



**Wangalwa v County Assemblies Forum (CAF) & 2 others (Employment and Labour Relations Petition E069 of 2023) [2024] KEELRC 1888 (KLR) (17 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1888 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E069 OF 2023**

**AN MWAURE, J**

**JULY 17, 2024**

**BETWEEN**

**JUDITH ODUMA WANGALWA ..... PETITIONER**

**AND**

**COUNTY ASSEMBLIES FORUM (CAF) ..... 1<sup>ST</sup> RESPONDENT**

**HON PHILEMON SABULEI, CHAIRMAN, CAF ..... 2<sup>ND</sup> RESPONDENT**

**HON CHEGE MWAURA, SEC GEN, CAF ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioner filed an Amended Petition dated 5<sup>th</sup> April 2024.

**Petitioner's Case**

2. The Petitioner avers that she was employed by the 1<sup>st</sup> Respondent on 15/05/2018 as the Chief Executive Officer (CEO) vide a contract dated 10/05/2018.
3. The Petitioner avers that she conducted her duties with diligence and never had any disciplinary case. She also contributed to the success of the 1<sup>st</sup> Respondent by implementing and overseeing various projects on its behalf.
4. The Petitioner avers that she has worked well with the 1<sup>st</sup> Respondent's Executive Committee that served from 2018 to July 2019 and successfully executed the transition of the committee that served 2019-2022 and the current one.
5. The Petitioner avers that the Executive Committee is an organ established under Article 10(1) of the 1<sup>st</sup> Respondent's constitution with the mandate to:



- a. Be responsible for the management of the affairs of the forum;
  - b. Ensure that the decisions of the General Assembly are implemented;
  - c. recruit and supervise the CEO.
6. The Petitioner avers that the Executive Committee held a meeting on 06/03/2023 to solely discuss office space and deliberate on the office space report by the Respondent's Finance Sub Committee which was confirmed by the 3<sup>rd</sup> Respondent upon her inquiry.
  7. The Petitioner avers that during the meeting, she read the office space report and the 2<sup>nd</sup> Respondent opened deliberations and upon discussions, resolutions were made.
  8. The Petitioner avers that once the resolutions were made, the 2<sup>nd</sup> Respondent asked her and the clerk to step out, Mr Austine Munene. The 3<sup>rd</sup> Respondent indicated there was another agenda to be discussed while she is out and she left.
  9. The Petitioner avers that subsequently, she had a brief meeting with the 2<sup>nd</sup> and 3<sup>rd</sup> Respondent on 09/03/2023 to discuss a meeting the 2<sup>nd</sup> Respondent was having with the Speaker of the Senate on the planned legislative summit. The 2<sup>nd</sup> Respondent asked the Petitioner to make the presentation as the technical lead person which she did and received accolades for the good concept note developed.
  10. The Petitioner avers that after the meeting at the Senate, the 2<sup>nd</sup> Respondent and the 3<sup>rd</sup> Respondent asked petitioner to proceed to the 1<sup>st</sup> Respondent's office to reflect on the last meeting of the Executive Committee including the meeting she did not take part in as she stepped out.
  11. The Petitioner avers that she was issued an interdiction letter dated 08/03/2023 on allegations of insubordination, failing to comply with contractual terms and reluctance to implement the Executive Committee decisions. She was subsequently sent on compulsory leave without due process and on baseless grounds.
  12. The Petitioner avers that the Respondent's Human Resource Policy and Procedures Manual (2019) does not envisage compulsory leave as a punishment and prior to her interdiction, she had never been issued with any warning letter or informed of any decision she failed to implement.
  13. The Petitioner avers that she responded to the interdiction letter vide a letter dated 10/03/2024 and requested that the grounds be elaborated and substantiated. However, the Respondents failed to supply her with the requested information and instead communicated to over 20 institutions in the devolution space that she has taken a leave of absence and proceeded to appoint an acting CEO.
  14. It is the Petitioner's case that she was issued with a notice to show cause (NTSC) letter dated 12/04/2023 to respond within 14 days. The letter levelled 7 charges against her being irregular employment; insubordination, disobeying orders from persons with authority; mismanagement of funds; abuse of office; conflict of interest; change of contract terms; and irregularly payment of gratuity.
  15. The Petitioner avers that grounds on the interdiction letter and NTSC materially differ and further the NTSC was written by Hon. Lantano Nabaala, the Chairperson of the 1<sup>st</sup> Respondent's Adhoc Investigation Committee which had no authority to discipline her.
  16. It is the Petitioner's position that she filed an application in this court seeking interim orders barring the Respondents from taking further disciplinary actions against her, the same was not granted and the Respondents commenced disciplinary action and ultimately dismissed her from employment vide a letter dated 10/05/2023.



17. The Petitioner asserts that section 8.11 of the Human Resource Policy and Procedures Manual (2019) and her contract of employment provides for the following disciplinary procedures: First warning; second warning; and the third and final warning. He was not subjected to any of these prior to his interdiction and dismissal.
18. It is the Petitioner's case that in accordance with Article 10(2) of the 1<sup>st</sup> Respondent's constitution, its Executive Committee lacked the mandate to make a resolution to interdict and send her on compulsory leave and further the disciplinary issue was not part of the agenda during the Executive Committee's meeting.
19. The Petitioner avers that she has not been availed with the proceedings of the Executive Committee's meeting held on 06/03/2023 despite numerous requests contrary to Articles 35 and 50 (1) of the Constitution on the rights to access to information and a fair hearing.
20. The Petitioner avers that she had a fundamental expectation that her employment would be terminated in accordance with the Employment Act and contract in case of any misconduct or breach of contractual provisions.
21. It was also her legitimate expectation that she would continue to serve the 1<sup>st</sup> Respondent as an employee as CEO until the end of her term contract and/or retirement age of 60 whichever comes earlier.

### **Respondents' Case**

22. In opposition to the Petition, the 2<sup>nd</sup> Respondent filed a replying affidavit dated 27<sup>th</sup> November 2023.
23. The Respondents avers that the 1<sup>st</sup> Respondent issued the Petitioner a NTSC on 12/04/2023 requiring her to respond within 14 days and appear before the 1<sup>st</sup> Respondent's Ad-hoc Committee on Investigations on 02/05/2024. However, the Petitioner failed to do as directed.
24. It is the Respondents' case that in the absence of the Petitioner's defence, the Executive Committee after consideration of the ad hoc committee report found that the Petitioner had violated several policies and procedures as set out in the NTSC. Consequently, the 1<sup>st</sup> Respondent summarily terminated the Petitioner's employment on 10/05/2023.
25. The Respondents aver that the prayers sought have been overtaken by events as they cannot be given in vain.
26. The Respondents aver that the 1<sup>st</sup> Respondent's Executive Committee investigated the Petitioner's conduct as it has higher authority to the Secretariat and is responsible for the management of the 1<sup>st</sup> Respondent's affairs.
27. The Respondents aver that the 2<sup>nd</sup> Respondent is the chairman of the Executive Committee while the 3<sup>rd</sup> Respondent is the Secretary General and both work closely in accordance with Article 5 and 10 of the 1<sup>st</sup> Respondent's constitution.
28. The Respondents aver that the Petitioner headed the Secretariat in accordance with Article 13 of the 1<sup>st</sup> Respondent's Constitution which office is subordinate to the 2<sup>nd</sup> Respondent's office.
29. The Respondents aver that Petitioner was issued the letter of interdiction dated 08/03/2023 in light of the issues raised in the Executive Committee on 06/03/2023 regarding her misconduct.
30. The Respondents aver that in response to the letter of interdiction, the Petitioner requested the grounds to be substantiated and a NTSC dated 12/04/2023 was sent to the Petitioner stating the basis



of her interdiction and gave her 14 days to respond. She was properly served on email and via courier the same day.

31. The Respondents aver that NTSC triggered the Petitioner to file this petition in a bid to interfere with ongoing investigations. Therefore, the Petitioner cannot say the Respondents issued the NTSC to defeat the present petition as they were filed after.
32. The Respondents aver that the Petitioner faced several disciplinary matters in relation to her conduct as the CEO as communicated in interdiction letter and further elaborated in the NTSC duly served upon her.
33. The Respondents aver that the Petitioner never responded to the allegations and the allegation that she was not supplied reasons for her suspension is a falsehood and misrepresentation of facts.
34. It is the Respondents' case that the notice to 20 other institutions regarding her absence dated 20/03/2023 was factual as the Petitioner was proceeding on leave. And it is normal procedure for the 1<sup>st</sup> Respondent to notify its partners in the devolution space of any changes likely to affect its normal operations.
35. The Respondents aver that the Petitioner being the highest-ranking officer amongst the 1<sup>st</sup> Respondent's staff, her interdiction was necessary as there was risk she would interfere with the investigations into her misconduct.

#### **Petitioner's Submissions**

36. The Petitioner submitted that the instant petition informed her unlawful interdiction and illegal compulsory leave, however, before the determination of the petition, the 1<sup>st</sup> Respondent proceeded to dismiss her employment.
37. It is the Petitioner's submission that the Respondents had no basis to interdict and send her on compulsory leave. The 1<sup>st</sup> Respondent's Human Resource Policy and Procedures Manual makes no provision for compulsory leave therefore not available to the Respondents in their quest to remove the Petitioner from her employment.
38. The Petitioner submitted that the petition raises constitutional issues regarding the violation of her rights cannot be overtaken by events as purported by the Respondents and this petition is properly before this court.
39. The Petitioner submitted that disciplinary process taken against her by the Respondents was flawed. Where the employer's action fails to comply with the relevant legal and policy parameters, the court is obliged to intervene.
40. It is the Petitioner's submission that the Respondents had no basis to interdict her and send her on compulsory leave as the Human Resource Policy and Procedures makes no provision for compulsory leave therefore the disciplinary process commenced through the interdiction letter was non-starter.
41. The Petitioner submitted that she was not informed of the meeting that made the resolution to interdict and send her on compulsory leave and she was never supplied with the proceedings despite requesting for the same.
42. The Petitioner submitted that the Executive Committee lacked the mandate to interdict her as the HR Policy does not provide for interdiction of the CEO as one of its roles. Therefore, the Committee exercised powers that it was bereft of making it unlawful.



43. The Petitioner submitted that the disciplinary process was without due regard of the provisions of the HR Policy and Manual breaching her rights to fair labour practices, fair hearing and fair administrative process under Article 41, 47 and 50 (1) of the Constitution.
44. The Petitioner submitted that the particulars of the charges against her in the NTSC and investigation report demonstrate a witch hunt by the Respondent to drive her out of employment. The particulars of insubordination occurred after the interdiction and institution of the disciplinary proceedings. For example the allegation that she disobeyed lawful orders from the 3<sup>rd</sup> Respondent to sign change of signatories forms occurred after her interdiction.
45. It is the Petitioner's submission that the Respondents had no valid and genuine reasons to dismiss her employment.
46. The Petitioner submitted that the 1<sup>st</sup> Respondent flouted its own HR Policy and Procedures Manual in dismissing her employment as she was never issued any warning letter prior to the decision to interdict her and dismiss her employment.
47. The Petitioner submitted that she was not invited for a disciplinary hearing prior to the decision to dismiss her employment and that the letter of dismissal does not inform her of her right to appeal in gross violation of Section 41 of the Employment Act and clause 8.12 of the HR Policy and Procedures Manual.
48. The Petitioner submitted that the Respondents actions were opaque by subjecting her to an illegal and unlawful disciplinary process in violation of Article 10 of the Constitution.
49. It is the Petitioner's submission that Respondent's action to interdict and send her on compulsory leave without any basis was in breach of her right to fair labour practices under Article 41 of the Constitution and right to fair administrative action under Article 47.
50. The Petitioner submitted that Article 50(1) of the Constitution was contravened as she was not accorded a fair hearing prior to the decision to interdict her and ultimately dismiss her from employment.
51. It is the Petitioner's submission that the Respondents' actions towards her were arbitrary, unlawful and malicious and she deserves maximum compensation for unlawful termination.

### **Respondents' Submissions**

52. The Respondents submitted that the grounds upon which the court would intervene in an employer's disciplinary process include: where an employee establishes that the employer contravened the provisions of the Constitution or legislation; in breach of agreed term of contract or employer's policy; or if the process is unfair and offends the rule of natural justice; or the internal dispute procedure must be exhausted.
53. The Respondents submitted that the application was dismissed the Petitioner's application to halt the disciplinary hearing. The dismissal was based on the grounds that the Petitioner had not established a prima facie case or demonstrated any prejudice. It is Respondents case that had the court identified any breach of constitutional provisions or legislation it would have intervened in the disciplinary process.
54. It is the Respondents submission that the grounds of termination outlined in the NTSC arose subsequent to an investigation conducted by the ad hoc committee, however, the Petitioner failed to respond or appear before the ad hoc committee as admitted by the Petitioner. In the absence of any defence, the Petitioner was not interested in participating in the disciplinary proceedings.



55. The Respondents submitted that the reasons for termination under the NTSC were believed to have existed by the 1<sup>st</sup> Respondent as they arose from complaints from staff and previous Executive Committees.
56. The Respondents submitted that Article 10(2)(c) of the 1<sup>st</sup> Respondent's constitution dictates that the Executive Committee shall recruit and supervise the CEO of the Forum. Therefore, in the absence of a defence, it made its decision influenced by the recommendations of the ad hoc committee and impact of the offences to the organization's reputation and financial stability.
57. The Respondents submitted that the NTSC invited the Petitioner to respond and attend a hearing before the ad hoc committee on investigation on 2/05/2023, however, she failed to do so. The Respondents fulfilled the requirements under Section 41 of the *Employment Act*.
58. The Respondents submitted that the reasons for termination were stated in the summary dismissal letter which stated that the Petitioner violated several policies and procedures as stated in the NTSC.
59. It is the Respondents submission that the 1<sup>st</sup> Respondent's Executive Committee majority of the members resolved that the Petitioner be interdicted as referenced in the minutes of the meeting dated 14/04/2023.
60. The Respondent submitted that there was no need for any warnings to be issued as alleges as Section 8.11.4.4 provides that in certain cases, the misconduct might be serious enough to justify summary dismissal without any warning. The allegations levelled against the Petitioner were serious that needed no warning.
61. The Respondents submitted that they have discharged their burden under Section 47 (5) of the *Employment Act*. There is nothing for the court to interfere since the disciplinary process was in accordance with the law, employment contract and the HR Policy and Procedures Manual.
62. The Respondents submitted that the Petitioner was interdicted to allow for investigations. The interdiction letter was clear that upon conclusion of the investigations, the Petitioner was to be given an opportunity to be heard; there was no violation of Article 10 or 41 of the *Constitution*.
63. The Respondents submitted that clause 13.2 of the Petitioner's employment contract provides that:  
- "the employer shall investigate the misconduct and while the employer is still investigating the employee may be suspended from performing duties until the investigation is concluded."
64. Therefore, suspension is provided under the contract pending investigations hence the Respondent's action cannot amount to unfair labour practice.
65. It is the Respondents submission that the disciplinary process was lawful and procedurally fair in accordance to Article 47 of the *Constitution*.
66. The Respondents submitted that the allegations that Article 50 (1) of the *Constitution* was not adhered to is false. The NTSC provided the Petitioner with an opportunity to defend herself, however, she did not respond or attend to the hearing she was invited to. Therefore, the Petitioner cannot allege that her constitutional right to fair hearing was infringed.
67. The Respondents submitted that the prayer of reinstatement sought is incapable of being granted since the Petitioner was validly and procedurally dismissed from her employment.



## Analysis and Determination

68. The Respondents submitted that the Petitioner failed to prove violation of rights and proof of damages arising out of violation. The Petitioner failed to prove these two and the prayer for compensation for violation rights should be dismissed.
69. The issue for determination is whether the respondent violated the petitioner's constitutional rights in interdicting her and sending her on compulsory leave and terminating her contract.
70. The trite law is that the employer has a duty according to employment laws to give a valid reason for terminating an employee from their employment section 47(5) of the *employment act* states:
- “For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”
71. Further section 45(1) of the said *employment act* as provides:
- (1) No employer shall terminate the employment of an employee unfairly.
  - (2) A termination of employment by an employer is unfair if the employer fails to prove——
    - a. that the reason for the termination is valid;
    - b. that the reason for the termination is a fair reason——
      - i. related to the employees conduct, capacity or compatibility; or
      - ii. (ii) based on the operational requirements of the employer; and
    - (c) that the employment was terminated in accordance with fair procedure.
72. The question to answer is if the respondents were justified or did they have valid ground to interdict the petitioner. The interdiction letter addressed to the petitioner and dated 8<sup>th</sup> March 2023 gave three reasons inter alia for interdiction.
- i. Insubordination
  - ii. Failure to comply with terms of employment and
  - iii. Reluctance to implement decisions of executive committee.
73. Thereafter the respondents through the chair of ad hoc committee Mr Lantano Nabaala on 12<sup>th</sup> April 2023 issued the petitioner with a notice to show cause letter and attached a list of the issue that they were accusing her. These included irregular employment, abuse of office, mismanagement of funds among others.
74. The petitioner had written a letter to the respondent's chairperson dated 10<sup>th</sup> March 2023 requesting for details and substantiated points to enable her to reply appropriately.
75. The court finds the information listed in the list annexed to the NTSC dated 12<sup>th</sup> April 2023 were quite detailed and the petitioner had sufficient information to enable her to respond appropriately. She was also informed she was expected to attend a disciplinary meeting on 2<sup>nd</sup> May 2023 at 8 am.



76. The petitioner did not respond to the notice to show cause but instead filed an application in court on 14<sup>th</sup> April 2023 seeking injunctive orders which court declined to grant vide ruling dated 3<sup>rd</sup> November 2023.
77. The court finds the petitioner was given valid reason in her notice to show cause letter by the respondent and she did not respond. She asked for details before the notice to show cause was issued to her and she was given the details annexed to the notice to show cause. She was also informed she was to attend a disciplinary hearing after her response and once again she did not show up. Hence the committee met and deliberated on her issues in her absence and found her culpable and hence dismissed her from employment.
78. The law however provides in section 41 of the *employment act* that the employee must be invited to a disciplinary hearing in the presence of a witness of her choice. This is the other leg of the fairness test as per the case of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR. The first leg is substantial justification which means giving valid grounds for terminating the employee while procedural fairness is adhering to the mandatory procedure provided in the aforesaid section 41 of the *Employment Act*.
79. Even if the respondents may have had good grounds to terminate the petitioner she was entitled to a hearing. In the case of *George Musamali v G4S Security Services Kenya Ltd* (2016) eKLR the court held:
- ....." the most important thing is to ensure that there is a valid reason or justifiable reason for termination which must be conducted by following fair procedure" this includes furnishing the employee with the charges he or she is facing and affording them an opportunity to defend themselves. It does not matter whether the employees guilt is apparent on the face of the record. He or she must be heard no matter how weak or useless his or her defence might seem to be."
80. In view of the foregoing matters the Court finds and holds that the petitioner's termination was unfair and more so unprocedural for want of procedure fairness.
81. The petitioner was not invited for a disciplinary hearing clearly and was not informed of her right to avail a witness of her choice. She had been asked to reply to NTSC and attend a disciplinary meeting but there was no other specific opportunity was afforded her to defend herself in the presence of her witness.
82. In conclusion, the court finds the amended petition is meritorious and judgment is entered in her favour.
- a. Prayers a, b, c, d f, g are not proved but court holds the petitioner was terminated in violation of the *employment act* and in particular section 41 of the *employment act*.
83. The relief granted is general damages for unprocedural termination @ equivalent of 4 months considering the period she worked for the respondent. Interest will be granted at court rates from date of judgment till full payment.
84. Other prayers of reinstatement and aggravated damages for constitutional violations are not proved and are not granted.
85. Each party will meet their respective costs considering the respondent had grounds to consider terminating the petitioner but failed on the procedure.



Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 17<sup>TH</sup> DAY OF JULY, 2024.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

