



Gachukia v Kenya Institute of Supplies Management (Employment and Labour Relations Petition E133 of 2023) [2024] KEELRC 1772 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEELRC 1772 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E133 OF 2023**

MN NDUMA, J

JULY 4, 2024

BETWEEN

MARTIN KANG'ETHE GACHUKIA PETITIONER

AND

KENYA INSTITUTE OF SUPPLIES MANAGEMENT RESPONDENT

JUDGMENT

1. The petitioner Dr. Martin Kang'ethe Gachukia filed the petition on 5th July 2023 seeking the following reliefs:-
 - a. A declaration that the action of the respondent is opaque, egregious, clandestine, capricious whimsical and contrary to articles 10, 27, 28, 41, 47, 50(1), and 236 of the [Constitution of Kenya](#), 2010 hence unconstitutional and consequently null and void.
 - b. A declaration that the letters dated 27th February 2023, 23rd March 2023, 11th May 2023 regarding the investigating committee meetings and the investigation report dated 23rd May 2023 are a violation of the petitioner's rights to due process and fair administrative action under article 47 of the [constitution](#) hence unconstitutional and consequently null and void.
 - c. A declaration that the respondent's actions of interdicting the petitioner, lifting the interdiction and suspending the petitioner is a violation of the petitioner's rights to fair labour practices under article 41 of the [Constitution](#), hence unconstitutional and consequently null and void.
 - d. That the honourable court be pleased to grant an order of permanent injunction prohibiting/restraining the respondent, its servants, officials, representatives, and/or agents from taking any disciplinary action against the petitioner or having so taken be restrained from acting thereupon or otherwise in any other manner.



- e. An order to set aside the suspension letter and show cause letters both dated 6th June 2023.
 - f. The honourable court be pleased to issue and hereby issues an order reinstating the petitioner to the employment with the respondent herein on similar terms and/or privileges without loss of any benefit and remuneration.
 - g. General damages for the constitutional violations of the petitioner's fundamental rights in respect to Articles 27, 28, 41, 47, 50(1) and 236 of the constitution.
 - h. The honourable court do issue any other orders and give such directions as it may deem fit to meet the ends of justice.
 - i. Costs of the petition
 - j. Interest on the above at court rates
2. The petition is premised on simple facts that the petitioner was alleged to have committed misconduct by his employer, the respondent and was issued with a letter of interdiction dated 24/2/2023. Thereafter the petitioner was invited to an investigation committee meeting on 23rd March 2023 to appear on 28th March 2023.
 3. That at the meeting of 28th March 2023, the petitioner noted that the committee was constituted of his junior colleagues named in the petition.
 4. The committee sought explanation from the petitioner on the allegations contained in the letter of interdiction dated 24th February 2023. The petitioner explained himself and was informed that he would receive feedback.
 5. On 11th May 2023, the petitioner received a letter inviting him to another investigation committee on 16th May, 2023.
 6. The petitioner attended the meeting. The committee comprised of 5 members namely, two senior procurement professionals, two members from the Institute of Human Resource Management (IHRM) and one member from Institute of Certified Public Accountants of Kenya (ICPAK).
 7. That upon the proceedings at that meeting, the petitioner was issued with a letter of suspension dated 6th June 2023 and the interdiction was lifted. The petitioner was in the letter of suspension required to show cause why disciplinary action should not be taken against him.
 8. The charges set out against the petitioner were as follows:-
 - a. As per your report to the Council dated 16th February 2023 under sections 3.0 and 4.0 herein attached you prepared licenses for members of the Institute who were not in good standing without verification of the Continuous Professional Development Points as prescribed by the Council and in accordance with the Supplies Practitioners Management Act, 2007 Section 20 (3) (b)
 - b. As per the rulings issued by the Election Dispute Committee most specifically ERC No. 2 of 2022 paragraph 15, ERC No. 3 of 2022 paragraphs 10 & 11 and ERC No. 4 of 2022 paragraph 7 you singlehandedly submitted a register to the Independent Elections Boundaries Commission that was defective and contained errors that limited the ability of members to effectively participate in the elections
 - c. You failed to adhere to the resolutions of the Council issued to you on the 17th October 2022 under the reference KISM/CEO/CO.RES/Vol.1 (13) and proceeded to communicate with



members on the collection of licenses without the express approval of the Accounting Officer. The resolutions extracted and highlighted below for your action

- i. MIN/FC/13/10/22/02: Audit And Risk Management Committee Report: The Registrar spearhead the express prescription of requirements for members registration and practitioners licensing in terms of fees, academic qualifications, and required continuous professional development (CPD) programs by 31st December, 2022; and
- ii. MIN/FC/13/10/22/03: Registration Committee Report: ‘The Registrar should ensure that the Ag. CEO is informed on all member related issues. All Communication to Members should originate from the office of the CEO’

Complaint

9. The petitioner filed suit seeking the reliefs already set out to stop the ensuing disciplinary process alleging inter alia that he has been subjected to two parallel disciplinary processes, interdiction and suspension. That the action by the employer is unlawful, unconstitutional and unfair and should be stopped by the court.
10. In particular the petitioner alleges that the intended disciplinary action violates Article 27 which provides for equality and freedom from discrimination; Article 28 which protects human dignity of the individuals; Article 41, which protects employees from unfair labour practices; Article 47 which protects the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair; Article 50 which protects the right of every person to a fair hearing before a court or if appropriate another independent and impartial tribunal or body; Article 236, and which protects the right of public officers not to be victimized or discriminated against for having performed the functions of office in accordance with the constitution or any other law and or dismissed, removed, demoted in rank or otherwise subjected to disciplinary action without due process of the law.
11. The petitioner alleges that the charges levelled against him are not based on sound facts, the process is flawed and unless the court protects the petitioner, he is likely to suffer irreparable harm.
12. The petitioner prays to be granted the reliefs sought in the petition and buttressed in the supporting affidavit and annexes thereof.

Defence

13. The respondent filed a replying affidavit to the position dated 3rd December 2023, sworn to by Nicholas Watule, the Acting Chief Executive Officer (CEO) of the respondent.
14. The deposition by the CEO may be summarized as follows: -
 - a) It is deposed by the Respondent CEO, inter alia, that through a letter dated 24th February, 2023, the Institute interdicted the Petitioner from exercising the duties of his office for purposes of paving way for investigations concerning the allegations that the Petitioner had prepared licenses for members of the Institute who were not in good standing without undertaking a verification of the Continuous Professional Development Points as prescribed by the Council under the provisions of section 20 (3) (b) of the *supplies practitioners management Act* 2007. That the Respondent single handedly submitted a Register to the Independent Elections and Boundaries Commission that was defective and contained errors that limited the ability of members to effectively participate in the elections and failed to adhere to the elections of the Council.



- b) That following the investigations the Institute established from a Memo and Report which had been issued by the Petitioner as Registrar that the Petitioner had issued a total of 544 licenses, 75 of which were issued to members in good standing, 135 of them to members who were not in good standing 86 of which were corporates and 49 issued to individuals, and 224 licenses were printed and withheld because the members were not in good standing as they had not attained the required CPD points. The Register was also found to be replete with errors as it failed to capture the emails and phone numbers of some members.
- c) That it was also further established that there was allocation of email addresses to the institute domain emails which would have enabled the recipients to vote multiple times. That the Petitioner failed to adhere to the Council Resolution KISM/CEO/CO.RES/VOL. 1 (13) requiring that the acting CEO be informed on all member related issues and that communication to members originate from the office of the CEO.
- d) It is deposed that the Respondent duly followed the Procedure Manual sections 11.13.1.5 as regarding the constitution of the Investigation Committee and that the Manual does not provide that members of the Institute be employees of the Institute. That the procedure of appeal provided for under section 11.5.3 of the manual requiring an appeal to the board within 6 months was not complied with which renders the petition an abuse of court process.

Further affidavit

- 15. The petitioner responded to the allegations set out in the replying affidavit aforesaid and joins issues with the respondent and puts the respondent to strict proof thereof. The petitioner reiterated the deposition set out in the supporting affidavit at paragraph 28, 38, 39 and 48 and traverses each and every paragraph in the replying affidavit.
- 16. In short the petitioner denies the allegations of misconduct levelled against him while acknowledging that the disciplinary process is yet to be concluded stating that the committee is biased, has a pre-determined outcome and will cause him irreparable harm if not stopped.

Determination

- 17. The parties filed written submissions which the court has carefully considered together with the deposition by the parties and the issues for determination are as follows:-
 - a. Whether the petitioner has made out a case to warrant the court to issue a permanent injunction stopping the intended disciplinary action against the petitioner.
 - b. Whether the petitioner is entitled to the reliefs set out in the petition.
- 18. The respondent first interdicted petitioner pending initial investigations.
- 19. The committee then prepared an investigation report which formed the basis of the suspension of the petitioner which letter also served as a notice to show cause and set out concrete charges of misconduct against the petitioner summarized as follows: -
 - a. Issuance of licenses to member not in good standing.
 - b. Submission of a defective voter register to IEBC
 - c. Insubordination by failure to adhere to resolutions by the KISM Council.



20. The court has noted the provisions that anchor those internal disciplinary processes of the respondent. The court has also considered the principles set out in the case of *Geoffrey Mworira v Water Resources Management Authority* [2015] eKLR where the court stated thus:-

“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 provisions 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.”

21. The court has also considered the case of *Kamau v Kenya Accreditation Service* (Petition E053 OF 2021) [2021] KEELRC & (KLR), 30th July 2021 where the court held: -

“In addition, and as we will show below, the emerging jurisprudence from the court supports the view that the court can intervene in the internal disciplinary process for a good cause being demonstrated by the employee. The said intervention is not necessarily meant to stop the process altogether but to put things right so as to avoid violation of the employee’s rights and fundamental freedoms, and also to ensure procedural fairness to the employee. Consequently, I find and hold that the preliminary objection by the respondent has no merits and is dismissed.”

22. The court has considered the allegation by the petitioner that he has been subjected to double jeopardy by being both interdicted and suspended on the same charges to be without merit since the process is based on the internal disciplinary policy and procedure manual of the respondent.

23. The court has also established that the disciplinary process having involved preliminary investigation leading to interdiction and a further investigation leading to suspension and notice to show cause within a period between 24th February 2023, when letter of interdiction was issued and 6th June when interdiction was lifted and the petitioner suspended pending final disciplinary process, was not visited by inordinate delay.

24. The court notes that the investigation and disciplinary process involved both staff and independent professionals and the allegation of bias and or threat of violation of rights set out in the petition lack sound basis at the investigatory stage of the internal disciplinary process of the respondent.

25. The court is further guided by the Supreme Court decision in *Gatirau Peter Munya v Dickson Mwende Kitbinji and 2 others*, Civil Application – No. 5 of [2014] where the court stated on the issue of issuing conservatory orders in public domain as follows: -

“[86] conservatory orders” bear a more decided public law connotation: for these are orders to facilitate ordered functioning with public agencies, as well as to uphold the adjudicatory authority of the courts in the public interest. Conservatory orders, therefore are not, unlike interlocutory injunctions, linked to such private party issues as “the prospects of irreparable harm” occurring during the pendency of a case or “high probability of success” in the supplicant’s case for orders of stay.



Conservatory orders, onsequently should be granted on the inherent merit of a case bearing in mind the public interest, the constitutional values and the proportionate magnitude and priority levels attributable to the relevant causes.”

26. In this matter, the court did not grant interlocutory conservatory order. The court has now been called upon to issue final injunction to stop the employer from conducting a disciplinary action against the petitioner who holds the position of Registrar of the respondent.
27. It is the court’s considered finding that injuncting that process permanently is not merited nor justified by the case brought out by the petitioner.
28. The petitioner has not proved any violation, breach or threat to his rights set out in the petition by the intended conduct of a disciplinary hearing.
29. Accordingly, the court enjoins the respondent to adhere to its internal policy, guiding statutes and the *constitution* in finalizing the pending process failing which the petitioner would be entitled to remedies upon conclusion of the process thereof.
30. The petition was brought prematurely, lacks merit and is dismissed with no order as to costs

DATED AT NAIROBI THIS 4TH DAY OF JULY, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:-

Mr. Achiado for petitioner

Mr. Ngoya for respondent

Mr. Kemboi Court Assistant

