bank of Kenya Limited [2021] eKLR, where the court held that the absence of the investigative report was not in any way prejudicial to the employee.
68. It was submitted in addition that no request was made for the report and the same denied for his right to information to crystallize under Article 35 of *the Constitution*.
69. As to whether illegally obtained evidence should be expunged, the Respondent argued that most of the information used in support of the Petition and the Notice of Motion were privileged and confidential information which the petitioner obtained illegally and the same should be expunged from the record by this Honourable Court. To support this view, the Respondent cited the supreme Court decision in Njonjo Mue & Another vs. Chairperson of Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR.
70. On costs, the Respondent submitted that the basic rule on attribution of costs is that costs follow the event. Therefore, that since the petitioner has not established any violation of the Petitioner's right, the Application and the entire Petition is lacking in merit and urged this court to dismiss it with costs for lacking in merit.

2nd Respondent's Submissions.

71. The Respondent herein submitted from the onset that the Petitioner seeks to stop the disciplinary process on account that he is being hounded out of office on the of his ethnicity, political affiliation and external influences. That the Petitioner cites the person and office of the Chief of Staff and Head of Public Service (HOPs) and investigations by the Ethics and Anti-Corruption Commission (EACC) and produced a letter dated 22nd September 2023, a Press Release from the State House Spokesman and a newspaper cutting, in support of his case. It was argued that the letter addressed to one Mr. Samuel M. Nderitu, the Chairman of the 1st Respondent's Board, was not copied to the Petitioner, hence the letter is inadmissible in law because the Petitioner has not explained its source. In this, they relied on the case of Okiya Omtatah Okoiti & 2 Others v Attorney General & Others [2020] eKLR where the Court held that, illegally acquired public documents cannot be produced as evidence in a court of law, because they violate Article 31, 35 and 50(4) of *the Constitution* because their production without the necessary certification is contrary to Section 79(1)(a)(iii) and 80 of the *Evidence Act* and it violates Articles 35 and 50(4) of *the Constitution*. Therefore it should be expunged from the record.
72. Similarly that Exhibits 'SKO-14', 'SKQ-15', 'SKO-22' and 'SKO-23' should be expunged from record for having been procured through unorthodox means.
73. On the newspaper cutting, the Respondent submitted that they are inadmissible in evidence, as they contain opinions of the individual authors who are unseeded as was held in Randu Nzai Ruwa and 2 Others vs. Internal Security Minister and another Mombasa HC Misc. No. -68 0 2010 [2012] eKLR where the court found that newspaper cuttings are hearsay and inadmissible.
74. Accordingly, that exhibits 'SKQ-12', 'SKO-13' and 'SKO-18' are of no probative value and the same cannot therefore be a basis for granting the orders sought in the interim or ultimately. Further that



to the extent that the Application and Petition herein are based on the above cited exhibits, then the same becomes unsupported by their inadmissibility and consequently the Application and Petition are bereft of evidence and therefore unproven and should be declined.

75. It was argued that the petition is not supported by a supporting Affidavit contrary to under Rule 11(1) and (2) of the Mutunga Rules, hence it is fatally defective. In this, they relied on the case of Maureen Nyambura Nyisi Warui v Board of Directors Kenya Power & Lighting Compny Limited & 2 others [2020] eKLR. Where the Court held that;-

‘Rule 11(1) & (2) of the Mutunga Rules do not require that a petition must be supported by an affidavit....it is conceivable that a petition which challenges for example constitutionality of a particular legislative text may not require an affidavit. Where however, a petition relies on matters of evidential fact, this must be proved by affidavit. So where, as here, it is sought to rely on matters of fact a suitable affidavit with documentary annexures ought to be filed in discharging the burden of proof of a plaintiff in terms of section 107, 108 and 109 of the Evidence Act...’

76. The Respondent also cited the case of Patrick Ochieng Obachi and 6 others Vs Kenya Anti-Corruption Commission [2010] eKLR and the case of Charles Okello Mwanda Vs EACC and Others, where the Court has been consistent that petitions filed without supporting affidavits or with fatally defective affidavits are incomplete and incompetent and are therefore liable for dismissal at the first instance.
77. On whether the orders sought are merited, it was submitted that prayers 2 and 3 of the Motion are supposed to be issued in circumstances where the main cause, in this case the Petition, is likely to succeed. But since in this case, the same has not been proved, the Orders are not merited and should not be allowed.
78. It was also submitted that the Applicant’s Motion and Petition are based on mere apprehensions and therefore the orders and declarations sought should not be issued at this stage and ultimately.
79. On whether the court can interfere with internal disciplinary processes, it was argued that it is now settled that the court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the Applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process. In support of this, they relied on the case of Thomson Kerongo & 2 others V James Qmariba Nyaoga & 3 others [2017] eklr where the Court held that: -

“Due process is an internal disciplinary process to be exercised by an employer. The Court is not expected to enter into the boardrooms of the employers to micro manage their affairs... The court will only interfere where there is breach of the process and even so, only with a view to setting the process right.”

80. Accordingly, that granting the interim orders will hamstring the human resource function of the 1st Respondent and it will be tantamount to this Court supplanting its processes on the Respondents and descending into their Boardrooms.
81. The Respondent herein urged this Court to dismiss the Application herein with costs.



82. I have considered the averments and submissions of the parties herein. The applicant contends that the respondents have initiated an illegality against him, which this court should stop.
83. The main ground of this contention is that the Respondents board is beholden without independence as the disciplinary process was initiated unfairly. Without delving into the merits or otherwise of the petition which the parties extensively submitted on, I will only resolve one issue of whether this court can stop a disciplinary process instituted by the employer against an employee.
84. As cited by the applicant in *Mulwa Msanifu Kombo vs Kenya Airways* (2013) eKLR this court can only interfere with a disciplinary process in cases where the process has been commenced or is continuing unfairly.
85. The applicant had contended that the Respondents cannot initiate a disciplinary process against him when EACC is investigating him. On this issue, I refer to this court's many judgments and rulings which have settled the fact that internal disciplinary processes are independent to criminal processes or investigations and both can proceed simultaneously.
86. And in deciding whether the court should stay the disciplinary process as stated above and as cited cases e.g *Miguna Miguna vs The PS Office of the Prime Minister & Attorney General* JR 188 OF 2011, this court can only intervene in an employer's administrative actions if it is established that the procedure relied upon offends fairness and due procedures on supervision can only be lifted where there are compelling reasons but that the employer retain the prerogative to take disciplinary action against an employee.
87. Courts would normally not stay disciplinary processes indefinitely where the process is flawed but to bring to bear proper procedures and fairness.
88. In the current application the applicant has contended that the board is being pushed from another hand to institute the disciplinary process, that notwithstanding, the applicant has not set out how the process is flawed.
89. In my view, the applicant rushed to court prematurely to stop a process that has not even began.
90. In the circumstances, I find the application has no merit and is thus dismissed. The parties are free to proceed with the main petition. Costs of this application in the petition.

RULING DELIVERED VIRTUALLY THIS 4TH DAY OF JUNE, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Miss Nyambura for AG present

Ombui for Petitioner – present

Akang'o for 1st Respondent - present

