



Republic & another v Friends Mixed Secondary School, Chesamisi & 3 others; Attorney General (Interested Party) (Miscellaneous Application E005 of 2025) [2026] KEELRC 310 (KLR) (5 February 2026) (Ruling)

Neutral citation: [2026] KEELRC 310 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
MISCELLANEOUS APPLICATION E005 OF 2025
DN NDERITU, J
FEBRUARY 5, 2026
IN THE MATTER OF AN APPLICATION FOR LEAVE OF JUDICIAL
REVIEW FOR ORDERS OF CERTIORARI AND MANDAMUS**

BETWEEN

REPUBLIC 1ST APPLICANT

ELIUD WAFULA WALELA 2ND APPLICANT

AND

FRIENDS MIXED SECONDARY SCHOOL, CHESAMISI 1ST RESPONDENT

**THE CHAIRMAN, BOARD OF MANAGEMENT CHESAMISI 2ND
RESPONDENT**

**THE PRINCIPAL/SECRETARY, BOARD OF MANAGEMENT FRIENDS
MIXED SECONDARY SCHOOL, CHESAMISI 3RD RESPONDENT**

FAITH KAMAU 4TH RESPONDENT

AND

THE HON ATTORNEY GENERAL INTERESTED PARTY

RULING

I. Introduction

1. The ex-parte applicant (the applicant) through A. W. Kituyi & Company Advocates filed a chamber summons (the application) dated 15th May 2025 seeking for the following orders –

- 1. That service of this application be dispensed with in the first instance.



2. That leave be granted to the applicant to file an application for Judicial Review for orders of Certiorari and Mandamus.
 3. That upon granting prayer 2 above, the said order for leave operate as stay of suspension made on 17th January, 2025 and summary dismissal made on 24th March 2025 or any other subsequent proceedings pending the hearing and determination of substantive Notice of Motion to be filed.
 4. That in the alternative, the suspension made on 17th January, 2025 and summary dismissal made of 24th March be lifted, and the Applicant be paid his dues and allowances pending the hearing and determination of Notice of Motion be lifted.
 5. That costs of this application be provided for.
2. The application is expressed to be brought pursuant to Order 53 of the Civil Procedure Rules and all other enabling provisions of the law.
 3. The application is based on the grounds on the face of it and supported with the affidavit of the applicant, sworn on even date, with several annexures thereto.
 4. Due to the nature of the orders sought, that are in effect seeking for reinstatement of the claimant back to work, the court directed that the application be served upon the respondents and the interested party.
 5. Upon service of the application, it is only the 4th respondent who entered appearance through Kiptoo Chumba & Partners Advocates and filed a replying affidavit sworn by herself on 30th September 2025. The other respondents and the interested party did not respond to the application.
 6. By consent and upon directions by the court, the application was canvassed by way of written submissions. Mr. Kituyi for the applicant filed written submissions dated 15th October 2025 and Mr. Chumba for the 4th respondent filed submissions dated 4th November 2025.

II. The Evidence

7. In the supporting affidavit, it is deposed that the applicant was prior to the dismissal a cook with the 1st respondent and a copy of the contract of employment is attached.
8. It is further deposed that on 17th January 2025 the applicant was suspended from duty and arrested; he was thereafter presented to court on 30th January 2025 on allegations and charges of stealing by servant.
9. It is deposed that vide a letter dated 24th March 2025 the applicant was summarily dismissed without notice or a hearing. A copy of the letter of dismissal is annexed.
10. It is the applicant's case that the dismissal offended the provisions of Article 47 of *the Constitution*, Section 6 of the Fair Administrative Actions Act, & Sections 41, 42, 43, & 44 of the *Employment Act*.
11. In the replying affidavit, it is admitted that the applicant was an employee of the Board of Management (BOM) of the 1st respondent having been employed on 30th April 2010 as a cook.
12. It is further deposed that the applicant was not an honest employee and the deponent cited various incidences of alleged misconduct on the part of the applicant ranging from forgery, destruction of property, to theft.



13. It is deposed that on 15th January 2025 metal rods and grills were stolen from the school and the same were later located in the home of the applicant by the police. It is deposed that the applicant was arrested and charged with criminal offences before the Magistrate's Court at Kimilili and the matter is pending in that court with the applicant having been placed on his defence.
14. It is further deposed that following the misconduct alluded to above, the applicant was vide a letter dated 5th March 2025 invited for disciplinary hearing on 14th March 2025 but the applicant opted not to attend allegedly following advice by his lawyers. That position was confirmed by his lawyers in a letter dated 6th March 2025 addressed to the respondents. Again, the applicant was invited for disciplinary hearing on 19th March 2025 but yet again he decided not to attend.
15. It is deposed that the BOM proceeded to consider the allegations and charges against the applicant and on the basis of the evidence of theft by the applicant against the property of the school, it was decided that the applicant be summarily dismissed for gross misconduct in accord with Section 44 of the *Employment Act*.
16. It is deposed that the dismissal was fair and lawful both in substance and procedure.
17. It is further deposed that the 4th respondent acted in her official capacity in the entire administrative action against the applicant and as such she is improperly joined in these proceedings in her personal capacity. In her official capacity she is joined as the 2nd respondent.
18. It is further deposed that the respondents had exercised a lot of caution and patience towards the applicant who had prior incidences of misconduct. It is stated that the theft for which the applicant is facing criminal charges completely ruined the relationship and the respondents lost faith in the applicant. It is further deposed that the applicant deliberately and purposely decided not to participate in the disciplinary hearing and hence the respondents proceeded to determine the matter based on the evidence of misconduct as investigated and presented.
19. It is deposed that the pending criminal case against the applicant was not a bar for the respondents to act against the blatant gross misconduct as alluded to above.

III. Submissions

20. Counsel for the applicant submitted that it is the 4th respondent who caused the arrest of the applicant without the knowledge of the other respondents based on her malice and bias against the applicant. It is submitted that the applicant was suspended from duty on 17th January 2025 by the 4th respondent again without the knowledge of the other respondents.
21. It is submitted that it was wrong for the respondents to take disciplinary action against the applicant while the criminal case was pending in court.
22. Counsel for the 4th respondent reiterated that the 4th respondent is improperly joined in the application as at all material times to the application she acted in her official capacity. It is further submitted that the decision to dismiss the applicant was made by the BOM in accord with the *Basic Education Act*, Section 17 of Legal Notice No. 39 of 8th April 2015, & Section 44 of the *Employment Act*. It is submitted that the 4th respondent only communicated and implemented the decision of the BOM without malice or bias or personal vendetta as claimed by the applicant. It is vehemently submitted and the court is urged to strike out the name of the 4th respondent from these proceedings.
23. On the substance of the application, it is submitted that since the applicant is alleging unfair and wrongful dismissal the right approach is to file a claim under the *Employment Act*. It is submitted that the claim by the applicant as pleaded and presented in court is not within the realm of judicial review.



24. On the merits of the dismissal, it is submitted that the replying affidavit confirms various incidences of misconduct on the part of the applicant culminating in the theft that ultimately resulted in his dismissal. On the procedure adopted by the respondents, it is submitted that the applicant was issued with a show-cause letter and twice invited for disciplinary hearing but on both occasions he opted not to attend.
25. It is further submitted that the applicant waived his right to be heard in his presence when he opted not to attend the hearing.
26. It is further submitted that the criminal charges against the applicant were not a bar to the disciplinary action as the Public Service Commission allows that procedure in its circulars. It is submitted that the disciplinary action did not in any way affect the criminal case and, in any event, the applicant has been put to his defence in the criminal trial.
27. It is further submitted that the BOM has a duty and an obligation to protect the property of the school, sustain institutional discipline of workers under it, and safeguard the integrity of the school. It is submitted that the respondent established and confirmed gross misconduct of the applicant under Section 44(4)(e) of the *Employment Act* and hence made the right decision to dismiss him.
28. It is submitted that the court has to desist from interfering with the lawful exercise of the respondent's mandate as such an action shall encourage indiscipline and impunity among staff.
29. The court is urged to dismiss the application with costs for lack of merits.

IV. Issues For Determination

30. The factual background of this matter has been set out by the parties and their respective counsel as per the summary in the preceding part of this ruling. The gist of the application is that the applicant is seeking for leave to file judicial review proceedings for the orders set out in the introductory part of this ruling. The leave applied for if granted is sought to operate as a stay to the suspension of 17th January 2025 and the summary dismissal of the applicant from employment on 24th March 2025. In the alternative, the court is asked to lift the said suspension and dismissal pending the filing and hearing of the intended judicial review proceedings.
31. In fact, the applicant is seeking that he be reinstated to his former employment pending the filing, hearing, and determination of the intended judicial review proceedings.
32. In my considered view, the issue for determination by the court is – Whether the applicant has demonstrated a case for issuance of the leave and the orders sought.
33. The preliminary issue that the court has to determine is whether the applicant has demonstrated a case for leave to be granted for him to seek the intended judicial review prerogatives. Fundamentally, the applicant is complaining that he was wrongfully, unfairly, and hence unlawfully dismissed from his employment as a cook with the 1st respondent. Of course, that is an issue that must be heard for a determination to be made.
34. In the understanding of the court, the applicant's complaint is against the dismissal for which he is seeking reinstatement in the interim. In my view, the applicant's case is that of an ordinary employment dispute. The respondents, and neither of them, are not public bodies. While the school is a public institution, the function and action against the applicant was in personam and not in execution and or performance of a public duty or role.



35. In the recent past it has become fashionable, though wrongly so, for litigants to file ordinary claims in court clothed as constitutional petitions or judicial review actions. While it is the duty of a court of law to determine all actions filed on their merits, it is equally the duty of the court to direct that actions be properly presented in court to avoid abuse of the process.
36. The intended action by the applicant is one for purported wrongful and unlawful dismissal. And in confirmation of that fact, the applicant is seeking reinstatement into his job in the interim. That is a claim that is properly and adequately provided for and should be handled under the provisions of the *Employment Act* and the *Employment and Labour Relations Court Act*. Those laws and other applicable provisions of the statutes should adequately remedy the applicant. For example, Section 49 of the *Employment Act* and Section 12 of the *Employment and Labour Relations Court Act* provide for a variety of remedies and reliefs that may be available to the applicant, including reinstatement.
37. Moreover, the remedy of reinstatement is an order that should be available in the final orders of the court in a judgment and not in the interlocutory. The court should be very careful not to issue such a final order in the interim. It is always advisable for the court to maintain status quo as at the time of the filing of the cause or claim in court. In any event, reinstatement is available to a claimant within three years of dismissal or termination and the applicant still has time to seek such remedy if he so desired.
38. In the circumstances, the application for leave is hereby denied. The applicant is free to consider filing an ordinary cause in accordance with the applicable law.
39. In view of the above finding and holding, the other issues raised by the 4th respondent need not be determined at this stage.
40. The court finds no factual, evidential, or legal basis upon which the application may be allowed and the same is devoid of merits and is hereby dismissed.

VI. Orders

- i. The chamber summons by the applicant dated 15th May 2025 is hereby dismissed for lack of merits.
- ii. No order as to costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT KAKAMEGA THIS 5TH DAY OF FEBRUARY 2026.

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DAVID NDERITU

JUDGE

