REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

ELRC PETITION NO. E019 OF 2026

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1,10, 20, 22, 23, 25, 27, 28, 41, 43, 47, 50, 232, & 237 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: ALLEGED VIOLATION OF RIGHTS ENSHRINED IN ARTICLE 162(2) OF THE CONSTITUTION OF KENYA, RULE 19 AND 23 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013, SECTION 3(1), 12 AND 20 OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT AND RULE 17(2) OF THE EMPLOYMENT AND LABOUR RELATIONS COURT (PROCEDURE) RULES 2016

IN THE MATTER OF THE EMPLOYMENT ACT, 2007 AND ALL OTHER ENABLING PROVISIONS OF LAW IN THE MATTER OF: AND THE FAIR ADMINISTRATIVE ACTIONS ACT (No. 4 OF 2015). LAWS OF KENYA

BETWEEN

CHURCHIL WINSTONES OCHIENG……. PETITIONER/APPLICANT

AND

SIC INVESTMENT CO-OPERATIVE SOCIETY LIMITED……RESPONDENT

CORAM

Before Lady Justice Jemimah Wanza Keli

C/A Otieno

RULING

1. The applicant, on his application dated 28th January 2026, having been heard in his absence, on account of non-attendance while aware of the date, and dismissed vide ruling dated 2nd February 2026, filed application by way of Notice of Motion brought under section 1A and 1B of the Civil Procedure Act, 2010 seeking for the following orders-

   a. spent

   b. THAT this Honourable Court be pleased to set aside the dismissal orders of 2nd February 2026 and do reinstate the Applicant's Applications dated 19th January 2026 and 28th January 2026 for hearing.

   c. THAT pending the hearing and determination of this Application, this Honourable Court be pleased to extend the orders dated 28th January 2026.

   d. THAT this Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

   e. THAT the costs of this application be in the cause.

Grounds of the application

2. THAT the Applicant herein filed Applications dated 19th January 2026 and 28th January 2026 respectively seeking interim conservatory orders restraining the Respondent from presiding over, concluding or doing any such or other further actions in relation to the impugned disciplinary and/or termination of the Petitioner/Applicant's employment.

3. THAT pending the hearing of said Applications scheduled for 2nd February 2026, this Honourable Court issued an ex-parte order restraining the Respondent from presiding over, concluding or doing any such or other further actions in relation to the impugned disciplinary and/or termination of the Petitioner/Applicant's employment.

4. THAT I was fully aware of the matter coming up for hearing on 2nd February 2026 and accordingly logged into Court via Court link https://bit.ly/2KLKxVy as indicated in the Cause List dated 2nd February 2026.

5. THAT it later became apparent that I had inadvertently joined Court through an erroneous link instead of https://cutt.ly/Dm4R29t, which was similarly provided for in the same cause list.

6. THAT this unfortunate mistake led to non-attendance on the part of Counsel for the Petitioner/Applicant. Regrettably, therefore, this Honourable Court

dismissed the Applications for want of prosecution on account of non-attendance.

7. THAT I logged into court through the said link long before Court commenced and was prepared to prosecute the Application on behalf of the Applicant.

8. THAT such inadvertence ought not to be visited upon the Petitioner/Applicant, who stands blameless in the circumstances.

9. THAT unless the Application is reinstated, the Petitioner/Applicant is likely to suffer a breach of his constitutional right to a fair hearing and to have his Applications determined on the merits.

10. THAT this Honourable Court retains discretion to reinstate the said Applications to prevent a miscarriage of justice, and unless that discretion is exercised in the present circumstances, the Applicant faces the real risk of the Respondent proceeding with its outright witch-hunt intended to terminate the Applicant's employment.

11. THAT it is only fair, just, and equitable that the orders sought by the Petitioner/Applicant be granted as prayed, so as to obviate substantial injustice and safeguard the Applicant's rights.

12. THAT unless this Application is heard urgently and the orders sought granted, there exists an imminent risk of the Respondent proceeding with its witch-hunt and terminating the Applicant's employment, thereby rendering the Petition nugatory.

13. The application was supported by the affidavit of the applicant of even date. The applicant restated the grounds in the application. The court will revert to the affidavit later in the ruling.

14. The application was opposed by the respondent who filed affidavit of Joshua Ooko, its legal officer, sworn on the 10th February 2026 in response to the instant application and that of 4th February 2026. The relevant response as regards the application seeking to set aside the ruling of 2nd February 2026 was as follows- '*First, an application that has been determined on merit cannot be reinstated. This Honourable Court on the said 2nd February 2026 examined the application and the reply thereto, and found the application to be unmeritorious. The Court noted in its determination dismissing the application that the process of disciplining the Petitioner was in accordance with the human resource policy and the law. Second, even if the application was to be considered, the grounds supporting the application are baseless. The reason the court is being asked to reinstate the application determined on 2nd February*

2026 is because the Petitioner's advocate allegedly logged into a different court. This ground has no basis as the Court Tracking System and the cause list for the day were clear that the matter was scheduled before Honourable Lady Justice J. W. Keli. Further, it is Honourable Justice J. W. Keli who gave the orders of 28th January 2026 and directed that the matter would be heard before her on the 2nd February 2026. The Petitioner extracted the order and served it on the Respondent. To purport that they did not know which court the matter would be heard is an attempt to mislead the court7. Lastly, no evidence has been led to demonstrate the allegations by the Petitioner or his advocate. 8. For the foregoing reasons, the application of 2nd February 2026 is for 9. dismissal for being defective and lacking in substance or reasons. On the said 2nd February 2026, this Court entertained the application of 2nd February 2026 for reinstatement and directed service, with a hearing date scheduled for 23rd February 2026. 10. However, on the 4th February 2026, the Petitioner filed yet another application seeking similar orders to the application of 19th January 2026 which had been dismissed on the 2nd February 2026. It is on the basis of this application that this court issued orders on 5th February 2026 stopping planned disciplinary hearing of the Petitioner. 11. Having a heard the application dated 19th January 2026 seeking conservatory injunction pending the hearing and determination of the application and petition, and having dismissed the application on the 2nd February 2026 on merit having found the

disciplinary process comports with the human resources policy and the law, the Respondent contends that the application of 4th February 2026 seeking similar orders is an abuse of court process and violates the doctrine of res judicata. It should, therefore, be dismissed in limine. 12. Upon dismissal of the application of 19th January 2026, nothing prevented the Respondent from proceeding with its lawful process of taking the Petitioner through the disciplinary process, a process that had commenced before the Petitioner rushed to court. 13. Even assuming the application of 4th February 2026 was not barred by the doctrine of res judicata, the Respondent contends that the said application has no substantive justification. ' The deponent further responded on merit of the application of which the court finds is relevant but not necessary for purpose of determination on whether to set aside the ruling.

15. The applicant filed a further affidavit dated 12th February 2026 and asserted that the application of 4th February 2026 was not resjudicata.

16. The parties appeared for hearing interpartes on the 12th February 2026 when their advocates submitted. The applicant was represented by Mr. Owour Advocate and the respondent Mr Wakwaya, Advocate.

Decision

17. When a court issues a ruling in the absence of one party, the legal basis to set aside the ruling typically rests on principles of natural justice, procedural law, and statutory provisions that allow proceedings to continue if proper notice has been served. The other party being aware of the hearing date, and in this case the applicant, under certificate of urgency obtained a conservatory order staying disciplinary proceedings initiated by the respondent before me on the 28th January 2026 . Taking into account that the court was intervening in a internal process which is a prerogative of management of the employer I issued interpartes hearing date of 2nd February 2026 vide same Order. The order was served on the respondent who appeared for the hearing. The applicant now enjoying the interim order, was absent. The reason for the absence given by Mr. Owour Advocate, when he appeared before me exparte on the 5th February 2026 under certificate dated 2nd February 2026 they had made a mistake on the appearance. The advocate stated in the certificate that the applicant's advocates were fully aware of the matter coming up for hearing on 2nd February 2026 and accordingly logged into court via court link https://bit.ly/2KLKxVy as indicated in cause list dated 2nd February 2026. The advocate, Otto, alleged that it became apparent that they had inadvertently joined court though erroneous link instead of https://cutt.ly/DDm4R29t which was similarly provided in the same cause list. The applicant then pleaded mistake of advocate.

18. The hearing of the application dated 28th January 2026 continued in the absence of the applicant on the 2nd February 2026 and in the presence of the respondent through its advocate Wakwaya who made its submissions. The court issued a ruling on merit and stated it had reviewed the material before court being the pleadings of the applicant. The court held that it was satisfied the impugned disciplinary process is in accordance with the Respondent's Human Resources Manual and further the court was aware that the disciplinary of an employee is a management prerogative of an employer and that the court will only interfere in exceptional circumstances related to fairness. Fairness in disciplinary process is according to section 41 and 45 of the Employment Act. Section 41 of the Employment Act provides-'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.'' . The court on perusal of the pleadings filed by the applicant found notices issued in compliance with section 41 of the Employment Act. The labour rights under article 41 of the Constitution are enforced as provided for under the

Employment Act unless the Act does not apply to the employee. In the instant case of private employer the Act applies to the applicant.

19. Following the non-attendance of the applicant, the court balanced between the right to be heard and the duty to proceed. The courts generally uphold the principle of *audi alteram partem* ("hear the other side"). However, if a party has been duly notified, and in this case obtained an interim stay order with the court date and fails to appear without a valid reason, the court may proceed ex parte (in the other party absence) to avoid undue delay and obstruction of justice. The court was not satisfied with the reason given by Mr. Owour for the applicant's non- attendance. The exparte order was issued by Justice Keli and thus the applicant knew the applicable cause list was of the said Judge. Why would the advocates then appear before a Deputy Registrar. The Cause list is a document of the court. The instant application was listed before Justice Jemimah Wanza Keli as follows-

TIME 09:00 AM

CERTIFICATE OF URGENCY

1.ELRCPET/88/2023

PROFESSOR MICHAEL NDURUMO VS THE UNIVERSITY OF NAIROBI AND KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

20. The court found that the reason of non-attendance was not genuine and the applicant's advocate was not being candid on the reason for non -attendance. The advocate did not demonstrate diligence in attendance to court on 2nd February 2026. In the supporting affidavit sworn by the applicant's advocate, Otto , not prosecuting the application, stated as follows- . '*THAT I was fully aware of the matter coming up for hearing on 2nd February 2026 and accordingly logged into Court via Court link https://bit.ly/2KLKxVy as indicated in the Cause List dated 2nd February 2026. 5. THAT it later became apparent that I had inadvertently joined Court through an erroneous link instead of https://cutt.ly/Dm4R29t, which was similarly provided for in the same cause list. (Annexed hereto and marked 10-2 is a copy of the Cause list dated 2nd February 2026) 6. THAT this unfortunate mistake led to non-attendance on the part of Counsel for the Petitioner/Applicant. Regrettably, therefore, this Honourable Court dismissed the Applications for want of prosecution on account of non-attendance 7. THAT I logged into court through the said link long before Court commenced and was prepared to prosecute the Application on behalf of the Applicant.''* In the virtual court, the court reasonably expects that in a minute or so a party ought to realize they are on wrong court link and join the correct one. In the instant case, the advocate did not even appear in the

entire period when the court ran through the causelist of 2nd February 2026. The right to be heard is deemed as exercised on a party being granted the opportunity to be heard. The applicant is enjoying exparte order staying the disciplinary proceedings while he is on suspension, earning salary and not working as the employer is unable to proceed with the disciplinary process. In the instant case the employer has demonstrated candour by obeying court orders. Any further extension of the stay order and setting aside of my ruling of 2nd February 2026 in the circumstances would amount to obstruction of justice.

21. In the upshot, the application dated 2nd February 2026 is disallowed for lack of merit. The respondent is at liberty to proceed with the disciplinary proceedings to conclusion. The applicant has the remedy to challenge the outcome of the disciplinary process before the court if aggrieved. It is premature for the court to pronounce itself with finality on the fairness of the internal process at interim stage.

22. The court having declined to set aside its ruling of 2nd February 2026 finds that the application 4th February 2026 is resjudicata and is struck out. The application of 28th January 2026 was considered on merit with finality as per the ruling dated 2nd February 2026. To be clear the interim conservatory order of 5th February 2026 is set aside.

23. On costs, the litigation principle is that costs follow the event. The court deviated in the instant case from the principle on taking into account the live employer employee relationship and in promotion of harmony of parties in the ongoing internal disciplinary proceedings, makes no order as to costs in the applications.

24. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2026.

J.W. KELI,

JUDGE.

IN THE PRESENCE OF:

Court Assistant: Otieno

Petitioner/Applicant : Owour

Respondents: Wakwaya