



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Munga v Kenya Maritime Authority & another (Cause E110 of 2024)  
[2025] KEELRC 1013 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1013 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E110 OF 2024  
K OCHARO, J  
MARCH 27, 2025**

**BETWEEN**

**ENGINEER MARTIN DZOMBO MUNGA ..... CLAIMANT**

**AND**

**KENYA MARITIME AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY, MINISTRY OF MINING BLUE ECONOMY AND  
MARITIME AFFAIRS ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Statement of Claim dated 11<sup>th</sup> November 2024, the Claimant sued the Respondents seeking the following reliefs;
  - i. A declaration that the 1<sup>st</sup> Respondent's actions complained of constitute a violation of Articles 10, 41, 47, & 232 of *the Constitution* and section 46 of the *Employment Act*.
  - ii. A permanent injunction restraining the 1<sup>st</sup> Respondent, its agents or servants from taking any disciplinary action against the Claimant on the basis of the events described in the 1<sup>st</sup> Respondent's letters dated 20<sup>th</sup> September 2024 and 23<sup>rd</sup> October 2024.
  - iii. There be an order of certiorari to call to this court the 1<sup>st</sup> Respondent's decisions contained in the letters dated 20<sup>th</sup> September 2024 and 23<sup>rd</sup> October 2024 and the notice to staff dated 20<sup>th</sup> September 2024 and to quash all those decisions.
  - iv. General damages for the violation of the Claimant's rights aforesaid.
  - v. The interested party be directed to within 120 days from the date of the judgement, investigate the affairs of the 1<sup>st</sup> Respondent in line with Section 18 of Cap 446 and if any person is found



culpable of any violations of the law, to mete out the sanctions authorised by section 19[1] of Cap 446.

- vi. The 2<sup>nd</sup> Respondent be directed to discharge its statutory duties of oversight over the 1<sup>st</sup> Respondent particularly based on the findings of the investigations by the 1<sup>st</sup> Interested Party.
  - vii. The 1<sup>st</sup> Interested Party and the 2<sup>nd</sup> Respondent be directed to file their reports on compliance with the orders above within ninety [90] days from the date of the 1<sup>st</sup> Interested Party's report.
  - viii. Such other relief as the Court may deem appropriate in the circumstances of the case.
  - ix. Costs of the suit to be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.
2. The Respondents resisted the Claimant's claim, denying his cause of action, and entitlement to the reliefs sought.
  3. Owing to its nature, this Court directed that this matter be heard on a priority basis, and indeed it was, with both the Claimant's and Respondent's cases taken on 4<sup>th</sup> March 2025.
  4. After hearing the parties on their respective cases, this Court directed them to file written submissions. They adhered to the directions. Their submissions are on record.

### **The Claimant's case**

5. It was the Claimant's case that he first came into employment as the 1<sup>st</sup> Respondent's Director General effective 15<sup>th</sup> December 2023, under a fixed term contract of three years.
6. Barely ten months into his employment, the employment relationship between him and the 1<sup>st</sup> Respondent got into headwinds. By a letter dated 20<sup>th</sup> September 2024, the 1<sup>st</sup> Chairperson Respondent's Board of Directors conveyed the Board's decision to send him on compulsory leave. Subsequently, by another letter of the same date, the Chairperson conveyed the Board's decision to appoint Eng. Julius Koech as the Director General in an acting capacity with immediate effect, to the employees of the 1<sup>st</sup> Respondent.
7. Aggrieved by this action by the 1<sup>st</sup> Respondent, the Claimant initiated a constitutional litigation against them, vide Mombasa ELRC Petition No. E 014 of 2024, challenging the action. This aroused the 1<sup>st</sup> Respondent to withdraw the compulsory leave through their letter dated 18<sup>th</sup> October 2024 and interdict him under the letter dated 23<sup>rd</sup> October 2024, contemporaneously serving him with a notice to show cause of the even date. In his view, the 1<sup>st</sup> Respondent's action was retaliatory.
8. The letter dated 20<sup>th</sup> September 2024, the notice to staff dated 20<sup>th</sup> September 2024, the interdiction letter and the notice to show cause, as well as the decision they purport to convey, were unlawful and a violation of *the Constitution* and statute law.
9. Soon after his appointment and completion of the administrative process, such as being an authorized bank signatory, he received numerous requests to approve payments. The purpose of the payments was never clear to him. Some of those requests, unfortunately, came from the very people who were supposed to be protecting public funds. His refusal to authorize such payments very often didn't sit well with the 1<sup>st</sup> Respondent's Board. His insistence on compliance with the law birthed an orchestrated move to pump him out from his position, with the Respondents hoping to give the position to somebody they would manipulate and control.
10. It was his further case that under clause 4.4.9 of the 1<sup>st</sup> Respondent's Human Resource Manual, acting appointments are not to be made unless the substantive holder of the office is going to be away for



- thirty [30] days. The 1<sup>st</sup> Respondent had seemingly predetermined that he will be away for more than thirty days, whatever the case.
11. Under Clause 4.4.10 of the HR Manual, appointments in acting capacity are permitted based on a recommendation and only if the law stipulates that the functions of that office can only be discharged by a person appointed in acting capacity. The appointment of Engineer Julius Koech was without any recommendation to, and consideration of the same by the Board.
  12. The letter dated 20<sup>th</sup> September 2024 referred to a Board meeting held on 20<sup>th</sup> September 2024 at Pride Inn Flamingo Hotel. Under paragraph 3[4] of the Second Schedule to Cap 370, Board meetings are held after notice of not less than fourteen [14] days. No such notice was issued.
  13. Additionally, under Section 8[1][c] of Cap 446 Laws of Kenya, Board meetings must be held at the 1<sup>st</sup> Respondent's offices. If they are to happen elsewhere, the approval of the State Corporations Advisory Committee must be obtained. Therefore, the meeting of 20<sup>th</sup> September 2024 was held contrary to the law and cannot give rise to any lawful resolution.
  14. The letter dated 20<sup>th</sup> September 2024 levelled two accusations against him, thus, over-expenditure by KShs. 321, 481,872.00 in the 2023/2024 financial year, and failure to appraise a total of eighty [80] employees of the 1<sup>st</sup> Respondent during the 2023/2024 financial year.
  15. The Claimant further stated that Clause 11.4.2 of the 1<sup>st</sup> Respondent's HR Manual binds it to ensure its disciplinary decisions are based upon logical proof or evidential material and are expeditious, efficient, lawful, reasonable and procedurally fair.
  16. The allegation that he allowed overspending under his watch was unreasonable and actuated by malice, for the following reasons;
    - a. He assumed the functions of his office in March 2024. It is illogical for him to be blamed for the expenditure of over 12 months when he only presided over the 1<sup>st</sup> Respondent's expenditure for approximately three months.
    - b. The Head of Finance who had been with the 1<sup>st</sup> Respondent before his appointment, explained each item where there was overspending.
    - c. Part of the overspend, being KShs. 46, 487,096.00 was because of the 1<sup>st</sup> Respondent's Board, and its various committees, holding more sittings than permitted. The same Board alleging to be aggrieved by the expenditure.
    - d. Another KShs. 54, 345,017 was spent on items such as campaigns for the IMO Secretary-General position and IMO Council meeting attendances, all of which are events that happened in 2023.
    - e. A further KShs. 54,183,002.00 was spent on foreign travel and accommodation to attend various IMO Assembly or Council meetings and campaign for Kenya's re-election bid to the IMO Council. Again, these events happened in 2023 or early 2024 before he assumed control of the 1<sup>st</sup> Respondent's budget.
  17. The allegations that he failed to appraise the 1<sup>st</sup> Respondent's employees are unreasonable and malicious. The duty to appraise the performance of all the employees of the 1<sup>st</sup> Respondent doesn't fall on him. He only supervises holders of four positions [Maritime safety, Maritime Education Training & Labour, Maritime Trade and Development, and Corporate Services and Regional Administration]. All other positions, save for Corporation Secretary & Legal Services & Internal Audit & Risk, who report directly to the Board, are appraised by their respective supervisors per the procedure set out in



- Clause 8.11 of the 1<sup>st</sup> Respondent's Human Resource Manual. His role was limited to endorsing the end-of-year appraisals, which could have been approved by the respective Heads of Department.
18. The 1<sup>st</sup> Respondent's Human Resource Manual does not provide for compulsory leave. Moreover, the compulsory leave was for an indeterminate period and didn't disclose his entitlements, if any, during that indefinite period.
  19. He further asserted that the 1<sup>st</sup> Respondent affronted the national values of the rule of law, good governance, integrity, transparency, and accountability when it deliberately made untrue allegations against him, convened meetings contrary to the law and meted out disciplinary action not provided for in its Human Resource Manual. Further, the 1<sup>st</sup> Respondent's actions were violative of the provisions of Article 232[1], which sets out the principles of public service.
  20. Article 41 of *the Constitution* guarantees him the right to fair labour practices. The 1<sup>st</sup> Respondent violated this right by victimising him for refusing to give in to demands to approve suspect transactions and to send him on indefinite compulsory leave. Contrary to section 46[h] of the *Employment Act*, the 1<sup>st</sup> Respondent undertook the retaliatory action of sending him for compulsory leave simply because he had decided to challenge its action[s] in court.
  21. Cross-examined by Counsel for the Respondents, the Claimant testified that he was appointed on 15<sup>th</sup> December 2023. His duties and responsibilities were set out under clause 3 of the letter of appointment. He was in charge of the day-to-day operations of the 1<sup>st</sup> Respondent and its employees.
  22. In his role, he was serving as a Public servant, and as such, the *Public Service Commission Act* applied to him. It equally applied to the 1<sup>st</sup> Respondent.
  23. He further testified that though he has alleged that he received requests for approval of payments whose purpose was less than clear to him, he hasn't placed any document before this court to demonstrate that the requests were made. Additionally, there aren't any documents before this Court from which it can be discerned that he declined to approve the payments.
  24. He admitted that the 1<sup>st</sup> Respondent Authority will expend only upon his approval.
  25. The document captioned Itemised Variance Explanation Notes, [pages 81-90, Claimant's bundle of documents] was basically an approved budget for 2023-2024. Among the items thereon are expenditures that he approved, for instance, the allowances on page 83. Some of the expenditures were incurred during the time of his service.
  26. Referred to the items under the head, Travelling, accommodation, and Foreign Travels [ see page 86], the Claimant stated that he couldn't be sure whether there were expenditures incurred during his tenure.
  27. The letter dated 11<sup>th</sup> March 2024 addressed to the High Commissioner, London, sought travel clearance for the Authority's staff to attend a conference outside the Country. He signed this letter, and the other dated 4<sup>th</sup> March 2020, wherein he had requested authorization to add more members to the travel list.
  28. The third last item on page 86 of the Claimant's bundle of documents relates to an expenditure for the IMO meeting. The expenditure was part of the KShs. 54, 183,020. However, that isn't the expenditure he mentions in paragraph 24[e] of the affidavit in support of his notice of motion herein.
  29. He appraised employees of the Respondent as was expected of him. The 1<sup>st</sup> Respondent's own exhibit [ see page 54 of its documents] is a testament to this. He appraised 134 employees out of 143.



30. In exercising their disciplinary power, the Authority's Board of Management is guided and bound by the stipulations of the [Public Service Commission Act](#). The 1<sup>st</sup> Respondent's Human Resource policy did bear a provision bestowing power on the Board to send him on compulsory leave, however, he is aware that the Public Service Commission had one that allowed the action.
31. In his view, the suspension was indefinite. It didn't have timelines. The suspension letter indicated that the suspension was until further notice. It, however, indicated that the suspension was pending an investigatory audit.
32. He admitted that he attended the Board meeting of 27<sup>th</sup> August 2024. As reflected in the minutes of the meeting, the Board resolved to have the next meeting on 18<sup>th</sup> -24<sup>th</sup> September 2024.
33. By the letter dated 2<sup>nd</sup> August 2024, the 1<sup>st</sup> Respondent informed the Permanent Secretary that the Board was to hold a meeting between 26<sup>th</sup> -30<sup>th</sup> August 2024, and sought permission for the holding of the same as the Board had surpassed their quota of six meetings per year. Through his letter dated 5<sup>th</sup> August 2024, addressed to him, the Permanent Secretary authorized the holding of the meeting as requested. As a result, approval was granted for the Board to hold its meeting outside the 1<sup>st</sup> Respondent's premises.
34. The show cause letter that was served on him had various accusations levelled against him, however, he only made two of them the subject matter of the instant suit. But that shouldn't be understood to mean that he was by conduct admitting the other accusations.
35. He responded to the show cause letter. In the response, he also requested to be furnished with some documents. He was only provided with some of the documents.
36. An invitation letter for a disciplinary hearing that was slated for 22<sup>nd</sup> August 2014, was sent to him under cover

### **The Respondents' Case.**

37. The Respondents presented three witnesses, Jessica Mbae, the 1<sup>st</sup> Respondent's Secretary & Director Legal Services [RW1], and Julius Odhiambo, the 1<sup>st</sup> Respondent's acting Director Finance & ICT [RW2], and Henry Musau[RW3] to testify on their behalf.
38. RW1 adopted her replying affidavit herein, sworn on 19<sup>th</sup> November 2024, and a further witness statement dated 24<sup>th</sup> January 2025, as her evidence in chief. She tendered as the Respondents' documentary evidence, the documents annexed to the affidavit, and those filed under a list of documents dated 20<sup>th</sup> November 2024.
39. She stated that by a letter dated 2<sup>nd</sup> August 2024, 1<sup>st</sup> Respondent sought approval from the Principal Secretary, State Department of Shipping and Maritime Affairs, to hold a Board Retreat from 26<sup>th</sup> to 30<sup>th</sup> August 2024 and a Board Meeting during the retreat.
40. By a letter dated 5<sup>th</sup> August 2024, the Principal Secretary, State Department of Shipping and Maritime Affairs, approved the holding of a Board Retreat and a Board Meeting during the Retreat.
41. She further stated that on 15<sup>th</sup> August 2024, the Principal Secretary, State Department of Shipping and Maritime Affairs, wrote and informed the board through the Claimant, that the ground-breaking ceremony for the Kisumu Maritime Regional Coordination Centre would take place on Tuesday, 20<sup>th</sup> August 2024.



42. During an e-board training meeting for Board Members held on August 27th, 2024, the Board resolved to postpone the retreat and Special Board meeting that was to be held in August, to September 18th—20th, 2024, to enable Board members and Management to organize and attend the ground-breaking ceremony on August 31st, 2024.
43. The ground-breaking ceremony had been postponed to the 31<sup>st</sup> of August 2024 to accommodate the President of the Republic of Kenya, who was scheduled to officiate the ground-breaking, thus necessitating the postponement of the Retreat and Board Meeting.
44. It was further stated that by a letter dated 9<sup>th</sup> September 2024, members of the 1<sup>st</sup> Respondent's Board were notified of, and invited to, attend a Board retreat and Board Meeting slated for 18<sup>th</sup> to 19<sup>th</sup> and 20<sup>th</sup> September 2024, respectively. The Board Retreat was subsequently held from 18<sup>th</sup> to 20<sup>th</sup> September 2024.
45. During the meeting, the Board considered and deliberated on the Annual Financial Report and Financial Statements for the year 2023/2024 and Performance Appraisal Report for the year 2023/2024 and established the following:
  - a. There was an over-expenditure by the Authority of Kshs. 321,481,872.00 against the *Public Finance Management Act*.
  - b. only sixty-four (64) employees were appraised out of one hundred and forty-four (144) total staff, being 31% of the Authority staff, raising concerns of a lack of leadership from the Claimant.
46. As a result, the Board resolved to send him on compulsory leave with immediate effect, to allow for a special audit to be conducted by the Director, Internal Audit and reports tabled to the Board through the next Human Resource Environment and Social Governance Committee and Audit and Risk Assurance Committee Meetings to be held in October, 2024
47. The Board further resolved to appoint the Director, Maritime Safety, Eng. Julius Koech as the Acting Director General effective from 20<sup>th</sup> September, 2024 until further direction of the Board after the Committee and full Board Meeting in October, 2024.
48. The special audit reports were prepared and tabled at the Human Resource Environment and Social Governance Committee meeting on 9<sup>th</sup> October 2024 and the Audit and Risk Assurance Committee on 8<sup>th</sup> October 2024. Thereafter, the reports were tabled by the Committees of the Board at the full Board Meeting held on 23<sup>rd</sup> October, 2024, for its consideration.
49. RW1 further stated that following deliberations of the Full Board on 23<sup>rd</sup> October 2024, a resolution was reached that a Notice to Show Cause be issued to the Claimant for him to Show Cause why disciplinary action should not be taken against him. The Board further resolved that the Claimant be interdicted. The Claimant was issued with a show because letter dated 23<sup>rd</sup> October 2024, in line with the Board Resolution.
50. By a letter of the same date, the Claimant was informed of the Board's decision to interdict him.
51. By his letter dated 13<sup>th</sup> November 2024, the Claimant responded to the Notice requiring him to show cause why disciplinary action should not be taken against him.
52. Subsequently, the Board considered the Claimant's response to the show cause letter dated 13<sup>th</sup> November 2024 during its Special Board Meeting held on 14<sup>th</sup> November 2014 and reached a decision



- to invite him to a disciplinary hearing on 22<sup>nd</sup> November 2024. The Claimant was informed of this through a letter dated 14<sup>th</sup> November 2024, which was sent to him via email on 15<sup>th</sup> November 2024.
53. The Respondents did not violate any of the Claimant's rights during the process, the subject matter of this suit, to warrant interference with the disciplinary process by the Court.
  54. The Claimant had a right of appeal to the Public Service Commission from any decision of the Kenya Maritime Authority Board, pursuant to Section 74 of the *Public Service Commission Act*. As such, the instant suit has been filed contrary to the doctrine of exhaustion and ought to be dismissed.
  55. Cross-examined by Counsel for the Claimant, the witness stated that it was the Claimant's responsibility to call for Board meetings, while it was her responsibility to issue notices. A notice must be issued for every Board meeting. For the meeting held on 20<sup>th</sup> September 2024, she issued a notice.
  56. Board meetings are supposed to be held within the 1<sup>st</sup> Respondent's premises. However, the foretasted meeting wasn't. It was held outside the premises, with the sought and granted approval of the Permanent Secretary. The approval was communicated through his letter dated 2<sup>nd</sup> August 2024. The approval was sought pursuant to Circular No. 208-OP/CAB.9/1A.
  57. Under the circular, Board retreats are supposed to be approved by the relevant Cabinet Secretary. The 1<sup>st</sup> Respondent didn't have approval from the Cabinet Secretary, but from the Permanent Secretary. The letter dated 5<sup>th</sup> August 2024 was very specific regarding the dates for the retreat and meeting, 26<sup>th</sup> -30<sup>th</sup> August 2024. The 1<sup>st</sup> Respondent didn't have a specific approval for the dates 18<sup>th</sup> -20<sup>th</sup> September 2024.
  58. The programme for the meeting indicated that on 20<sup>th</sup> September 2024, the agenda for the day was "Human Resource matters & Succession planning. Deliberation on Finance matters hadn't been slated as an item for that day. However, on that day, the Board discussed finance matters. The Board decided to send the Claimant on compulsory leave. 1<sup>st</sup> Respondent's Manual does not provide for compulsory leave.
  59. The compulsory leave letter identified only two allegations against the Claimant. After this letter, the 1<sup>st</sup> Respondent issued the Claimant with two other letters, the interdiction letter, and the show cause letter.
  60. The show cause letter did set forth seven allegations against the Claimant, among them that he had failed to appraise the 1<sup>st</sup> Respondent's employees. The Board paper on performance appraisal shows that 93% [133 of 144] of the employees had been appraised.
  61. The Claimant was also accused of having overseen an over expenditure to the tune of KShs. 321, 481, 872. During the Board meeting, a financial paper was presented. Explanations were given regarding the expenditure. The alleged over expenditure includes the amount indicated under "amortization" - KShs. 76,305, 084. Amortization isn't an actual expenditure.
  62. She asserted that the accusation of mismanagement of funds was accurate.
  63. The Claimant requested for documents in support of the approvals of expenditure of two million. He was provided with the same. However, the Respondents have not presented to this Court any document to demonstrate that, indeed, the documents were availed.
  64. The Claimant was accused of disclosing confidential information. The information the 1<sup>st</sup> Respondent was referring to was the Board Paper that he filed herein.
  65. She admitted that in the instant proceedings, she has filed documents marked "confidential".



66. In her evidence under re-examination, the witness testified that she issued a notice both for the retreat and the Board meeting that were slated for the 20<sup>th</sup> of September 2024.
67. The request to the Permanent Secretary for approval was made to him, because he is in charge of the administrative matters of the Ministry. The approval was for the dates, 26- 30th August 2024. However, after the approval, the 1<sup>st</sup> Respondent received a letter informing them of the presidential function that was slated for 31<sup>st</sup> August 2024. The Board made and resolved to reschedule the retreat and meeting to 18<sup>th</sup> – 20<sup>th</sup> September 2024.
68. In the meeting, several resolutions were passed, among them, sending the Claimant on compulsory leave, conducting a special audit regarding the financial statement and recruitment of staff. The reports were presented to the Board in the meeting of the 23<sup>rd</sup> October 2024. This culminated in the show-cause letter.
69. RW2 adopted his witness statement dated 24<sup>th</sup> February 2025 as his evidence in chief.
70. Cross-examined by Counsel for the Claimant, the witness stated that his role included recommending for payments, but didn't extend to authorisation of payments. Further, he could advise on available balances.
71. The 1<sup>st</sup> Respondent has an enterprise resource system, through which all payments are made. His department inputs all approved expenditures into the system.
72. The witness further stated that he made a financial report to the Board on the 18<sup>th</sup> September 2024. The report indicated an over expenditure of KShs. 321, 481,872. He explained the expenditure, which, in his view, was reasonable.
73. He further stated that, though in his witness statement he has indicated that the Claimant approved expenditure as from November 2023, the true position is that he came into the employment of the 1<sup>st</sup> Respondent on 15<sup>th</sup> December 2022.
74. In his evidence in re-examination, he stated that the sum KShs. 321, 481,000 was an expenditure for the whole financial year. Part of the amount was expenditure approved by the Claimant.
75. RW3 adopted his witness statement dated 24<sup>th</sup> January 2025, as his evidence in chief.
76. In his evidence under cross-examination, the witness stated that he prepared a Board paper dated 19<sup>th</sup> September 2024. Shown the Board paper presented by the Respondent as evidence, the witness stated that he cannot verify that the signature on it is his. He admitted that according to the paper, 133 employees out of 144 were appraised. The figures are untrue.

### **Analysis and determination**

77. I have carefully considered the pleadings by the parties herein, their respective evidence, and submissions by their Counsels, and the following principal issues emerge for determination;
  - i. Whether this Court should stop the disciplinary process that was initiated by the 1<sup>st</sup> Respondent against the Claimant.
  - ii. Who should bear the costs of this suit?
78. The legislation on unfair termination and entrenchment of employment rights in *the Constitution* represents a major incursion into the common law, limiting the employer's otherwise open-ended power to discipline an employee, bring the contract of employment to an end without the need



for substantive justification, and imposing general standards for procedural fairness. It is upon this legislative and constitutional incursion that courts have, in exceptional cases, exercised their jurisdiction to interdict any unfair action, including incomplete disciplinary proceedings.

79. As regards the circumstances under which the judicial intervention can be exercised and the extent of interference, in my view, it is not appropriate and achievable to set an exhaustive list. It should be left to the Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would be whether failure to intervene would lead to a grave injustice or whether justice might be attained by other means.

80. In *Aviation and Allied Workers Union v Kenya Airways Limited* [2012] eKLR, the court stated;

“..... Thus, similarly, this court would be reluctant to involve itself in a disciplinary process commenced by the employer unless, in an appropriate case, it is established that the disciplinary process has been commenced or is continuing unfairly. The intervention in the disciplinary process by employers will be entertained by the court rarely and in clear cases where the process is likely to result in unfair imposition of punishment against the employee. The Court will intervene in an administrative disciplinary procedure if it is established that the procedure relied on by the employer offends fairness or due process by not upholding the rules of natural justice, or, if the procedure is in clear breach of the agreed or legislated or employer’s prescribed applicable policy or standards, or, if the disciplinary procedure were to continue it would result into manifest injustice in view of the circumstances of the case. The court will normally not intervene if it is established that there exist mechanisms between the employer and the employee such as appeal or revision that the employee would invoke internally to remedy the dissatisfaction that would otherwise justify the court’s intervention and, the employee has not exhausted such internal mechanisms.”

81. In the case of *Geoffrey Mwororia v Water Resources Management Authority & 2 Others* [2015] KEELRC 1124 [KLR], cited by Counsel for the Claimant, the Court held;

“The court will sparingly interfere in the employer’s entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere the applicant must show that the employer is proceeding in a manner a manner that is in contravention of the provision of *the Constitution* or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer’s internal process.”

82. The Claimant contended that the process leading to the 1<sup>st</sup> Respondent’s decision to place him under compulsory leave, issuance of a show cause letter to him, his interdiction, and disciplinary proceedings shall be undertaken against him were afflicted by illegality, as;

- i. The Board meeting whereat the decision was made was held contrary to the clear and mandatory provisions of section of the *State Corporations Act*, which required of the Board to hold the meeting at the 1<sup>st</sup> Respondent’s offices, and that if the meeting had to be held outside then an approval for it was to be obtained from the State Corporations Advisory Committee. The approval wasn’t sought. As such, the deliberations and the decisions of the Board were null and void.



83. Section 8 [c] of the *State Corporations Act*, Cap 446, Laws of Kenya, provides;

“No meeting of a Board shall be held at any place other than the registered or principal office of the state corporation except with the approval of the committee.”

The Interpretation section of the Act defines committee to mean the State Corporations Advisory Committee established under section 27 of the Act.

84. There can be no doubt, therefore, that there is a statutory meeting requirement as regards the place of meeting. The question that then springs up is, what is the consequence of non-adherence to the requirement? The Claimant’s Counsel suggests that it invalidates any deliberations and resolutions made in the meeting.

85. In my view, without underestimating the purpose for which the requirement exists, ensuring prudent use of public resources, accountability, and transparency, Counsel’s submission isn’t convincing. The provision doesn’t present the consequence of non-adherence, as invalidity of the transactions of any meeting held as such. If the legislature intended that it be, they could have expressly stated so in the Act.

86. It is my further view that an interpretation such as Claimant’s Counsel suggests will lead to absurdity. It means that Board meetings held by video or call conference or any other means of communication approved by the Board, provided that all members have been given prior notification and they can communicate with each other simultaneously, would be invalid. Such an interpretation could ignore technological advancement in society and its place in ordering the daily operations of entities.

87. Deliberations and resolutions of a Board meeting held with non-adherence to the place of meeting requirement can only be invalidated if it is demonstrated that the holding of the same was inspired by ill faith, malice, and to further a prior identified illegal act.

88. However, if it can be demonstrated that non-adherence to the requirement has led to a breach of the Constitutional principle of prudent use of public resources, and thus the Corporation has suffered loss, the Board members may be held to suffer liability to the extent of the loss, for instance by surcharging them.

## **II. The approval sought from the Principal Secretary couldn’t override the requirement for approval from the Committee.**

89. There is no dispute that there was an approval sought from, and granted by the Principal Secretary pursuant to a ministerial circular. In my view, ministerial circulars have a binding effect on those to whom they apply. More so, considering that normally they are issued pursuant to statutory and or constitutional authority, and in a bid to foster adherence to policy, statutory, and or constitutional requirements by public officers, state officers, state organs, and persons.

90. As such, I hold that the seeking of approval from the Principal Secretary wasn’t off the mark.

91. The Claimant’s Counsel submitted that in any event, the circular requires that the Cabinet Secretary approve himself. I agree with the submissions by Counsel for the Respondent that this submission is ignorant of the stipulations of Article 155[2] of *the Constitution* of Kenya which provides that, “Each State department shall be under the administration of a principal secretary.” It is clear from this provision that the day today running of a State Department is the responsibility of the Principal Secretary, not the Cabinet Secretary.

92. I am unpersuaded that where a requisite approval has been sought and granted for holding of a meeting, but for one or other valid reason[s], it is adjourned and rescheduled for another date in the presence of



the Board members, there could be a mandatory need to apply and get a further approval. In my view, such insistence doesn't find a foundation in law, nor align with the principle, prudent use of resources, inclusive, the precious public service time.

### **III. The requisite notice was not issued for the Board meeting.**

93. I have considered the chronology of the events preceding the subject Board meeting, as elaborated in the evidence of the 1<sup>st</sup> Respondent's witness, and hold that there was sufficient and proper notice issued for the Board meeting.
94. The Claimant asserted that the accusations against him lack substance and therefore, it could be gravely unfair to allow the disciplinary process to continue against him.
95. From the onset, it is imperative to restate that the notice to show cause letter issued against the Claimant bore more than three accusations against him. Critically considering his pleadings, evidence, and submissions, it is clear that only three have been made a subject in the instant suit. Therefore, even if I were to find that the three accusations lack substance, this Court cannot have a basis to interdict the disciplinary process wholly, absent any other reason to fully interdict.
96. I have carefully considered the evidence of RW3, more specifically that under cross-examination, and the fact that in the evidence, he distanced himself from the Board paper, regarding the performance appraisal. The paper was the substratum of the accusation, yet it clearly doesn't support the charge, as correctly admitted by the witness in his evidence under cross-examination. The 1<sup>st</sup> Respondent didn't place any evidence before me to demonstrate the alleged inadequacy of the Claimant regarding leadership in performance management processes, otherwise than the Board paper, which gives a contrary picture of the Claimant.
97. It is manifestly unfair, and contrary to the implied duty of confidence and trust, for an employer to accuse an employee of things unreasonably, and for which they have no evidence in support or evidence that does not support that accusation. That would amount to abuse of the employer's prerogative, which a court must stymie.
98. In a bid to seek justice in this matter, the Claimant placed before the Court the Board paper mentioned above, to illustrate how gravely unfair some of the accusations against him were, and that on that basis, the 1<sup>st</sup> Respondent should be restrained from proceeding with the disciplinary proceedings. The 1<sup>st</sup> Respondent held that this was a breach of confidentiality.
99. With great respect, the accusation is nonsensical. It is not alleged that he unlawfully obtained the document. In fact, this could be a document he had access to in his capacity as the Managing Director of the 1<sup>st</sup> Respondent. Further, this is the same document that RW3 has run away from.
100. I see the 1<sup>st</sup> Respondent's decision to make the Claimant's act of placing the document before the court a ground for disciplinary action, in the absence of an assertion that the document was unlawfully obtained, and that it was placed before the court maliciously, an unreasonable decision, and oppressive to the Claimant's pursuit for justice, contrary to the stipulations of Section 46 of the *Employment Act*.
101. By reason of the foregoing premises, I am persuaded that the two counts lacked substance; as such, the court cannot allow the disciplinary proceedings to proceed on their account.
102. Lastly, the Claimant was accused of overseeing an over expenditure in the sum mentioned hereinabove. It is not in dispute that in his capacity, he was in charge of the approval of the 1<sup>st</sup> Respondent's expenditure. In my view, a person in charge of approving expenditure must ensure that the entity for which he works, operates within the approved budget. The Claimant contended that the over



expenditure he was being accused of related to a period when he wasn't in the employment of the 1<sup>st</sup> Respondent. However, during cross-examination, he admitted that part of the over expenditure occurred during his tenure.

103. Given the admission, justice must be balanced here. The 1<sup>st</sup> Respondent's disciplinary prerogative over the Claimant on this count cannot be fully interdicted. The justice this matter demands that the process continue, but conditionally. The conditions shall be set out hereinafter.
104. The tenets of natural demand that an accused be accorded a fair hearing. The right, among other things, embodies an accused's entitlement to documents or materials relevant to the matter, made available to him in advance of the hearing. This Court has not lost sight of the fact that the Claimant asked for documents relevant to the charge of over expenditure to enable him to prepare for his defence, and his assertion that they were not availed notwithstanding the request.
105. The Respondents baldly asserted that the documents were given to the Claimant. However, pressed to show when and how, they failed to.
106. I am convinced that the Claimant was not furnished with the documents.

#### **Is the Claimant entitled to the Reliefs sought?**

107. The Claimant asserted that the Respondents breached his constitutional rights, sought a declaration to the effect, and damages for the breach. In light of the analysis and findings hereinabove, and considering the Claimant's evidence before this court, which didn't in any satisfactory manner speak to the rights and the alleged violation, I am unable to find that the declaration and relief for general damages are entitled.
108. Further, given the foregoing premises, this court concludes that the Claimant is entitled to a partial stoppage of the disciplinary proceedings already initiated against him.
109. In the upshot, the Claimant's case succeeds to a very limited extent, thus;
  - a. The 1<sup>st</sup> Respondent is interdicted from continuing with the disciplinary proceedings against him, on the two charges of;Lack of leadership in performance appraisal of staff for FY 2023/2024.Disclosure of confidential information.
  - b. Disciplinary proceedings on the charge of mismanagement of funds, to proceed only upon the 1<sup>st</sup> Respondent providing the Claimant with better particulars, regarding over expenditure [if any] during his time of service, and all the documents that he sought. The better particulars and documents are to be supplied to him within 10 days of this judgment. In the default, the Claimant shall be deemed exculpated of the charge.
  - c. For avoidance of doubt, disciplinary proceedings against the Claimant on the other counts set out on the show cause letter dated 23<sup>rd</sup> October 2024, shall proceed unconditionally, but with adherence to the dictates of procedural fairness.
  - d. In light of this judgment, this Court's order of 23<sup>rd</sup> January 2025 is set aside. The Claimant's remuneration, effective from April 2025 and pending the conclusion of the disciplinary, shall be, per the 1<sup>st</sup> Respondent's policy on payment of remuneration to interdicted employees.
  - e. As the Claimant's case failed substantially, each party bears its own costs.

**READ, SIGNED AND DELIVERED THIS 27<sup>TH</sup> DAY OF MARCH 2025.**

**Ocharo Kebira**



## **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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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.

**Ocharo Kebira**

**JUDGE**

