

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

**ELRC PETITION NO. E267 OF 2025**  
***(Before Hon. Lady Justice Hellen Wasilwa, J)***

<b>ENG. OKOVA.....</b>	<b>DEREK .....PETITIONER</b>	<b>WANGAKI</b>
<b>VS</b>		
<b>KENYA LIMITED.....</b>	<b>PIPELINE .....RESPONDENT</b>	<b>COMPANY</b>

**RULING**

- 1 The Petitioner approached this Court vide a Notice of Motion application dated 16<sup>th</sup> December 2025 seeking ORDERS:
  1. Spent
  2. *THAT pending the hearing and determination of the Application inter-partes, the Honourable Court be pleased to issue CONSERVATORY ORDERS restraining the advertisement by the Respondent whether by itself, its agents, servants or employees or any one acting on its behalf for the position of General Manager [Operations and Engineering Services] or the appointment or filling or declaration of the*

*vacancy for said position or in any way abolishing the position.*

3. *THAT pending the hearing and determination of the Petition, the Honourable Court be pleased to issue CONSERVATORY ORDERS restraining the advertisement by the Respondent whether by itself, its agents, servants or employees or any one acting on its behalf for the position of General Manager [Operations and Engineering Services] or the appointment or filling or declaration of the vacancy for said position or in any way abolishing the position.*
4. *THAT the court be pleased to issue an order for REINSTATEMENT of the Petitioner in the position of General Manager [Operations and Engineering Services] of the Respondent pending hearing and determination of the Petition.*
5. *THAT costs of this application be provided for.*

- 2 The application is supported by a supporting affidavit dated 16<sup>th</sup> December 2025 and a supplementary affidavit and further supplementary affidavit dated 20<sup>th</sup> February 2026 and 23<sup>rd</sup> March 2026, all sworn by the Petitioner/Applicant.

### **Petitioner/Applicant's Case**

- 3 The Applicant avers that he was employed by the Respondent on 19<sup>th</sup> February 2024 as the General

Manager (Pipeline Operations & Maintenance) under Job Grade KPC 2, pursuant to a contract of employment of even date for a term of five (5) years. This position required him to lead the Operations and Engineering Services.

- 4 He avers that the contract was to be read together with the Human Resource Policy and Procedures Manual and the Kenya Pipeline Code of Conduct and Ethics (2016). Under Clause 1.4.1 of the Human Resource Policy and Procedures Manual and Part II of the Code of Conduct and Ethics (2016), the Respondent committed itself to compliance with constitutional imperatives under the Constitution.
- 5 The Applicant states that upon assuming office, he diligently performed his duties for a period of 1 year and 9 months, leading to the Respondent getting awards, with 65% contribution from his directorate. These includes the Company of the Year Award 2025 and recognition by the Ministry of Labour and Social Protection in July 2025 for excellent performance in the productivity matrix.
- 6 He states that on 10<sup>th</sup> December 2025, the Respondent's Managing Director unlawfully and unilaterally terminated his services on account of poor performance without according him procedural fairness as contemplated under the Constitution, the Employment Act, the Human

Resource Manual and Procedural Manual and the Kenya Code of Conduct and Ethics (2016).

- 7 It is the Applicant's case that the reasons given for termination centered around poor performance and that the same was flawed, biased, discriminatory and based on personal whims, in disregard of Articles 10, 47 and 50(1) of the Constitution and the substantive and procedural requirements of the Human Resource Policy and Procedures Manual, the Code of Conduct & Ethics [2016].
- 8 The Applicant avers that his good performance is evidenced by the fact that he was paid a bonus of Kshs. 483,082 in October 2025, which he states contradicts the allegation of poor performance and demonstrates bias, victimization and a premeditated plan to remove him from employment.
- 9 He states that on 18<sup>th</sup> September 2025, he was issued with a Notice to Show Cause but upon my response on 22<sup>nd</sup> September 2025, the issue was resolved with issuance of a warning. The issue was conclusively closed vide a letter dated 6<sup>th</sup> November 2025, wherein he was advised to be more vigilant. Therefore, the Respondent cannot rely on the said Notice to Show Cause as a basis for termination, nor can the warning issued substitute the requirement for a hearing under Section 41 of the Employment Act.

- 10 The Applicant further avers that despite an elaborate procedure under Section 8 of the Human Resource Policy and Procedures Manual on assessment on staff performance and the remedial measure of performance improvement Plan (PIP) for poor performers, the Respondent disregarded the same.
- 11 It is the Applicant's case that the allegation of poor performance is therefore baseless and absurd in light of his demonstrated excellent performance and even being paid bonuses in appreciation.
- 12 He states that the Respondent's actions violated his legitimate expectation to a fair process aligned with constitutional and statutory frameworks, thereby infringing his rights and causing damage to his career, reputation and financial standing. He further avers that he was subjected to discrimination and ethnic profiling, contrary to Article 27 of the Constitution and Section 5(3) of the Employment Act.
- 13 The Applicant contends that the termination process, conducted in disregard of constitutional and statutory safeguards, violated his rights under Articles 25, 41, 47 and 50(1) of the Constitution, including his right to human dignity and fair hearing.
- 14 He further states that he stands to suffer prejudice as termination on grounds of poor performance will adversely

affect his employability and reputation as a practicing engineer. He also avers that the Court ought to consider the Respondent's privatization and its implications on his fixed-term contract.

- 15 On the issue of internal remedies, the Applicant contends that the internal appellate mechanism is ineffective, as the Respondent has been privatized, rendering the Public Service Commission, previously the appellate body under Section 11.2 of the Human Resource Manual, moribund.
- 16 The Applicant thus urges this Court to intervene and protect his constitutional rights and livelihood, and to find that the termination was unlawful, discriminatory and procedurally unfair.

### **Respondent's Case**

- 17 In opposition to the application, the Respondent filed grounds of opposition dated 19<sup>th</sup> February 2026 on grounds that:

- 1. The Application does not satisfy the well-established legal threshold governing the grant of conservatory orders sought, as articulated by the Supreme Court in Gatirau Peter Munya Vs Dickson Mwenda Kithinji & 20 others. The Petitioner/Applicant has failed to establish a prima facie case with a probability of success and has failed to demonstrate any prejudice that cannot be remedied by damages.*

2. *The Application seeks a final remedy at an interlocutory stage, which cannot fall for consideration other than in the context of a full trial as it invariably determines the entirety of the Petition. Granting the order for reinstatement would amount to determining the substantive dispute prematurely and irregularly.*
3. *The Petitioner/Applicant deliberately failed, refused, and/or neglected to invoke and exhaust the internal appeal mechanism expressly provided for under the Respondent's Human Resource Policy and Procedures Manual. It is a well-established principle of law that where there is an adequate internal dispute resolution mechanism or appeal mechanism, a party ought to exhaust the same before seeking judicial intervention, unless exceptional circumstances are demonstrated. No such exceptional circumstances have been demonstrated.*
4. *The Petitioner/Applicant has not demonstrated that he stands to suffer irreparable harm incapable of compensation by way of damages. Loss of employment, without more, is compensable in damages and does not meet the threshold for conservatory injunctive relief; imperatively, the employment contract was for a fixed-term contract.*
5. *Public interest militates against the issuance of the orders sought, as there is no property in a public office. As such, the balance of convenience tilts in*

*favour of preserving rather than disrupting the organizational structure and crippling the Respondent's operations contrary to public interest.*

- 18 The Respondent further filed a replying affidavit dated 18<sup>th</sup> March 2026, sworn by Dinah Kirwa, its General Manager (Human Resource and Administration).
- 19 The Respondent that vide a letter dated 19<sup>th</sup> February 2024, the Applicant was appointed as General Manager (Pipeline Operations & Maintenance) for a defined period of five (5) years, effective from 27<sup>th</sup> February 2024 when he accepted the offer.
- 20 The Respondent states that the offer of appointment expressly provided that the appointment was subject to termination before the lapse of the 5-year term, depending on the performance of the Respondent. Further, it provided that the appointment could be terminated by either party unconditionally by giving one (1) month's written notice or one (1) month's basic salary in lieu of notice.
- 21 The Respondent avers that throughout his tenure, the Applicant's performance was consistently poor and was marked by repeated lapses in the discharge of his duties, failure to meet expected standards, and inability to provide effective leadership in his managerial role. It contends that these shortcomings persisted despite

continuous supervision, feedback and opportunities for improvement, thereby adversely affecting operational efficiency and rendering him unsuitable for the position.

- 22 The Respondent states that the Applicant's deficiencies were formally communicated through a Notice to Show Cause dated 18<sup>th</sup> September 2025, which outlined instances of failure to complete projects, procedural lapses arising from poor leadership, and breaches of procurement policies exposing the Respondent to potential litigation and reputational risk.
- 23 It asserts that the Applicant's conduct not only undermined internal governance and compliance standards but also compromised the Petitioner's ability to discharge his duties in a manner consistent with the Respondent's operational and fiduciary obligations.
- 24 The Respondent avers that the law does not mandatorily require an oral disciplinary hearing provided that procedural fairness is observed, and that written representations suffice where an employee is informed of the allegations and given adequate opportunity to respond. The Applicant was aware of the concerns raised against him and was granted sufficient time to make his representations, which right he exercised by submitting a written response, which was duly considered by the Respondent.

- 25 It is the Respondent's case that upon consideration of the Applicant's response, the Board of Directors made the decision to terminate his employment vide a letter dated 10<sup>th</sup> December 2025, in accordance with the terms of his employment, applicable internal procedures, and the Human Resource Policy and Procedure Manual. It contends that the Applicant had been afforded adequate time, guidance and opportunity to meet the required standards of competence expected in the role but failed to do so.
- 26 The Respondent further avers that the issues leading to termination did not relate to ordinary performance shortcomings in meeting targets or deliverables warranting placement on a Performance Improvement Plan (PIP), but rather the issues pertained to the Petitioner's breach of established company policies, failure to properly discharge the core functions of his office, and conduct inconsistent with the standards of diligence, accountability, and compliance expected of a person in his position. These circumstances fell within the realm of misconduct and dereliction of duty, for which a performance management process was neither appropriate nor require
- 27 The Respondent states that the Applicant has failed to adduce any credible evidence to demonstrate that the disciplinary process was flawed, biased, discriminatory or

in breach of the rules of natural justice, and that such allegations are unsubstantiated and speculative.

- 28 It further contends that the bonus reflected in the Applicant's payslip for October 2025 formed broader departmental or organizational incentive linked to collective performance outcomes and not his individual effort, and therefore cannot be relied upon as evidence of satisfactory performance. Similarly, it avers that the awards and recognitions relied upon by the Applicant were granted in recognition of the collective efforts and overall performance of the Respondent as a company and its workforce and were not attributable to the Petitioner's individual contribution.
- 29 The Respondent denies that the Applicant was subjected to ethnic profiling or discriminatory treatment and contends that no evidence has been adduced to support such allegations. It asserts that all disciplinary measures were taken in accordance with its policies, the law, and the Constitution, without bias or improper motive.
- 30 The Respondent avers that the Applicant was accorded a fair and procedurally sound process, having been informed of the allegations, given an opportunity to respond, and his representations duly considered prior to termination, in compliance with the Employment Act and the Constitution.

- 31 On the issue of the reliefs sought, the Respondent contends that the Applicant has not met the legal threshold for the grant of conservatory orders as set out in *Gatirau Peter Munya v Dickson Muwenda Kithinji & 2 Others*, as he has failed to establish a prima facie case or demonstrate irreparable harm incapable of compensation by damages.
- 32 The Respondent further states that the prayer for reinstatement is a final remedy under the Employment Act and cannot be granted at an interlocutory stage as it would amount to determining the substantive dispute prematurely.
- 33 It also contends that the Applicant failed to exhaust the internal appeal mechanism provided under the Human Resource Policy and Procedures Manual and has not demonstrated any exceptional circumstances to warrant bypassing the same.
- 34 The Respondent avers that the Applicant has not demonstrated that he will suffer irreparable harm, as loss of employment is compensable by damages, particularly in the context of a fixed-term contract.
- 35 It further contends that public interest militates against the grant of the orders sought, noting that there is no property in a public office and that the balance of convenience favours maintaining the status quo post-

termination. It states that the position held by the Applicant is strategic and critical to the Respondent's operations, and restraining the Respondent from filling or reorganizing the position would prejudice operational efficiency, institutional continuity and the public interest.

36 It is the Respondent's case that the Application is misconceived, an abuse of the court process, and urges the Court to dismiss it with costs.

### **Applicant's Submissions**

37 The Applicant submitted on two issues: whether the petitioner has made out a case for issuance of conservatory orders; and whether the petitioner has made out a case for reinstatement.

38 On the issue of conservatory orders, it is the Applicant's submissions that Prayer 3 of the Notice of Motion seeks to restrain the Respondent from advertising, filling, or in any manner declaring vacant the position of General Manager (Operations and Engineering Services). This prayer is premised on the egregious and malicious manner in which his employment was terminated, in violation of his constitutional rights under Articles 27(1) & (4), 41 and 47 of the Constitution.

39 He submitted that under the Human Resource Policy and Procedures Manual and the Code of Conduct and Ethics,

particularly Clauses 10 and 11 and Part II thereof, the Respondent expressly bound itself to comply with the Constitution. Despite this commitment, the Respondent acted in breach of Articles 10 and 232 of the Constitution, and being a state corporation, it is further bound under Articles 2 and 3 to uphold the rule of law and constitutionalism.

40 The Applicant further submitted that his contract was for a fixed term of 5 years ending in 2029, and that 3 years remain unexpired. He argued that if the position is advertised and filled, it would prejudice his chances of resuming duty should the Court find that the termination was unlawful and unconstitutional.

41 The Applicant placed reliance on ***CENTRE FOR RIGHTS EDUCATION AND AWARENESS (CREAW) & 7 others v ATTORNEY GENERAL [2011] eKLR***: *“At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order there is real danger that he will suffer prejudice as a result of the violation or threatened violation of [the Constitution](#).”*

42 On the issue of reinstatement, the Applicant submitted that the legal basis is anchored under Section 12(3)(viii) of the Employment and Labour Relations Court Act, which empowers the Court to order reinstatement within three

(3) years of dismissal subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law. He ***Fadhil Juma Kisua & another v Kenya Ports Authority [2015] eKLR***: “However this courts view is that after inter parties hearing of an application for reinstatement pending trial, the court can still reinstate an employee if it is within 3 years after termination, the reason for termination is unfair within provisions of section 46 of EA, or where the appointment has a statutory under pinning. An appointment has statutory under pinning .....

43 He further relied on ***Stephen Mbugua Chege v Nairobi City Water & Sewerage Company [2017] eKLR***, ***Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR*** and ***National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR***.

44 The Applicant submitted that the termination was premised on poor performance, yet the Respondent failed to comply with Section 8 of its Human Resource Policy and Procedures Manual, which requires performance evaluation and placement of an employee on a Performance Improvement Plan (PIP) prior to termination. He argued that this omission rendered the termination procedurally and substantively unfair.

45 He further submitted that the allegation of poor performance is contradicted by evidence on record,

including the payment of a performance bonus of Kshs. 483,082 and issuance of a certificate of recognition on 1st July 2025 for outstanding performance, thereby demonstrating the absurdity and inconsistency of the Respondent's position.

46 It was further submitted that the Respondent violated Sections 41 and 44 of the Employment Act by failing to accord him a hearing prior to termination, and thereby infringed his rights to fair administrative action under Article 47 and fair labour practices under Article 41 of the Constitution. He argued that there is no evidence that he was subjected to any hearing on the allegations of poor performance.

47 On the law relating to termination for poor performance, the Applicant relied on ***National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR***, where the Court of Appeal held: *"The reason advanced by the Bank for terminating the respondent's employment was poor performance in Jane Samba Mukala v Ol Tukai Lodge Limited Industrial Cause Number 823 of 2010; (2010) LLR 255 (ICK) (September, 2013) the court observed as follows;*

*a. Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of*

*noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.....c. Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses.”*

- 48 It is the Applicant’s submission that as a professional engineer, termination on grounds of poor performance has far-reaching implications on his reputation and employability, and urged the Court to grant the orders sought.

### **Respondent’s Submissions**

- 49 The Respondent submitted on three issues: whether the Applicant has satisfied the threshold for the grant of the conservatory orders sought; whether the Applicant should be reinstated at the interlocutory stage: and who should bear the costs of the application.
- 50 On the issue of conservatory orders, it was submitted that the Applicant seeks conservatory orders restraining the advertisement by the Respondent of the position of General Manager (Operations and Engineering services) or

appointment or filing or declaration of vacancy or abolishing such position. It argues that public interest militates against the grant of the orders sought, as there is no proprietary interest in a public office, and the balance of convenience tilts in favour of preserving the status quo post-termination rather than disrupting the Respondent's organizational structure and operational efficiency.

51 The Respondent submitted that conservatory orders was defined in ***Munya v Kithinji & 2 others [2014] KESC 30 (KLR)***: *“Conservatory orders bare a more decided public-law connotation: for they are orders that facilitate orderly functioning within public agencies, as well as uphold the adjudicatory authority of the Court in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues like “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders ought to be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”.*

52 It further relied on ***Nkunja v Magistrates and Judges Vetting Board & another [2016] KEHC 7269 (KLR)*** where the Court set out the principles for grant of conservatory orders: *“An applicant must demonstrate that*

*he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution; Whether if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and the public interest must be considered before grant of a conservatory order.”*

- 53 It was submitted that the Applicant has failed to establish a *prima facie* case as defined in ***Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KECA 175 (KLR)***. T argued that it is incumbent upon the Applicant to demonstrate a *prima facie* case with a likelihood of success and, in the absence of the conservatory orders sought, the prejudice they stand to suffer.
- 54 It is the Respondent’s submission that the Applicant has failed to establish a *prima facie* case with a probability of success and has also failed to demonstrate any prejudice that they stand to suffer that cannot be remedied by damages. The Respondent asserts that it has demonstrated that its actions were not only justified but were also well within the law.
- 55 On irreparable harm, the Respondent submitted that the Applicant has not demonstrated any real or imminent harm incapable of compensation by damages. Reliance

was placed on ***Giella v Cassman Brown & Co. Ltd [1973] EA 358***, where the Court held that an applicant must show that they would suffer irreparable damage that cannot be compensated by an award of damages.

56 The Respondent argued that the alleged harm, which is loss of employment without more, is compensable in damages, and imperatively the employment was for a fixed term contract of 5 years. Additionally, the offer of appointment provided that the appointment could be terminated by either party unconditionally by giving one (1) month's written notice or one (1) month's basic salary in lieu of notice. As such, the Applicant was aware that the position held was for a limited period.

57 On the balance of convenience and public interest, the Respondent submitted that public interest militates against the issuance of the orders sought as there is no propriety in a public office and the Applicant cannot claim personal ownership, private rights, or personal interest in the position he held. As such, the balance of convenience tilts in favour of preserving rather than disrupting the organizational structure and crippling the Respondent's contrary to public interest.

58 It cited ***Trusted Society of Human Rights Alliance v Kenya Revenue Authority & another; National Treasury & 2 others (Interested Parties) [2025] KEHC 8769 (KLR)*** wherein the court stated that

this limb requires the Court to consider where the balance of convenience lies and to ensure that the public interest is not prejudiced by the grant or refusal of the orders. Even if an applicant passes the first two tests, a court may still decline a conservatory order if granting it would disproportionately harm the other side or the public.

59 It was submitted that the Respondent operates critical national infrastructure and the position in question is strategic and sensitive, affecting safety, efficiency and continuity of operations. It argued that restraining the Respondent advertising, filling, or reorganizing the said position, as this would severely prejudice public interest, institutional efficiency, and operational continuity. The public stands to suffer irreparable harm through operational paralysis and managerial uncertainty.

60 On reinstatement, the Respondent submitted that the orders sought are final in nature and cannot be granted at an interlocutory stage as they would dispose of the entire suit prematurely.

61 It was submitted that pursuant to Section 49 (3)(a) of the Employment Act, reinstatement is a remedy issued upon full hearing on the merits of a case and cannot be granted at an interlocutory stage. Reliance was placed on ***Loice Mutai v Kenya Revenue Authority [2017] KEELRC 653 (KLR)***: *“To my mind, reinstatement is a summative remedy to be granted after hearing the full*

*case of the parties and only in very exceptional circumstances. .... The Court must therefore tread with caution, especially at the interlocutory stage, when not all the facts are on the table. In my view, an employee seeking reinstatement must earn their stripes by going through a full trial.”*

- 62 The Respondent submitted that granting reinstatement at this stage would amount to prematurely determining the substantive dispute and denying it the opportunity to demonstrate that the termination was lawful and fair.
- 63 On costs, it was submitted that It is trite that costs are at the discretion of the court. The guiding principles applicable in the exercise of that discretion were enunciated by the Supreme Court in ***Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR***, wherein it was held that costs are generally awarded according to the principle that costs follow the event, meaning the unsuccessful party ordinarily bears the costs of the suit. Thus, a party who institutes proceedings will pay costs if the claim fails, but if the suit succeeds, the opposing party will typically bear them.
- 64 The Respondent submitted that the Applicant deliberately failed, refused, and/or neglected to invoke and exhaust the internal appeal mechanism expressly provided for under the Respondent’s Human Resource Manual. As a result, the Respondent has been compelled to defend the

present Application prematurely, notwithstanding the existence of an adequate and available internal remedy that ought to have been pursued in the first instance. It argued that the Court should award it costs as it has been forced to defend a premature suit.

65 It is the Respondent's submission that the Applicant has failed to satisfy the threshold for grant of conservatory orders and that reinstatement cannot issue at an interlocutory stage. It urged the Court to dismiss the Application dated 16<sup>th</sup> December 2025 with costs.

66 I have considered the averments and submissions of the parties herein. The applicant seeks orders to bar the respondent from advertising and filling up of the vacancy for the post he occupied before termination. He also seeks order of reinstatement at this interlocutory stage.

67 The court granted orders staying the filling up of the vacancy previously occupied by the applicant. The order to reinstate the applicant at this stage however would be tantamount to determining the entire petition at an interlocutory stage without considering the entirety of the same.

68 At the interlocutory stage on 15/1/2026, this court had issued orders allowing prayer 1 and 2. In order then not to destroy the substratum of this petition the orders in prayer 1 and 2 already in force will remain in force and also

pending the hearing and determination of the entire petition as per prayer no 3. Costs in the petition.

**Dated, Signed and Delivered Virtually at Nairobi  
this 21<sup>st</sup> Day of April, 2026.**

**HELLEN WASILWA**

**JUDGE**