

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT**  
**NAIROBI**

**ELRC PETITION NO. E013 OF 2025**  
***(Before Hon. Lady Justice Hellen Wasilwa, J)***

**NICHOLAS KAMUNYU.....**  
**PETITIONER**

**VS**

**PETER NDEGWA.....1<sup>ST</sup>**  
**RESPONDENT**

**FLORENCE NYOKABI.....2<sup>ND</sup>**  
**RESPONDENT**

**SAFARICOM PLC.....3<sup>RD</sup>**  
**RESPONDENT**

**JUDGMENT**

1. By a Petition dated 2<sup>nd</sup> February 2025, the Petitioner sought for the following reliefs; -
  - a. *A declaration that the Respondents' actions violated the Petitioner's constitutional rights under Articles 41, 47, and 50 of the Constitution.*
  - b. *A declaration that the suspension letters dated 17<sup>th</sup> January 2025 and 19<sup>th</sup> January 2025 are null and void and of no legal effect.*
  - c. *An order compelling the Respondents to pay general and exemplary damages for the violation of the Petitioner's constitutional rights, including the right to fair labour practices, fair administrative action, and a fair hearing.*

- d. An order of permanent injunction restraining the Respondents from intimidating, harassing, or retaliating against the Petitioner in any manner.*
- e. Costs of this Petition be borne by the Respondents.*
- f. Any other relief that this Honourable Court may deem just and fit to grant.*

### **Petitioner's Case**

2. The Petitioner avers that despite a clear and binding order by this court's on 16<sup>th</sup> January 2025 in **ELRCJR/E066 of 2024**, suspended disciplinary proceedings against him pending the hearing and determination of the suit; the 2<sup>nd</sup> Respondent on 17<sup>th</sup> January 2025, purportedly under the direction or with the knowledge of the 1<sup>st</sup> Respondent, issued him a suspension letter based on allegations that occurred 15 months prior to his employment with the 3<sup>rd</sup> Respondent.
3. It is the Petitioner's case that the disciplinary process initiated against him was fundamentally flawed and violated internal policies and constitutional rights, as detailed in **ELRCJR/E066 of 2024**, including: Improper constitution of the disciplinary committee as it comprised peers and complainants, contrary to the principles of fairness and impartiality; it denied the Petitioner the opportunity for cross-examination and defence; and non-compliance with the Disciplinary Policy.

4. The Petitioner avers that he was suspended less than 24 hours after the Court's ruling demonstrating the Respondents retaliatory intent and a deliberate attempt to undermine the Court's authority. Additionally, the alleged issues in the suspension letter pertain to a contract executed before the Petitioner joined the 3<sup>rd</sup> Respondent, making them irrelevant to his conduct during his tenure with the 3<sup>rd</sup> Respondent.
5. The Petitioner avers that the Respondents failed to inform him of the issues raised and give him an opportunity to provide his account and respond to the allegations before suspending him.
6. The Petitioner avers that he was issued the suspension letter by the Chief Human Resources Officer in contravention of the 3<sup>rd</sup> Respondent's Disciplinary Policy and Procedure which requires the same to be issued by the 1<sup>st</sup> Respondent who is the Petitioner's line manager who holds the legal mandate to issue such disciplinary actions.
7. Upon his suspension, the Petitioner was immediately locked out of the Respondent's systems and has since been unable to access any documents, records, or evidence necessary to prepare his defense and prove his innocence. It is the Petitioner's case that this hampers his ability to effectively respond to the allegations and also raises concerns about the potential interference with the system to fabricate or manipulate evidence against him.

8. The Petitioner avers that he has no knowledge of what actions are being undertaken in the system during his lockout thus he is at real risk of victimization through data manipulation or evidence fabrication.
9. The Petitioner avers that his access card was confiscated, and he was stripped of access to essential services. These actions were abrupt and punitive, leaving him without the means to perform his duties or maintain his professional obligations.
10. The suspension letter failed to disclose critical details, including: the identity of the complainants, if any; the dates and circumstances under which the complaints were made; and the basis for the alleged complaints. This lack of transparency denied the Petitioner the ability to adequately respond to the alleged complaints and to defend himself, against the complaints contrary to fair administrative action as provided in law.
11. It is the Petitioner's case that the timing of the suspension, coming barely a day after the ruling, strongly suggests retaliation and discrimination. This undermined the Petitioner's constitutional rights and protections, including the right to fair labor practices under Article 41 of the Constitution.
12. He further avers that the suspension impedes his ability to engage in daily work interactions that foster professional development, networking, and mentorship. These losses,

coupled with the reputational harm and psychological distress caused by an unjust suspension, significantly undermine his well-being and professional trajectory.

13. The Petitioner avers that the suspension letter pertains to an Electronic Distribution Management System (EDMS) contract that was signed before his employment. The Respondents have failed to provide the full agreement, implementation plan, or sign-off documentation related to the contract, which are critical for assessing the claims being made. Additionally, the Respondents have not disclosed the beneficial owner of the contract, the terms under which payments were made, or the account into which payments were deposited. They have also not clarified who authorized the payments, whether the milestones for payment were met, or whether the policy for contract payments was followed.
14. It is the Petitioner's case that the termination of the EDMS contract also raises concerns as the Respondents have not provided the termination notice, including who signed it, when it was issued, and under what provisions of the agreement the termination was effected.
15. The Petitioner aver that despite alleging that he was involved in procuring an alternative vendor, the Respondents failed to disclose the process followed for engaging new vendors, who approved it, who submitted the documentation, and who drafted and signed the agreement. It is unclear whether this process adhered to

the established policies or if exceptions were made in this case, and if so, whether such exceptions are consistent with other instances

16. It is the Petitioner's case that the Respondents have not disclosed when the investigation on the EDMS issue was conducted, who led it, whether the Petitioner was asked to respond, or if any documentation or evidence was presented to the Petitioner. Furthermore, there has been no evidence provided of the matter being presented to the board, including the dates of any board meetings, copies of minutes, or deliberations on this issue.
17. It is the Petitioner's case that there was no disciplinary hearing held to address the evidence before issuing the suspension, despite the matter being deliberated months ago.
18. The Petitioner avers that the 3<sup>rd</sup> Respondent has failed to provide any evidence of instructions or documentation assigning responsibility for the contract to him, making the basis for the allegations unfounded.
19. The Petitioner avers that by instructing the 3<sup>rd</sup> Respondent to issue the suspension letter, the 1<sup>st</sup> Respondent implicated himself in procedural lapses and opened himself to direct scrutiny.
20. The Petitioner avers that the Respondents relied on alleged audit findings without involving him in the audit process.

Internal audit procedures require the subject of the audit to provide clarification on flagged issues before finalizing the report. No evidence has been provided to show that the Petitioner was questioned or mentioned in the audit report. The audit findings must be scrutinized to confirm whether the Petitioner's name was explicitly mentioned or whether any recommendations were made to the Board Audit Committee. Minutes of the committee meetings must be reviewed to establish the facts.

21. It is the Petitioner's case that the suspension is unprocedural, unfair, and illegal, as it violates constitutional principles, statutory provisions, and Safaricom's own HR policies. It reflects malice and bad faith intended to victimize the Petitioner and contravene judicial orders.

### **Respondents' Case**

22. In opposition to the Petition, the Respondents filed a Replying Affidavit dated 6<sup>th</sup> June 2025 sworn by the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Respondent is the Chief Human Resources Officer of the 3<sup>rd</sup> Respondent.

23. The Respondents aver that vide a letter of employment dated 3<sup>rd</sup> May 2021, the Petitioner was employed by the 3<sup>rd</sup> Respondent as its Chief Channels Officer and he was summarily dismissed on 28<sup>th</sup> March 2025.

24. The Respondents aver that the genesis of this petition is the letter issued on 17<sup>th</sup> January 2025, by which the 3<sup>rd</sup> Respondent suspended the Petitioner pending investigations into his conduct in the implementation of the Electronic Distribution Management System ("EDMS") contract between the Respondent and Baran Telecom Networks Limited ("BTN").
25. The Petitioner also filed *ELRC JR No. E066 of 2024* seeking judicial review orders of certiorari and prohibition and stay of the 3<sup>rd</sup> Respondent's decision to commence disciplinary proceedings against him. On 2<sup>nd</sup> December 2024, the court granted him leave to apply for judicial review orders of certiorari and subsequently, the Petitioner filed a substantive motion dated 20<sup>th</sup> December 2024.
26. The Respondents aver that the 3<sup>rd</sup> Respondent filed an application seeking to strike out the Petitioner's *ELRC JR No. E066 of 2024* dated 29<sup>th</sup> November 2024, or in the alternative setting aside the leave granted to the Petitioner to apply for orders of certiorari. However, the court dismissed the application on 16<sup>th</sup> January 2025.
27. The 3<sup>rd</sup> Respondent thereafter filed an application dated 27<sup>th</sup> January 2025 seeking stay of proceedings in *ELRC JR No. E066 of 2024* pending appeal to the Court of Appeal against the aforesaid ruling.
28. It is the Respondents' case that on 19<sup>th</sup> January 2025, the Petitioner filed two applications in *ELRC JR No. E066 of 2024*

seeking that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein be held in contempt of the ruling delivered on 16<sup>th</sup> January 2025 for suspending the Petitioner from employment; and interim injunction staying suspension of the Petitioner. The court declined to grant the Petitioner interim injunctive orders staying his suspension as sought. The Petitioner contends that these applications were prompted by the same suspension as the petition herein and that the petition was filed after the court declined to grant the interim reliefs.

29. The Respondents aver that the court vide its ruling delivered on 5<sup>th</sup> March 2025 on the contempt application clarified that the orders granted by Court did not bar them from instituting any disciplinary processes against the Petitioner outside the proceedings of 18<sup>th</sup> November 2024. This was subsequently clarified on 14<sup>th</sup> March 2024; thus, the suspension was not in contravention of any court orders issued in *ELRC JR No. E066 of 2024*.
30. Following the clarification, the 3<sup>rd</sup> Respondent commenced disciplinary proceedings against the Applicant in relation to the Applicant's conduct in the implementation of the EDMS contract between the Respondent and BTN; and the disciplinary proceedings culminated in the summary dismissal of the Applicant on 28<sup>th</sup> March 2025.
31. The Respondents aver that the petition has been filed in bad faith and that the Petitioner is guilty of material non-disclosure of the fact that the orders sought in the instant

petition are a replica of the application and orders sought in *ELRC JR No. E066 of 2024*.

32. It is the Respondents' case that the Petition is *sub judice* and that the only other legal alternative to striking it out, is to stay the same pending determination of the similar application in ELRC JR No. E066 of 2025 to avoid the risk of 2 different courts ending up with conflicting decisions thereby embarrassing the court.
33. The Respondents aver that the petition has not met the threshold of a constitutional petition for failing to plead the alleged constitutional grievances with specificity as espoused in the *Anarita Karimi Case*.
34. The Respondents aver that following the recommendation of its Board Risk and Audit Committee, the 3<sup>rd</sup> Respondent vide a letter dated 17<sup>th</sup> January 2025, initiated investigations into the abandonment of a contract between Safaricom PLC and Baran Telecom Networks which led to the loss of USD.2,201,402 which is approximately Kshs. 283,980,858. The contract was to be implemented by Safaricom's Channels Division headed by the Petitioner. The Petitioner was suspended to allow for the completion of the said investigations.
35. The Respondents aver that contract was abandoned at the point of implementation and at a time when the Petitioner was heading the user team, being the Channels division.

This was not disputed by the Petitioner in the petition and supporting affidavit.

36. It is the Respondents' case that the suspension was premised clause 7 of the Safaricom Disciplinary Procedure Policy hence it did not constitute unfair labour practices or misuse of management prerogative. Additionally, the suspension letter indicated that the Petitioner's salary and benefits would continue to be paid and this was honored thus the allegations that his constitutional rights were violated are misconceived.
37. The Respondents aver that the Petitioner responded to the suspension letter vide a letter dated 17<sup>th</sup> January 2025 citing it was un-procedurally issued, based on unfounded allegations, violation of court orders and loss of benefits. However, the Respondents contend that this was premature as he had not been asked to respond and that a response was dependent on the outcome of the investigations
38. The Respondents aver that the Petitioner's claim that his constitutional rights were violated is unfounded since he was given the right to be heard after the investigations found the Petitioner to have played a role in the abandonment of a contract requiring explanation.
39. The Respondents aver that the 1<sup>st</sup> Respondent vide a letter dated 19<sup>th</sup> January 2025 explained that: the ongoing investigations were initiated following recommendation by the Board Risk and Audit Committee; the suspension was in

order to facilitate fair investigations; the suspension was with full pay and benefits; the orders in ELRC JR NO. E066 OF 2024 did not insulate the Petitioner from other person from other processes; and he had authorized the suspension and the allegation that the 2<sup>nd</sup> Respondent lacked authority to issue the suspension letter is fake.

40. The Respondents aver that the suspension was a precautionary measure and not a disciplinary measure to ensure the Petitioner, in his capacity as the Chief Channels Officer, does not interfere with the investigations. Further, the suspension letter indicated that the suspension period would not be longer than necessary although it would be extended when appropriate.

41. It is the Respondents' case that the suspension was not retaliatory but necessary considering the colossal amount involved.

### **Petitioner's Submissions**

42. The Petitioner submitted five issues that: whether the Respondents violated Articles 41, 47 and 50 of the Constitution; whether there was illegality and ultra vires; whether there was malice, retaliation and bad faith; whether there was inconsistent, allegation and lack of evidence; whether there was prolonged, punitive and unjustified suspension; whether the process leading to the Petitioner's suspension was procedurally and substantively

fair; and whether the Petitioner is entitled to the reliefs sought.

43. On the first issue, the Petitioner submitted that the Respondents' action, specifically the lack of right to fair hearing and inadequate notice resulted in breach of petitioner's right to fair labour practice enshrined under Article 41 of the Constitution. He placed reliance in definition of unfair labour practices in **PETER WAMBUGU KARIUKI AND 16 OTHERS V KENYA AGRICULTURAL RESEARCH INSTITUTE [2013] KEELRC 373 (KLR)** wherein the court held: *"First, it is the opinion of the court that the bundle of elements of "fair labour practices" is elaborated in Article 41(2), (3), (4) and (5) of the Constitution. .... These constitutional provisions constitute the foundational contents of the right to fair labour practices. Secondly, it is the opinion of the court that the right to "fair labour practices" encompasses the constitutional and statutory provisions and the established work place conventions or usages that give effect to the elaborations set out in Article 41 or promote and protect fairness at work. These include provisions for basic fair treatment of employees, procedures for collective representation at work, and of late, policies that enhance family life while making it easier for men, women and persons with disabilities to go to work."*

44. The Petitioner submitted that he was suspended without being granted a hearing and was denied access to

documents and internal systems. He was given a notice to show cause within 24 hours. His response, citing court orders and lack of access, was met with a disciplinary invitation just four hours later. The 24hour notice was not sufficient time for the petitioner to prepare for his defense hence the act negates the component of procedural fairness, leading to a violation of his right to a fair hearing. He cited **Marete v Kenya Power & Lighting Company Limited [2023] KEELRC 3419 (KLR)** wherein the court held: “.....In the circumstances of the matter, the less than 24 hours’ notice in my view was inadequate to allow the Claimant to prepare for his defence against the accusations..... In my view, it would not be a defence for the employer to just assert that the employee did not protest the insufficiency of the notice or seek an adjournment of the disciplinary hearing.”

45. The Petitioner further submitted that he was denied access to documents and internal systems to prepare for the defence. He cited **David Wanjau Muhoro v Ol Pejeta Ranching Limited [2014] KEELRC 296 (KLR)**

46. It is the Petitioner’s submission that the Respondents actions violated his right to fair administrative action articulated in Article 47 of the Constitution, which provides that, every person has the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. This was reiterated under Section 4 of Fair administrative action Act which provides that, where an administrative action is likely to adversely affect the rights

or fundamental freedoms of any person, the administrator shall give the person affected by the decision including prior and adequate notice of the nature and reasons for the proposed administrative action an opportunity to be heard and to make representations in that regard, information, materials and evidence to be relied upon in making the decision or taking the administrative action.

47. The Petitioner submitted that in ***David Wanjau Muhoro v Ol Pejeta Ranching Limited [supra]***, the court outlined the principles of fair hearing such as sufficient opportunity to prepare, right to understand the charges and the right to documentation that the employee must be given the documents the employer intends to rely on at the hearing, as well as other documents the employee may request for. In the instant case, the Petitioner was denied the laid elements of a fair hearing thus infringing his right to fair hearing.

48. On the second issue, the Petitioner submitted that the 3<sup>rd</sup> Respondent's HR Manual authorizes the 1<sup>st</sup> Respondent (line manager) to issue suspensions, however, the Petitioner instead suspended by the 2<sup>nd</sup> Respondent. He cited ***Kariithi v Micro and Small Enterprise Authority [2021] KEELRC 1819 (KLR)*** wherein it was the petitioner's case that the Director General relied on deliberation of Human Resource Advisory Committee which is not provided in the manual to interdict her. The advice and actions taken by Human Resources Advisory Committee was therefore null and void. At Paragraph 43, the court held: *"the reference of the Petitioner's*

*disciplinary matter to the Committee was obviously without authority, as the Committee has no capacity to deal with disciplinary cases for officers in job grades MSEA 1 to MSEA 7 as set out in Regulation 2.8 of the Manual. To this extent, the disciplinary process as initiated against the petitioner is null and void for being ultra vires.”*

49. On the third issue, the Petitioner submitted that he flagged the contract which was the basis of his suspension in good faith, yet he is the only employee targeted. Despite multiple departments being involved, only the Petitioner faced suspension. He cited ***Sankale v Masai Mara University; Transparency International Kenya & 2 others (Interested Parties) [2024] KEELRC 1741 (KLR)*** in which the court held: “The Mara Heist was aired on the Citizen Television on 1<sup>st</sup> September, 2019 and the Petitioner recognized as a whistleblower. The Petitioner was therefore entitled to be protected from retaliation as provided for under Section 65 of the ACECA 2003 as well as Section 21 of the Bribery Act, 2016 which prohibits intimidation and harassment.” At paragraph 49 the court viewed that the dismissing the petitioner was intended to silence him from whistleblowing at the university.

50. On the fourth issue, the Petitioner submitted that the Respondents’ shifting reasons from complaints to audit findings to neglect of duty reveal a fishing expedition. Additionally, the Respondents have not produced in court any complaint, investigation report or hearing minutes.

Reliance was placed in ***Ndoji v Questworks Limited [2023] KEELRC 2259 (KLR)*** the court held: *“In this case the Respondent kept on changing the reason for termination of the Claimant’s employment ranging from absenteeism, poor performance and company restructuring due to financial difficulties hence there was no clear reason in the Court’s view for the termination of the Claimant’s employment.”*

51. On the fifth issue, the Petitioner submitted that he was suspended for over 90 days in clear violation of fair labour practices. The continued extensions beyond the initial period were clearly punitive and serve no investigative purpose. In the case of ***Samson Omwoyo v Maasai Mara University & Vice Chancellor Maasai Mara University [2017] KEELRC 357 (KLR)*** the court held: *“the employer has the prerogative to discipline its employees. However, a prolonged suspension of an employee that is not addressed within a reasonable time only results in anxiety and is bound to raise concern.”*

52. On the sixth issue, the Petitioner submitted that for suspension to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness address the procedure adopted by employer in affecting the termination.

53. It is the Petitioner's submission that the reason for suspension keep shifting from audit finding to neglecting duty, and an employer must not discipline employee for violating a rule or standard whose nature and penalties have not been made known. Having not decided on which reason to suspend the Petitioner, the Respondents have no valid reason to suspend him.

54. The Petitioner submitted that he was denied access to documents, disciplinary meeting, was not given adequate time to prepare defense and was suspended by the 1st respondent, all these show that procedural fairness test was not complied with, ***Kenfreight EA Limited vs Benson K Nguti (2016) eKLR*** court emphasized on procedural fairness

55. On the final issue, the Petitioner submitted that he has demonstrated a well-orchestrated, unlawful, and unconstitutional campaign to victimise him for acting in good faith. The process was tainted with malice, conducted in bad faith, and in breach of court orders and natural justice. Therefore, he is entitled to general, exemplary, and constitutional damages for humiliation, psychological distress, loss of opportunity, and reputational damage.

### **Respondents' Submissions**

56. The Respondents submitted on six issues: whether the instant Petition is moot; whether the Petition offends the doctrine of constitutional avoidance and should therefore

be struck out; whether the Petition is sub judice and therefore an abuse of the court process; whether the Petition has met the threshold of a constitutional petition as set out in *Anarita Karimi v Republic*; whether the suspension was in contravention of Articles 41, 47 and 50 of the Constitution, that is, the Petitioner's right to fair labour practice, fair administrative action and on fair hearing respectively; and whether the Petitioner is entitled to the reliefs sought.

57. On the first issue, the Respondents submitted that the petition challenges the Petitioner's suspension from employment pending disciplinary proceedings vide a letter dated 17<sup>th</sup> January 2025. Following the conclusion of investigations and disciplinary proceedings, the Petitioner was summarily dismissed on 28<sup>th</sup> March 2025. However, the Petitioner has neither amended the petition to challenge the disciplinary process or dismissal, nor filed a fresh ordinary claim to do so.

58. It is the Respondents' submission that the petition has since been rendered moot. The suspension, being interlocutory and temporary in nature, cannot be assessed in isolation once the disciplinary process has concluded with a dismissal. Further, the suspension was not a punishment but administrative measure pending disciplinary action.

59. The Respondents submitted that the petition did not mention the 24-hour show cause notice within and it was only introduced through his submissions in an attempt to indicate a pre-determined outcome orchestrated by the Respondents. In their response, the Respondents included evidence of subsequent events following the suspension to demonstrate that the suspension was overtaken by the subsequent notice to show cause, disciplinary hearing and eventual dismissal. If the Petitioner wished to take issue with this subsequent process and outcome, he should have amended the petition first, then submit on it.

60. The Respondents submitted that under the doctrine of mootness, courts will not adjudicate academic or hypothetical disputes. A matter is moot when it no longer presents a live controversy requiring resolution. Since the suspension has been overtaken by events, and there is no live challenge to the dismissal, the petition serves no practical legal purpose.

61. It is the Respondents' submission that the Petitioner has not shown his case falls within the exceptions to the doctrine. This would include if the issue is of significant public interest as was held in ***National Assembly & another v Okoiti & 55 others [2024] KECA 876 (KLR)*** that it is a prerequisite that a party seeking courts' discretion to be exempted from the doctrine of mootness to demonstrate that any order which this Court may make will have some practical effect either on the parties or on others.

62. On the second issue, the Respondents submitted that the Petitioner should have pursued his claim through an ordinary civil remedy. He has not shown why he could not have filed a memorandum of claim under the Employment and Labour Relations Court (Procedure) Rules. In view of another mechanism available to the Petitioner through which the dispute can be resolved, the Petition is untenable in view of the doctrine of avoidance and should be struck out.

63. It is the Respondents' submissions that the constitutional jurisdiction of the Court has been prematurely and improperly invoked and therefore the Petition should be struck out. Reliance was placed in the Court of Appeal case of **James Mukuha Gichane v National Hospital Insurance Fund & 3 others [2017] KECA 728 (KLR)**, the court held: *"The circumstances of this appeal show that the appellant's claim, based, under the constitution (now repealed) was misplaced. The alleged breach of fundamental constitutional right was not proved. The grievance of the appellant related to termination of employment and the only issue for determination was whether he was lawfully terminated. No matter how broadly the scope of fundamental rights is interpreted, it cannot encompass ordinary tortious and contractual rights between individuals that do not bear on human or fundamental rights. Thus, the rights of an employee vis a vis the employer in ordinary circumstances do not connote*

*breach of fundamental rights. In this appeal, the relationship between the appellant and the 1<sup>st</sup> respondent being that of an employee and employer relationship, was pegged on contract. The issue of right to life which the appellant alleged was not discernible and could not arise under the contract.”*

64. On the third issue, the Respondents submitted that the Petitioner filed in *ELRCJR E066 of 2024*, a similar application as this Petition. In other words, the Petitioner sought similar reliefs, that is, interim orders restraining the Respondents from intimidating, victimizing and retaliating against the Petitioner. Subsequently, the Petitioner filed an application for contempt of court which was dismissed vide the ruling delivered on 2<sup>nd</sup> July 2025. On 20<sup>th</sup> May 2025, the Petitioner abandoned his applications dated 19<sup>th</sup> January 2025 in *ELRC JR No. E066 of 2024* on grounds that the applications had been overtaken by events following his dismissal.
65. The Respondents submitted that since the withdrawal of *ELRC JR No. E066 of 2024*, the Petitioner has initiated multiplicity of suits and applications over the same issues and without proper foundation. This is a clear case of the abuse of the Court process and it is only after his attempts to obtain or sustain favourable court orders failed did he withdraw *ELRC JR No. E066 of 2024*.
66. The Respondents submitted that the *sub judice* rule is codified in section 6 of the Civil Procedure Act thus: “No

*court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”*

67. The Respondents submitted that the petition should be struck out for being an abuse of the Court process. Reliance was placed in the Court of Appeal decision in ***Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others (2009) KECA 453 (KLR)***, the court held that what constitutes an abuse of court process to include; “(a) *Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action. (b) Instituting different actions between the same parties simultaneously in different courts even though on different grounds. (c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice”*

68. On the fourth issue, the Respondents submitted that the Petitioner has invoked Articles 41, 47 and 50 of the Constitution, however, he has not shown a clear nexus between the cited constitutional provisions and the

allegations. The Petition has not met the threshold in *Anarita Karimi v Republic* and should therefore be struck out.

69. The Respondents cited the Court of Appeal ***in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR)*** while affirming the principles in ***Anarita Karimi v Republic*** held; “We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude *ex ante* is to miss the point.”

70. On the fifth issue, the Respondents submitted that legitimate investigations cannot be said to be a form of intimidation or victimization. Additionally, this court held in *ELRC/JREO66 of 2024*, that it cannot interfere with legitimate internal processes of an employer unless as provided for in the law.

71. It is the Respondents' submission that the ruling dated 5<sup>th</sup> March 2025 dismissing the Petitioner's contempt of court application vindicated them by declaring that they did not violate any previous Court order. Therefore, the allegation by the Petitioner that the suspension was retaliatory falls on its face.
72. The Respondents submitted that there had been ongoing investigations arising from a contract between Safaricom PLC and Baran Telecom Networks wherein there was an alleged loss to the company of the USD. 2,202,402 which is approximately Kshs. 283,980,858 at the current exchange. Consequently, the internal audit team referred the matter to the Board Audit Committee which recommended investigations and it is on this basis the Petitioner was suspended.
73. The Respondents submitted that the Petitioner's suspension by the Respondent on 17<sup>th</sup> January 2025 was to allow investigations into the abandonment of EDMS procured from Baran Telecom Networks at a cost of USD 2,201,402, which is a separate and distinct issue from the disciplinary hearing held on 18<sup>th</sup> November, 2024, the subject of the judicial review proceedings.
74. The Respondents submitted that Section 7.1 of Safaricom Disciplinary Policy and Procedure provides for suspension as a precautionary measure; it is not a disciplinary sanction. The Petitioner's suspension based on his role in the abandonment of the contract between Safaricom PLC

and Baran Telecom Networks was necessary. This decision was taken because of the seriousness of the allegations and to avoid interference with the fact-finding process.

75. The Respondents submitted that the Petitioner's letter in response to the suspension was misconceived because this was not a punitive suspension but administrative pending investigations. Therefore, the issue of hearing did not arise. That is why he had not been asked or required to respond to the suspension letter. The Petitioner's claim that his constitutional rights were violated is unfounded since the right to be heard would only arise after the investigations found the Petitioner to have played a role in the abandonment of a contract requiring explanation.

76. It is the Respondents' submission that the suspension was not retaliatory but necessary considering the colossal amount involved, hence it did not constitute unfair labour practices or misuse of management prerogative. The suspension was a precautionary measure and not a disciplinary measure to ensure the Petitioner, in his capacity as the Chief Channels Officer, does not interfere with the investigations.

77. On the final issue, the Respondents submitted that the Petitioner's suspension was not in violation of any of the articles invoked by the Petitioner. The suspension was lawful, fair and within the rights of the 3<sup>rd</sup> Respondent. Therefore, prayers (a) and (b) are not available to the Petitioner.

78. The Respondents submitted that the suspension was not retaliatory as it relates to separate proceedings from the proceedings subject of the Judicial Review Application, thus, prayer (d) is therefore misconceived.

79. On the claim for general and exemplary damages, the Respondents submitted that the Petitioner has neither proposed or pleaded any specific quantum, nor has he provided any basis or material upon which this Honourable Court can assess an appropriate award.

80. The Respondents submitted that it is trite that a party seeking constitutional damages must not only plead the type of damages sought, but must also provide the court with material justification for the award whether by way of comparative case law, aggravating circumstances, or evidence of prejudice suffered. In the absence of such justification or evidentiary basis, the prayer for general or exemplary damages remains speculative and should not be granted.

81. I have examined the averments and submissions of the parties herein. The petitioner has averred that his rights under the constitution have been violated by the respondents and in particular rights under articles 41, 47 and 50 of the Constitution.

82. In determining whether the rights of the petitioner were breached as submitted, I note the petitioner's submission that vide an order of this court of 16/1/2025 in ELRC JR

066/24 disciplinary proceedings against him were suspended pending the hearing and determination of the suit. It is however indicated that on 17/1/25, the 2<sup>nd</sup> respondent served him with a suspension letter based on allegation that had occurred 15 months prior to his employment with the 3<sup>rd</sup> respondent.

83. The petitioner has averred that the process was flawed because the respondent failed to follow its own internal policies and especially not the constitution of the disciplinary committee and denial of the petitioner rights to cross examine his accusers. He contends that he was denied an opportunity to provide his account and respond to the allegations before suspending him.

84. The petitioner also avers that he was issued with a suspension letter by the Chief Human Resources officer in contravention of the respondent's HR policies which require the same be issued by the 1<sup>st</sup> respondent who is the petitioner's line manager.

85. The respondents denies any breaches. They aver that the disciplinary proceedings were done above board. They also aver that the petition is *sub judice* ELRC JR 066/24 and they asked court to dismiss the petition accordingly.

86. Despite the fact that the respondent submits that this petition is *res judicata*, it is my finding that this is not the position as JR 066/24 became moot when the disciplinary

process was overtaken by events and is still pending in court.

87. Concerning the disciplinary process that the petitioner was subjected to, it is clear that the petitioner was sent on suspension on 17/1/2025. The petitioner indicated that the process was flawed contrary to clause 7.2 of the respondents disciplinary policy and procedure which provides that a show cause should be issued by the respondents CEO but in the petitioner case, his was issued by the Chief Human Resource Officer. Indeed clause 7.2 of the respondents disciplinary policy and procedure manual provide as follows:

*Where an employee has committed an offence that does not warrant investigations (absence from duty of not more than 6 days, frequent late reporting this is not exhaustive) the line manager of the employee in consultation with human resources will issue a show cause letter.*

*The employee will be required to respond in writing to the show cause letter within 24 hours of acknowledgement of receipt of letter. The reply will be considered and if the decision is made to discipline the employee appropriate disciplinary action will be taken. If the employee explanation is acceptable, then the matter will be closed and the employee will be informed in writing.*

88. The petitioner also submitted that the respondent breached clause 7.4(ii) of the respondents disciplinary policy and procedure where the disciplinary committee did not call any witnesses to adduce evidence against the petitioner

and to be allowed to cross examine the petitioner during the purported disciplinary hearing.

89. Clause 7.4(ii) of the respondents disciplinary manual states as follows:

*An employee will have the right to be accompanied to a disciplinary/appeal/hearing by a work colleague but may not be accompanied/ represented by an external representative.*

*A colleague's representative may address the disciplinary hearing, confer with the colleague during the disciplinary hearing, lead evidence on behalf of the colleague and cross examine the company witness if any, but may not answer questions posed directly to the colleague who is the subject of the hearing. No employee shall be victimized for accompanying, advising or supporting a colleague facing a disciplinary process.*

90. I have not had occasion to look at the proceedings of the disciplinary committee meeting against the petitioner, as they were not supplied by either party. However the petition has submitted that no witness was called by the respondents and he had no chance to cross examine his accusers.

91. Section 41 of the Employment Act 2007 states as follows:

**41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the**

**employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

92. Indeed, a requirement for fair hearing involves the need to call witnesses and give an accused a chance to cross examine them. In default of such a chance, the hearing process becomes flawed. The petitioner has further submitted that the respondents breached clause 7,4(v) of the HR manual which provides for membership of the disciplinary team which states as follows:

*The Disciplinary Committee will comprise of an independent line manager, and where appropriate, Head of Department, Director or Chief Officer. There will be at least one (1) representative from Human Resources who acts as the facilitator and at least one (1) representative from the Legal Department and/or any other division of Safaricom, who acts as an independent observer. Depending on the subject matter of the disciplinary hearing, representatives from other relevant functions may participate in the Disciplinary Hearing.*

93. The petitioner has averred that the panel that heard his case was not properly constituted and since he was reporting to the respondent's Board, it was the board committee that should have considered his case. Indeed submitting before a proper disciplinary panel is a matter that the respondent should have considered but which they failed to do.

94. Section 4 of the Fair Administration Action Act provides that a person affected by an administrative decisions should be given prior and adequate notice of the nature and reason of the proposed administrative action and an opportunity to be heard and make representation in that regard, information materials and evidence to be relied upon in making the decision or taking the administrative action.
95. The petitioner has submitted that this right was denied to him as his system was locked up and he was given 24 hours to respond to the show cause. He had no access to documents to enable him respond. This he submits breached his right to fair administrative action under article 47 of the constitution and for which I agree with him and add that 24 hours was not adequate to prepare his defence and this negates procedural fairness leading to the violation of his right to be subjected to a fair hearing and fair labour practice envisaged under article 41 of the constitutional.
96. In view of the way the disciplinary process was conducted against the petitioner, it is my finding that his right to fair hearing also under article 50 of the constitution was also breached.
97. Having considered the breaches above, I do find that the petitioner is entitled to payment of damages for breach of his constitutional rights and which I award him at Kshs 5 million.

98. The petitioner sought an order to declare his suspension null and void. It is my view that this order has already been overtaken by events following eventual dismissal of the petitioner from employment by the respondent.

99. The respondents shall pay costs of this petition plus interest at court rates with effect from the date of his judgement.

**Dated, Signed and Delivered Virtually at Nairobi this 22<sup>nd</sup> Day of October 2025.**

**HELLEN WASILWA  
JUDGE**