



REPUBLIC OF KENYA



KENYA LAW
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**Kamunyu v Safaricom PLC (Judicial Review E066 of 2021)
[2025] KEELRC 28 (KLR) (16 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 28 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
JUDICIAL REVIEW E066 OF 2021
HS WASILWA, J
JANUARY 16, 2025**

BETWEEN

NICHOLAS KAMUNYU PETITIONER

AND

SAFARICOM PLC RESPONDENT

RULING

1. The application before the court is an application dated December 4, 2024, filed by the Respondent under Section 12 of the *Employment and Labour Relations Court Act*, 2011, Sections 2 and 9 of the Fair Administrative Actions Act, and other enabling provisions of the law. The Respondent seeks several orders, including the striking out of the Applicant's application dated 29th November 2024 or, alternatively, setting aside the leave granted to the Applicant to apply for orders of certiorari. The Respondent contends that the Applicant obtained leave through misrepresentation and non-disclosure of material facts. It is argued that letters dated 11th and 14th November 2024, which the Applicant claims are decisions capable of being quashed, were merely a show-cause letter and an invitation to a disciplinary hearing, respectively, issued in compliance with the Safaricom PLC Disciplinary Policy and Procedure. The Respondent further asserts that disciplinary proceedings are not acts or decisions capable of being quashed, as only the outcome of such proceedings may be subject to review.
2. The Respondent maintains that the Applicant failed to exhaust internal appeal mechanisms provided under Safaricom PLC's Disciplinary Policy, which ought to address issues such as procedural flaws, unreasonableness, or new evidence. The Applicant has not demonstrated exceptional circumstances to justify bypassing these mechanisms. The Respondent asserts that proceeding with the current application renders the suit defective and an abuse of the court process. Additionally, the Respondent argues that the stay of further action against the Applicant will cause irreparable harm to its business operations and create uncertainty. It is submitted that there is a high likelihood of success in



setting aside the leave granted to the Applicant, and the balance of convenience favors granting the Respondent's application. The application is supported by the annexed affidavit of Florence Nyokabi and other grounds to be adduced during the hearing.

3. The Respondent certifies the urgency of the application, highlighting that the court's grant of leave to the Applicant, Nicholas Kamunyu, to apply for certiorari and the accompanying stay of further action has stalled a disciplinary process that was at its final stage, pending only the communication of the outcome. The Respondent emphasizes that the stay prevents the conclusion of a disciplinary process involving the Applicant, who occupies a senior position within Safaricom PLC as the Chief Channels Officer, overseeing a significant portion of the workforce and operations.
4. The disciplinary process stems from allegations of gross misconduct against the Applicant, involving inappropriate and offensive behavior towards female staff members at a company event. The Respondent argues that it is in the interest of all parties that the disciplinary process is concluded promptly to avoid operational uncertainty and reputational harm, particularly given the Applicant's critical role within the organization.
5. The Respondent further contends that the stay is causing irreparable harm to its business operations, fostering uncertainty, and was not justified under the applicable law and circumstances. It is also argued that the matter, previously handled confidentially in compliance with the company's disciplinary procedures, has now entered the public domain, potentially causing unrest within the organization. Consequently, the Respondent urges the court to hear and determine the application expeditiously in the interest of justice and fairness.
6. In an affidavit dated 4th December 2024 sworn by Florence Nyokabi, the Chief Human Resources Officer of Safaricom PLC, the deponent affirmed her role in leading the company's human resources strategy and her authorization to swear the affidavit on behalf of Safaricom PLC. She stated that Safaricom PLC is a publicly listed company with nearly 6,000 employees and is not a state corporation or agency. The Applicant, Nicholas Kamunyu, serves as the Chief Channels Officer and a member of the Senior Leadership Team, overseeing approximately 50% of the company's workforce.
7. The affidavit outlined complaints against the Applicant following a company event held on 26th October 2024, where he was accused of harassment, physical and verbal assault, and use of offensive language. Investigations by Safaricom's Ethics and Compliance Department concluded there were sufficient grounds for disciplinary action. Subsequently, the Applicant was issued a show cause letter dated 11th November 2024, to which he responded, admitting to using vulgar language during the event. The response was deemed unsatisfactory, warranting a disciplinary hearing scheduled for 18th November 2024.
8. The disciplinary hearing was conducted with the Applicant's participation, and he was provided with all necessary documents beforehand. The Disciplinary Committee comprised members selected in accordance with company policy, and the Applicant was aware of their identities and roles. After the hearing, deliberations were conducted in confidence, and the outcome was shared only with the Chief Executive Officer before the Applicant sought court intervention, staying the disciplinary process.
9. The deponent argued that the Applicant misrepresented facts to the court, claiming decisions in letters dated 11th and 14th November 2024 were capable of being quashed, whereas they were merely procedural communications. The Applicant also failed to disclose the existence of internal appeal mechanisms under Safaricom's Disciplinary Policy, which he had not exhausted. The affidavit asserted that the disciplinary process was confidential and conducted in compliance with the policy, and the Applicant's court action was speculative, premature, and an abuse of the court process.



10. The deponent expressed concerns about irreparable harm and uncertainty caused by the stay orders, emphasizing the need for the matter to be resolved urgently to avoid disruption to Safaricom PLC's operations and reputation. The affidavit concluded by urging the court to grant the orders sought in the present application, stating it was in the interests of justice.

Respondent's Written Submissions

11. The Respondent, in their submissions dated 16th December 2024, contends that judicial review is a remedy of last resort, available only after all other possible avenues for resolving a dispute have been exhausted, and is not a substitute for statutory remedies. The Respondent submits that judicial review focuses on the legality and fairness of the decision-making process rather than the merits of the decision itself, emphasizing that administrative bodies must have the opportunity to correct their own errors to avoid unnecessarily burdening the judicial system. Judicial review is characterized as a final safeguard to ensure that public or quasi-judicial bodies act lawfully and fairly.
12. The Respondent argues that the Applicant, Nicholas Kamunyu, has alternative remedies available and has failed to exhaust the internal appeal mechanisms provided under the Safaricom PLC Disciplinary Policy and Procedure, which constitutes a fatal defect in his application. Further, the Applicant neither filed an ordinary claim nor demonstrated exceptional circumstances to excuse him from exhausting these internal mechanisms. The Respondent asserts that there is no decision capable of being quashed, rendering the judicial review proceedings a non-starter.
13. The factual background provided indicates that the Applicant is the Chief Channels Officer at Safaricom PLC and attended an event on 26th October 2024, where complaints of harassment and inappropriate conduct were made against him. Following this, the Applicant was issued a show-cause letter dated 11th November 2024, responded to the allegations, and attended a disciplinary hearing on 18th November 2024. The Respondent notes that the judicial review proceedings were filed before the outcome of these disciplinary proceedings was communicated.
14. The Respondent submits that the *Fair Administrative Action Act*, 2015 applies to the case, emphasizing Section 3 of the Act, which covers both state and non-state agencies. The Respondent contends that the Applicant's reliance on traditional judicial review remedies under the *Law Reform Act* and Order 53 of the Civil Procedure Rules, 2010, is misplaced since Safaricom PLC is a private company and not a state agency. The Respondent's Notice of Motion dated 4th December 2024 invokes the *Fair Administrative Action Act*, seeking to strike out the Applicant's application or set aside the leave granted for certiorari orders.
15. The Respondent outlines their grounds for the application, emphasizing the Applicant's failure to exhaust internal mechanisms under the Disciplinary Policy and the existence of more efficacious remedies through an ordinary claim under the *Employment and Labour Relations Court Act*. They also argue that the show-cause letter and invitation to the disciplinary hearing are not decisions capable of being quashed.
16. The Respondent relies on Section 9(2) of the *Fair Administrative Action Act*, which mandates that internal mechanisms for appeal or review be exhausted before seeking judicial review. This principle, they argue, has been affirmed in various cases, including *Glencore Energy UK Limited vs Commissioners of HMRC* [2017] EWHC 1476, which held that judicial review should only be allowed in exceptional circumstances where alternative remedies are inadequate or inappropriate.
17. The Respondent also cites the Court of Appeal decision in *Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 Others* [2015] eKLR, where it was held that alternative dispute resolution



mechanisms must be exhausted before invoking judicial jurisdiction. The High Court decision in *Adipo v Secretary/CEO Law Society of Kenya & Another* [2024] KEHC 12811 (KLR) is referenced to highlight the obligation of a party seeking to sidestep a statutory mechanism to demonstrate exceptional circumstances and apply for exemption under Section 9(4) of the *Fair Administrative Action Act*.

18. The Respondent further relies on *United Millers Limited v Kenya Bureau of Standards & Others* [2021] KECA 1024 (KLR), where the Court of Appeal upheld the mandatory requirement to exhaust alternative remedies and emphasized that the High Court must decline jurisdiction unless an exemption under Section 9(4) is sought and granted. The Court of Appeal reiterated that failing to revert to internal mechanisms divests the court of jurisdiction to entertain judicial review proceedings, in line with the principles established in *The Owners of Motor Vessel Lilian S*.
19. The Respondent submits that the *Employment Act*, 2007 governs the employer-employee relationship in this case. Additionally, the *Employment and Labour Relations Court Act* and the Employment and Labour Relations Court (Procedure) Rules, 2024 provide the procedural framework for enforcing employee rights.
20. Section 45(7) of the *Employment Act* explicitly prohibits unfair termination. An aggrieved employee may pursue relief through ordinary claims under the Employment and Labour Relations Court (Procedure) Rules, 2024.
21. Rule 7 of the Rules requires a claimant to file a statement outlining the facts, grounds, and issues of the claim. Rule 45 empowers the Court to grant temporary injunctions, even ex parte, to protect an applicant's rights during ongoing processes.
22. The Respondent argues that judicial review is unsuitable for resolving disputes requiring factual determination, such as the interpretation of internal policies and contested events. Instead, such matters are better addressed through the alternative statutory remedies provided by the Employment and Labour Relations Court, as held in *Ndiara Enterprises Ltd v Nairobi City County Government* [2018] eKLR.
23. The Respondent cites *Glencore Energy UK Limited v Commissioners of HMRC* [2017] EWHC 1476, asserting that judicial review is a remedy of last resort. The Court should prioritize statutory procedures, which are better equipped to address fact-intensive disputes. Moreover, judicial review should avoid duplicative efforts and ensure judicial efficiency.
24. The Respondent prays that this Honourable Court decline jurisdiction and strike out the application on these grounds.

Orders of Certiorari

25. The Respondent submits that the notices and disciplinary proceedings in question are not "decisions" capable of being quashed by certiorari. They are procedural steps in the employer's internal process, not final decisions affecting the Applicant's rights.
26. The Court of Appeal in *Republic v Kenya National Examination Council Ex Parte Gathenji* [1996] eKLR held that certiorari can only quash decisions already made, not intermediate steps.
27. Similarly, in *Republic v The Commissioner for Co-operative Development & Others Ex Parte Mwangi* [1990], the Court found that letters or procedural actions without legal finality are not subject to certiorari.



28. The Respondent urges this Court to find that neither the show cause letter, the invitation to the disciplinary hearing, nor the disciplinary proceedings constitute decisions capable of being quashed by certiorari.

Setting Aside Leave

29. The Respondent further submits that leave granted to the Applicant to apply for judicial review should be set aside on the basis of misrepresentation. The Applicant inaccurately framed internal procedural steps as decisions and misled the Court regarding his employment status.
30. The principles for setting aside leave are well-established in cases such as *Republic v Vice Chancellor Moi University* [2018] KEHC 5531 (KLR) and *Geosurvey International LLC v Malindi Municipal Council* [2008] EA 144.
31. The Respondent contends that the stay orders issued create an untenable situation, effectively forcing a continued employment relationship under duress. This undermines the employer's ability to finalize the disciplinary process.
32. Based on these authorities and statutory provisions, the Respondent submits that the Applicant has prematurely invoked the Court's judicial review jurisdiction without exhausting the internal appeal mechanism or seeking exemption under Section 9(4) of the *Fair Administrative Action Act*. Consequently, the Respondent argues that the Court lacks jurisdiction to entertain the application and that the judicial review proceedings should be struck out.

Applicant's Case

33. In a replying affidavit dated 8th January 2025, Nicholas Kamunyu, the Applicant, opposed the Respondent's application dated 4th December 2024 seeking to vacate stay orders granted by the court on 2nd December 2024. He stated that he is the Chief Channels Officer of the Respondent, employed through a letter of appointment dated 3rd May 2021, effective 1st July 2021, and a member of the Senior Leadership Team (SLT), reporting directly to the Chief Executive Officer (CEO).
34. The Applicant averred that he diligently discharged his duties but was issued with a notice to show cause by a letter dated 11th November 2024, alleging breaches of company policies. He claimed the letter was improperly issued by the Chief Human Resources Officer (CHRO) instead of his line manager, contrary to Clause 7.2 of the Respondent's Disciplinary Policy. Despite these irregularities, he responded to the notice on 13th November 2024 after seeking and obtaining an extension.
35. Following his response, the Applicant was invited to a disciplinary hearing via a notice dated 14th November 2024. He alleged that the composition of the disciplinary committee, which included peers from the SLT and individuals directly involved in investigating the allegations, was irregular and violated principles of natural justice, as established in *Ridge v Baldwin* [1964] AC 40. He also cited *Mwangi v ABSA Bank Kenya PLC (Cause E065 of 2023)* [2024] KEELRC 2399 and *Bolo v SBM Bank Limited (Cause 757 of 2019)* [2024] KEELRC 2485, where courts emphasized the need for impartiality and ruled against the inclusion of investigating officers in disciplinary panels.
36. The Applicant stated that the disciplinary process contravened Clause 7.4 of the Respondent's Disciplinary Policy by failing to disclose witnesses or allow cross-examination, and Clause 7.4(v) requiring an independent line manager's participation. He also claimed that irrelevant evidence was introduced during the hearing and procedural irregularities were evident in the transcripts, such as contradictory responses from the CHRO.



37. He filed an application for judicial review on 29th November 2024, leading to the court granting leave and issuing stay orders on 2nd December 2024. He argued that the stay orders were necessary to prevent further prejudice and cited *Republic v National Land Commission & Another Ex Parte Cecilia Chepkoech Leting* [2020] eKLR to emphasize the importance of preserving the substratum of judicial review proceedings.
38. The Applicant contended that the Respondent's application to vacate the stay orders lacked merit and failed to demonstrate irreparable harm as required in *Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge* [1997] eKLR. He noted that disciplinary proceedings against one employee do not impair the operations of a multi-billion-shilling corporation and emphasized the importance of maintaining the stay to uphold his constitutional rights under Articles 47 and 50 of *the Constitution*, which guarantee fair administrative actions and hearings.
39. He concluded by asserting that the balance of convenience favours retaining the stay orders to protect his rights and requested the court to dismiss the Respondent's application with costs, citing *Municipal Council of Mombasa v Republic & Umoja Consultants Ltd* [2002] eKLR for the discretionary nature of judicial review orders aimed at ensuring administrative actions comply with the law.

Written Submissions

40. The Applicant, in his written submissions dated 23rd December 2024, opposes the Respondent's application dated 4th December 2024, which seeks to strike out the Applicant's judicial review application and vacate the stay orders issued by the Honourable Court on 2nd December 2024. The Applicant contends that the stay orders were issued to preserve the integrity of the judicial review proceedings, which address the Applicant's right to fair administrative action under Article 47 of *the Constitution* of Kenya and the *Fair Administrative Action Act*. The Applicant submits that the Respondent's application lacks merit, both procedurally and substantively, and should be dismissed with costs.
41. The Applicant argues that the disciplinary process undertaken by the Respondent violated his constitutional rights under Articles 47 and 50 of *the Constitution*. These violations include the omission of informal engagement between the Applicant and his line manager, as required by the Respondent's disciplinary policy, and the improper issuance of the show-cause letter by the Chief Human Resources Officer (CHRO) instead of the Applicant's line manager, as stipulated in Clause 7.2 of the policy. The Applicant also submits that the composition of the disciplinary committee was biased, including members such as Nicholas Mulila, who was involved in the investigation. This violated the principles of natural justice, particularly the rule against bias, as outlined in *Ridge v. Baldwin* [1964] AC 40. The Applicant further relies on *Mwangi v. ABSA Bank Kenya PLC (Cause E065 of 2023)* [2024] KEELRC 2399 and *Bolo v. SBM Bank Limited (Cause 757 of 2019)* [2024] KEELRC 2485, where courts held that the inclusion of investigators in disciplinary panels compromised fairness.
42. The Applicant submits that the Respondent failed to disclose witnesses or allow their cross-examination, contrary to Article 50 of *the Constitution* and Clause 7.4(iii) of the Respondent's policy. The process also violated Clause 7.4(v) of the policy by failing to include an independent line manager, further undermining procedural propriety. Additionally, the CHRO acted as both the complainant and facilitator of the disciplinary process, creating a conflict of interest that contravened principles of natural justice. The inclusion of the investigating officer in the disciplinary panel compounded the procedural flaws, as highlighted in *Republic v. Kenya National Examinations Council Ex Parte Geoffrey Gathenji Njoroge* [1997] eKLR, which emphasizes the need for impartiality in administrative



- actions. The Applicant also notes that reliance on irrelevant evidence and the denial of an opportunity to present counter-witnesses prejudiced his defense and violated his right to a fair hearing.
43. The Applicant contends that the Respondent has failed to meet the conditions for vacating the stay orders. Citing *Kenya Shell Limited v. Kibiru & Another* [1986] KLR 410 and *Kenya National Examinations Council v. Republic Ex Parte Geoffrey Gathenji Njoroge* [1997] eKLR, the Applicant submits that the orders do not cause significant prejudice to the Respondent, compliance with constitutional standards is critical, and there is no irreparable harm demonstrated by the Respondent. The Applicant further argues that internal appeal mechanisms are inadequate to address the procedural irregularities and bias already exhibited, as noted in *Geoffrey Muthinja v. Samuel Muguna Henry* [2015] eKLR. The *Fair Administrative Action Act* also permits exceptions to the exhaustion doctrine where justice necessitates immediate intervention.
 44. The Applicant submits that the Respondent's actions constitute administrative actions subject to judicial review, as affirmed in *Municipal Council of Mombasa v. Republic & Umoja Consultants Ltd* [2002] eKLR. Judicial review is the proper avenue to challenge the legality and fairness of administrative actions, including procedural steps leading to final decisions. The Applicant contends that the stay orders were necessary to prevent an unlawful process from being concluded, citing *Republic v. National Land Commission & Another Ex Parte Cecilia Chepkoech Leting* [2020] eKLR, where the court held that stay orders preserve the substratum of judicial review proceedings.
 45. The Applicant argues that the application for leave to apply for judicial review orders is merited. Under Order 53 Rule 1 of the Civil Procedure Rules, leave is granted where a prima facie case of procedural unfairness or unlawfulness is demonstrated, as highlighted in *Republic v. Kenya Revenue Authority Ex Parte Yaya Towers Limited* [2008] eKLR. The Applicant also relies on *Republic v. National Environmental Management Authority Ex Parte Sound Equipment Limited* [2011] eKLR, which underscores that public interest considerations support the granting of leave in cases involving adherence to principles of natural justice.
 46. In conclusion, the Applicant submits that the Respondent's application should be dismissed with costs, the stay orders should remain in place to safeguard the Applicant's constitutional rights, and the application for leave to apply for judicial review orders should be upheld. The Applicant emphasizes that the stay orders are necessary to ensure compliance with constitutional and statutory safeguards, preserving the integrity of the disciplinary process and the judicial review proceedings.
 47. I have examined all the averments and submissions of the parties herein. The main contention by the applicant is that the exparte applicant did not exhaust internal disciplinary and appeal processes before moving to this court.
 48. The applicant also submitted that Judicial Review is a remedy to deal with fairness and legality of a process and not merit of the same.
 49. Indeed Judicial Review application deal with processes and not merit. The exparte applicant approached this court on that same issue of the illegality and unfairness of the disciplinary process. The court on considering the application established merit on the face of it and allowed the applicant to institute judicial review proceedings.
 50. This Court issued stay orders. In order to preserve the integrity of the judicial review process without going into the merits of the disciplinary process this Court was convinced on the face of the record that the process warranted review.



51. To vacate the interim orders granted would render the entire judicial review process a nullity and would be tantamount to giving and taking away with the same hand by destroying the substratum of the entire application.
52. I find the application by the applicant is not merited and I disallow it accordingly. Costs in the judicial review application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF JANUARY, 2025.

HELLEN WASILWA

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 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.

A signed copy will be availed to each party upon payment of Court fees.

HELLEN WASILWA

JUDGE

