

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
PETITION NO. E193 OF 2025

(Before Hon. Justice Dr. Jacob Gakeri)

WILLIAM MBUGUA.....
PETITIONER

VERSUS

UNGA LIMITED.....
RESPONDENT

JUDGMENT

The Petitioner filed the instant Petition on 29th September, 2025 alleging violation of his constitutional rights.

The Petitioner's case is that he was employed by the Respondent as its Business Controller effective 3rd January, 2023 at Kshs.349,792.00 per month and served diligently until 15th September, 2025 which he received a Notice to Show Cause and responded on 16th September, 2025. That a report availed with the notice to show cause alleged that he had received Kshs.560,144.00 from the Respondent's suppliers/ transporters. That the investigation report intruded into the Petitioner's private affairs by accessing his M-pesa transaction records.

That the Respondent suspended him on the same date and was invited for a disciplinary hearing vide letter dated 26th September, 2025 within 72 hours, which was short and had no investigation report nor the criminal court order on the investigations.

The Petition was based on Articles 1 (3) (1) (c), 2(1), 10, 19, 20, 21, 22, 31, 47, 259(1) of the constitution of Kenya, section 4 of the Fair Administrative Action Act and sections 25, 26, 30(1) and 32(1) of the Data Protection Act.

According to the Petitioner the Respondent violated his right to privacy, fair labour practices, fair administrative action, right to access justice and fair hearing and this violated the provisions of the Constitution of Kenya, Fair Administrative Action Act and Data Protection Act.

The Petitioner prayed for:

- (i) Declaration that the investigation report violated his right to privacy, fair labour practices, access to justice, fair hearing, fair administrative action and was this null and void, that the notice to show cause dated 15th September 2025, was null and void as was the suspension letter of even date.
- (ii) An Order of *Certiorari to quash* the notice to show cause and suspension letter.
- (iii) An Order of Prohibition restraining the Respondent from subjecting the Petitioner to disciplinary proceeding on the basis of illegally obtained evidence including M-pesa transactions.
- (iv) Compensation for violation of rights and fundamental freedoms under Articles 31, 41, 47, 48 and 50 of the constitution.

- (v) Another relief or orders the court deemed appropriate and just to grant.
- (vi) Respondent bear costs of the Petition.

Respondent's case

By a Replying Affidavit sworn by John Mwendwa on 16th October, 2025, the affiant deposed that the Petitioner admitted having received funds from suppliers/transporters of the Respondent.

That the Respondent's Code of Conduct and Ethics required all employees to uphold it and not accept gifts of more than nominal value, cash gifts from suppliers or receive money from suppliers.

The affiant deposed that following a whistle-blower report on financial impropriety, the matter was reported to the police who sought an court order to access financial statements of supplier/transporters which showed that the Petitioner had received the sum of Kshs.449,000.00 from supplier/transporters of the Respondent and was issued with a notice to show cause while investigations were still ongoing and the Petitioner admitted having received Kshs.450,000.00 as alleged repayment of a loan made to the supplier and charges for alleged tax advisory services he had rendered to a supplier.

The affiant denied that the Respondent violated the Petitioner's right of privacy as the information was accessed for purposes of an investigation pursuant to a court order and the disciplinary hearing

was scheduled two weeks after the notice to show cause and the process was fair.

According to the affiant, the petitioner's Petition had no merit.

By a supplementary Affidavit sworn on 31st October, 2025, the Petitioner deponed that the Gift, Hospitality Policy and Disciplinary Policy were approved on 26th September, 2024 and shared with staff on 20th June 2025 and the alleged activities happened earlier.

That the court order was dated 8th April 2025 while the application was dated 10th April, 2025 and the DCI sought to investigate the director's accounts from 1st June, 2024 to 5th April, 2025 and information outside that timeframe was null and void and the Respondent accessed data outside the prescribed duration and such evidence was illegally obtained.

By a Further Affidavit sworn on 13th March, 2026 the Petitioner deponed that the subsequent disciplinary process mentioned by the Respondent in its Replying Affidavit had not been challenged in court and was irrelevant in these proceedings.

That these proceedings related to the disciplinary process conducted prior to the Court's Ruling.

The entire Affidavit contains averments on the disciplinary proceedings prior to the court's Ruling.

Petitioner's submissions

As to whether the Respondent's access and reliance on the Petitioner M-Pesa transaction records was a violation of his right to privacy, counsel submitted that while the court order was dated 8th April, 2025 the application and Supporting Affidavit were dated 10th April 2025, a legal impossibility according to counsel.

Counsel submitted that the Respondent disregarded judicial limits in that the application by the D C I was made to facilitate investigation of a director for theft and only records between 1st June 2024 and 5th April 2025 could be accessed but the Respondent accessed transactions predating the time lines given.

Reliance was placed on the decision in **Gold Crown Beverages (Kenya) Ltd v Maina Ngugi (2019) 1695 (KLR)** on access to personal M-Pesa records.

Counsel further submitted that the Respondents contention that the Petitioner had consented could not avail it as the alleged consent was generic. Reliance was placed on the citing the decisions in **Mwambu v Twiga Foods Ltd (2024) KEHC 10889 (KLR) G.J.K V K.P.M & Advisory Services (2017) KEELRC 1236 (KLR) and Abinayo v House & Farm Co. Ltd (2014) KEERC 2832 (KLR).**

On procedural unfairness and illegal evidence, counsel submitted that the evidence was inadmissible. Reliance was placed on the decision in **Mathew Kipkemboi Kitai v Postal Corporation of**

Kenya (2016) KEHC 4065 (KLR) Kenya Union of Commercial Food & Allied Workers v Delmonte (K) Ltd (2013) KEHC 3872 (KLR) and Akala v Kenya Commercial Bank (2025) KEELRC 1724 (KLR) to urge that procedural mis-steps by the employer renders a termination of employment unfair. That the Respondent relied upon non-existent policies and the Petitioner was denied time to prepare his defence as he was not accorded adequate time, the Respondent withheld information and the hearing was a mockery of justice.

On reliefs, counsel submitted that the Petitioner was entitled to the reliefs prayed for violation of the right to human dignity, professional reputation and compensation for the Respondent's disregard of the law.

Finally, counsel submitted that the Petitioner was entitled to the order of *certiorari* to quash the disciplinary process, *mandamus* to compel the Respondent to reinstate the Petitioner and prohibition to restrain the Respondent from relying on illegally obtained M-Pesa data.

Respondent's Submissions

Counsel for the Respondent submitted that the ruling delivered on 17th December, 2025 was explicit that the Respondent was free to commence proper disciplinary process having halted the earlier process. That the Respondent commenced a fresh disciplinary process which culminated in the Petitioner's dismissal on 13th February 2026.

Counsel, further submitted that the courts ruling did not nullify any records.

According to counsel, portions of the petition had been overtaken by events.

Reliance was placed on the sentiments of the court in **Red Holdings v Principal, Secretary Ministry of Interior & Co-ordination of National Government & another (2026) KEHC 2393 (KLR)** where orders were declined for having been overtaken by events, as well as those in **Kaminja & 3 others (Suing as Westland Environmental Caretaker Group & 3 others v County Government of Nairobi (2019) KEHC 2059**.

It was submitted that the Petitioner covenanted to uphold the code of conduct avoid conflict of interest, and not to accept cash gifts from suppliers and the policy circulated in June 2025 was an updated version of the document which was available on the intranet and the Petitioner was bound to ensure compliance with the terms of his employment as he held a managerial position.

Reliance was placed on the decision in **Mark To Mwangi v Gateway Insurance Co. Ltd (2013) eKLR**. Counsel submitted that the Petitioner violated the terms of his employment.

On access to the Petitioner's M-Pesa records, counsel submitted that the Respondent reviewed records of transporters suppliers and

the records revealed that the Petitioner had received cash from supplier/transporters.

That the order issued by the Makadara Court had not been challenged in any court and was issued in criminal proceedings over which this court had no jurisdiction.

Reliance was placed on the sentiments of the Supreme Court in **Macharia & another v Kenya Commercial Bank & 2 others (2012) KESC 8 (KLR)**, on jurisdiction generally.

It was submitted that the Respondent exercised its managerial prerogative in appointing an investigator, citing the decision in **Mutiga v Proto Energy Ltd (2025) KEELRC 1747 (KLR)**.

Counsel submitted that the Respondent had a legal basis to use the information obtained by the investigator by dint of section 28 (1) (f), 52 (2) (c) and 30(a) (b) (i) and (vii) of the Data Protection Act, which according to counsel permitted the Respondent to process personal data unearthed by the investigation without the Petitioners consent and no breach of the right to privacy.

Counsel urged that the Respondent was entitled to access data for purposes of investigation of financial impropriety by its employees.

Reliance was placed on the UK High Court decision in **Dixon v North Bristol NHS Trust (2022) EWHC 3127 (KB)** to submit that the data contained in the investigation report which showed

that the Petitioner received cash from the Respondent's transporters/suppliers was lawfully processed and the decisions cited by the Petitioner's counsel were distinguishable as they related to use of images of persons and access to an employee's phone and the petitioner consented via his employment contract which was binding on him.

Further, reliance was placed on the decision in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another (2001) KECA 362 (KLR)**.

Counsel submitted that the Petitioner admitted having received monies from a supplier/transporter, which he had not disclosed prior to the investigation and thus violated the Respondent's Code of Conduct his right to privacy was not violated and no relief commended itself. Counsel urged the court to dismiss the petition with costs.

Analysis and determination

The Petitioner commenced the instant suit vide a Petition dated 29th September 2025 together with a Notice of Motion of even date seeking various interim orders. When the matter came up on 1st October, 2025, the court certified it urgent, the Petitioner was directed to serve the Respondent *status quo* be maintained and *inter parties* hearing was scheduled for 21st October, 2025.

By a ruling delivered on 17th December, 2025, the court halted the disciplinary process against the petitioner and added that

“The Respondent was free to initiate proper processes based on the law and their own HR Manual”

The Respondent deponed that, disciplinary proceedings continued after the courts ruling on 17th December 2025. Specifically, Mr. John Mwendwa deponed that a notice to show cause was served upon the Petitioner on 29th December, 2025 together with the investigation report and a response required within 9 days.

The Petitioner was suspended from duty for 30 days and responded to the notice to show cause vide letter dated 6th January 2026 requesting for documents yet he had a copy of the HR Manual. The documents were supplied vide letter dated 14th January, 2026 but he made a further request for information vide letter dated 18th January, 2026 and hearing took place on 2nd February, 2026 and the Petitioner attended with his advocate and remained unco-operative during and after the hearing and did not provide feed back on the minutes of the meeting and was dismissed from employment vide letter dated 13th February, 2026.

The Petitioner made it clear in his Further Affidavit that the disciplinary proceedings conducted after the court’s Ruling had not been challenged in court and his case was grounded on the disciplinary process before 17th December, 2025 and the relief sought related to the proceedings prior to the Ruling.

This far the court is in agreement with the Petitioner's averment that his case relates to the disciplinary process prior to the courts ruling on 17th December, 2026.

Be that as it may, it is important to underscore the fact that the some of the reliefs sought implicate the employment relationship which according to the Respondent did not exist and the Petitioner appeared to acknowledge that fact and his responses to the Respondent's communication via email left no doubt that the Petitioner's employment was terminated vide letter dated 13th February 2026 after a hearing, minutes of which the Petitioner received on 5th February, 2026.

It is not in contest that the Petitioner joined the Respondent as an employee vide letter dated 3rd January, 2023 signed on 31st January, 2023 as a Business Controller effective 1st January, 2023.

The Petitioner was issued with notice to show cause dated 15th September 2025 allegedly for having received or extorted the sum of Kshs.449,000.00 from suppliers/transporters and was suspended from duty effective 6th September, 2026 for 30 days with full pay.

The Petitioner responded via letter dated 23rd September, 2025 seeking extension of time to respond to the notice to show cause.

The Petitioner's counsel responded vide letter dated 25th September 2025 more than 10 days after the notice to show cause was issued and 8 days after the prescribed duration of response.

The Petitioner's request for extension of time was declined. By letter dated 26th September, 2025, the Respondent invited the Petitioner for a disciplinary hearing slated for 30th September, 2025 at 11.00 am. The instant Petition was filed the day before the proposed hearing.

The Petitioner's case is that the Respondent violated his right to privacy, fair labour practices, fair administrative action, right to access justice and fair hearing.

The issues for determination are:

- (i) Whether the Petitioner's constitutional rights were violated by the Respondent.
- (ii) Whether the Petitioner is entitled to the reliefs prayed for.

Concerning the right to fair labour practices under Article 41 of the Constitution Fair Administrative Action and fair hearing under Articles 47 and 50 of the constitution of Kenya, 2010, the trial vide its Ruling delivered on 17th December 2025 found that the process was inconsistent with the Respondents Human Resource Manual and the law and halted the process forthwith to obviate further transgression. The court accorded the Respondent an opportunity

to conduct any processes it undertook thereafter in accord with the law and the Human Resource Manual.

At that point, the only adverse action the Respondent had taken against the Petitioner was the suspension from duty, which is either prescribed by law or the contract of service.

Notably, the Petitioner's contract of employment incorporated the employee Handbook and policies on various matters on the intranet only the Code of Ethics and Conduct was enclosed with the Letter of Appointment.

The Human Resource Manual on record was approved on 26th September 2024 and became effective on that date.

Paragraph 12.3 of the Human Resource Manual provide for suspension of an employee if the Respondent considered the employee's continued presence detrimental to the progress of the investigation or the interest of the Respondent due to serious misconduct that required investigation or clarification.

The Petitioner's suspension was pending conclusion of disciplinary proceedings.

Finally, paragraph 12.3.2(ii) of the Human Resource Manual provided that suspension was not deemed to be a disciplinary measure.

In the court's view, based on the allegations made against the Petitioner, the Respondent as a reasonable employee could invoke the provisions of paragraph 12.3 of the Human Resource Manual, 2024.

The fact that the Petitioner was accorded 48 hours to respond to the notice to show cause in *lieu* of a minimum of 36 hours and the Respondent refused to extend the time frame, were significant procedural *miss steps* which implicated the Petitioner's right to fair hearing and were corrected by the court's stoppage or discontinuation of disciplinary process which left the Respondent with no option but to restart the process a fresh if it was still desirous of subjecting the Petitioner to a disciplinary process.

The most potent allegation related to violation of the Petitioner's right to privacy under article 31 of the Constitution of Kenya.

According to the Petitioner, the Respondent accessed and obtained his M-pesa transaction records without his consent, knowledge or valid court order, which was an unjustifiable infringement of the Petitioner's right to privacy.

The Respondent denied having breached the Petitioner's data privacy right, citing the provisions of section 28(i) (f), 52(2) (c), 30(1) (b) (i) and (vii) and 51 (2) (b) of the Data Protection Act.

According to the Respondent since it was conducting an investigation of his suppliers/transporters the access was permitted by law.

It is common ground that the Respondent's investigator accessed M-pesa transaction data between the some of its suppliers/transporters and Petitioner, although the Petitioner was not the subject of the investigation.

The Petitioner's case is that although Corporal Kiso Kitaka No. 49997 attached to the DCI Makandara obtained an order whose particulars the petitioner contested, the data to be accessible was limited to between 1st June, 2024 to 5th April, 2025, but the Respondent accessed data outside the prescribed period and the evidence was illegally obtained.

A copy of the court order on record revealed that the investigating officer (IO) obtained the order dated 8th April 2025, none of the parties availed verifiable evidence as to when the application was made. The order mandated the IO to obtain data and bank statements in specific accounts at Diamond Trust Bank, NCBA bank, Co-operative Bank of Kenya and National Bank of Kenya as well as several cell phones numbers at Safaricom Kenya Ltd from 1st June 2024 to 5th April 2025.

The three (3) pages of the Supplier's Investigation Report 2025 allegedly conducted by S.K. Mwaniki Paneno Crime Security and Safety Watch Ltd, lacked any form of authentication or date of the investigation, methodology used, elaborate findings, conclusions or

recommendations. The three pages related to the petitioner and one Peter Wanjohi Nderitu.

The Report revealed that from 10th July 2023 to 3rd August 2024 the Petitioner received Kshs.375,000.00 in his two (2) cell phone numbers 0758466722 and 0711702461, a fact the Petitioner did not deny but Respondent that Mr. Peter Wanjohi Nderitu/Flawless Ltd was repaying a personal loan extended to the supplier, and regarding one Margaret Nyamisa Tonya the Petitioner had rendered adhoc tax compliance advisories in his personal capacity.

It is notable that the Petitioner provided no verifiable evidence of the alleged personal loan or adhoc tax compliance advisories not even the amount of the alleged personal loan and the date among other particulars.

Strangely, only 2 transactions fell within the period authorised by the court order a total of Kshs.33,000.00. the rest of the amount was paid and received outside the period authorised by the court order.

Concerning data Protection in Kenya, the Data Protection Act is the principal legislature framework. The Preambular provision provides that: The Data Protection Act is an Act of Parliament to give effect to the provisions of Article 31 (c) and (d) of the Constitution of Kenya to establish the office of the Data Protection Commissioner; to make provision for the regulation of processing of personal data; to provide for the rights of data subjects and obligations of data controllers and processors and for connected purposes.

Under section 28(a) of the Act;

- (1) A data controller or data processor shall collect personal data directly from the data subject.
- (2) Despite sub section (1) personal data may be collected indirectly where-
 - (a) ...
 - (b) ...
 - (c) ...
 - (d) ...
 - (e) ...
 - (f) **the collection of data from another source is necessary-**
 - (i) **for the prevention, detection, investigation prosecution and punishment of crime.**
- (3) A data controller or data processor shall collect store or use personal data for a purpose which is lawful specific and explicitly defined.

A plain reading of these provisions evinces that a data controller or processor is at liberty to access personal data otherwise than by consent of the data subject where the data is necessary for certain defined purposes including investigation or prosecution and the police in this case accessed the Petitioner's financial data on account of having received funds from suppliers/transporters and had not declared any conflict of interest in accord with the Respondents Code of Ethics and Conduct.

Similarly, section 30 of the Act shows that a data collector or controller may process personal data without the data subject's consent in certain instances, and in this case the processing was necessary for the legitimate interests pursued by the data controller.

In the courts view, since the Respondent accessed personal data belonging to the Petitioner in the course of an investigation by the police initially, and the subject of the investigation were the Respondent's suppliers/transporters, the access was justifiable and the provisions of Article 31 (c) of the Constitution of Kenya may not avail the Petitioner because the information in question, which is private was not unnecessarily revealed. It was necessary according to the Respondent and the police and arguably, the evidence was not illegally obtained.

From the foregoing, it is discernible that the Petitioner has failed to prove that the Respondent violated his constitutional right of privacy by accessing M-pesa transaction records without any justification.

Similarly, and based on the evidence on record the court is not persuaded that the petitioner has placed sufficient material before this court for a finding that his right to fair labour practices, right to fair administrative action and hearings were violated.

On entitlement to the relief sought, the court proceeds as follows;

As regards the declaration that the Respondents' Suppliers Investigation Report containing details of the Petitioners M-pesa transactions violated the petitioners constitutional right to privacy, fair labour practices, fair administrative action, access to justice, right to access justice and fair hearing and thus void, the court is satisfied that the Report was not invalid or a nullity but violated the Petitioners right to fair administrative action in that he was not invited to record a statement with the investigator before the report was prepared and published.

However, the court is not persuaded that the notice to show cause or the suspension letters dated 15th September, 2025 was invalid null or void and ought to be quashed by an Order of *certiorari*.

Concerning the Order of *mandamus* to allow the Petitioner resume duty, it is common ground that the documentary evidence availed by the Respondent, which the Petitioner did not contradict revealed that after the court ruling on 17th December, 2025, the Respondent commenced disciplinary proceedings against the Petitioner, who participated in the process including a hearing with his advocate as a witness, received a copy of the minutes to confirm but failed to respond and was issued with a letter of dismissal. The Petitioner admitted the that process had not been challenged in court and thus remained valid.

In the court's view, granting an order of *mandamus* at this stage would be ineffectual on account that the Petitioner has not been on

suspension or interdiction to resume duty and there is no contract of service between the parties. The order would be tantamount to a reinstatement.

Similarly, the Petitioner has not demonstrated that the prerequisites of *mandamus* have been fulfilled as outlined in **Apotex Inc. Canada (Attorney General & Dragon v Canada Minister of Citizenship & Immigration** cited in other decisions such as **Republic v Principal Secretary Ministry of Internal Security and another Ex Parte Schon Noorani & another (2018) eKLR.**

See also **Republic v Jomo Kenyatta University of Agriculture & Technology v Ex Parte Elijah Kamau Mwangi (2021) eKLR, Jidraph Kamau & another v Attorney General Mombasa Misc. Application No. 406 of 2000, Republic v Commissioner of Land & another Ex Parte Kithinji Murungu Mangere Nairobi HC Misc Application No. 395 of 2012.**

The prayer for *mandamus* directing the Respondent to allow the Petitioner resume duty is declined.

On the Order of Prohibition to restrain the Respondent from subjecting the Petitioner to disciplinary proceedings on the basis of illegally obtained evidence, having found that the evidence was not illegally obtained in this instance, the prayer is disallowed.

On compensation or damages for violation for constitutional rights, having found that the petitioner's right to fair administrative action was violated by the Respondent, the Petitioner is awarded the sum of Kshs.200,000.00.

In conclusion, judgment is entered in favour of the Petitioner against the Respondent in the sum of Kshs.200,000.00.

Costs to the Petition at ½ scale.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13th DAY OF MAY, 2026.

**DR. JACOB GAKERI
JUDGE**

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in

delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI
JUDGE**