



**Shibutse v Anti-doping Agency of Kenya (Petition E023 of 2025)  
[2025] KEELRC 793 (KLR) (14 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 793 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E023 OF 2025**

**B ONGAYA, J**

**MARCH 14, 2025**

**IN THE MATTER OF ARTICLES 3(1), (22), 35, 47(1), 48, 50(1), 162(2)  
(A), 165(5), 258 AND 259(1) OF THE CONSTITUTION OF KENYA**

**BETWEEN**

**SARAH IDIEVA SHIBUTSE ..... PETITIONER**

**AND**

**ANTI-DOPING AGENCY OF KENYA ..... RESPONDENT**

**RULING**

1. The petitioner filed a Notice of Motion dated 17.02.2025 through Nchogu, Omwanza & Nyasimi Advocates. The application was under section 12(3) (i) and (ii) of the *Employment and Labour Relations Court Act* and under rule 45 of the Employment and Labour Relations Court (Procedure) Rules, 2024. The applicant is seeking the following orders:
  - a. ....(spent).
  - b. ....(spent).
  - c. Pending the hearing and determination of the main suit, the Honourable Court be pleased to issue a temporary injunction restraining the respondents, their staff, subordinates and agents from conducting the intended disciplinary hearing against the applicant.
  - d. The costs of the application be provided for.
2. The application is supported by the applicant's affidavit sworn on 17.02.2025, further affidavit sworn on 05.03.2025, and upon the following grounds:



- a. The applicant was appointed as the Chief Executive Officer of the respondent on contract for a term of 3 years vide a letter dated 24.08.2022 and which is eligible for renewal for a further one term.
  - b. That following a board of directors meeting held on 16.12.2024, in which the applicant was asked to step out of at mid-meeting, it was resolved to send the applicant on compulsory leave for a period of 90 days even though it is not provided for in the employment contract or the respondent's manual.
  - c. Vide a letter dated 17.01.2025 the respondent revised its letter dated 18.12.2024 sending the applicant on compulsory leave to the extent that the compulsory leave shall be for a period of 30 days and not the 90 days earlier communicated. The applicant was to resume her duties on 03.02.2025.
  - d. After the applicant received the communication to send her on compulsory leave through a letter dated 18.12.2024, she aired her grievances and offered an explanation through her letter dated 10.01.2025.
  - e. On 13.01.2025 the respondent invited the applicant to its special board meeting to be held on 17.01.2025 at 8:00am.
  - f. On 17.01.2025 despite the applicant arriving at the respondent's offices at 7:45 am she was called to the boardroom at 2:00pm and to her surprise, it was the Audit and risk management board committee. Upon inquiry the committee informed her that the full board had adjourned its meeting to 27.01.2025.
  - g. Vide a letter dated 27.01.2025 the respondent interdicted the applicant and on the same day, the applicant was served with a notice to show cause letter.
  - h. The actions of the respondent regarding the disciplinary process are contrary to the provisions of the human capital manual of the respondent.
  - i. The Honourable Court has jurisdiction to intervene where the disciplinary process is bound to occasion grave injustice and where the process is marred with irregularities and outright illegalities as is the case in this particular case.
  - j. Unless the court intervenes and hears this matter urgently, there is a likelihood of the applicant suffering irreparable injury as her contract which is soon coming to an end and while she can apply for a further term, won't be eligible to apply until the conclusion of the disciplinary process.
3. In turn the respondent filed the Replying Affidavit of Rt. Rev Joseph Kagunda, Chairman of the Board of the Anti-Doping Agency of Kenya, sworn on 28.02.2025 through the office of the Hon. Attorney General. It was stated and urged thus:
- a. That the instant application and the petition dated 17.02.2025 is premature, misguided, misinformed and intended to defeat the disciplinary process. The petitioner is keen on avoiding to respond to the critical question of misappropriation of public funds. The petitioner has not even responded to the show cause letter to enable the respondent make a decision regarding the allegations.



- b. Following the rise in doping cases in the country within the sport of athletics in the recent years, the country was faced with a high possibility of being sanctioned by the World Anti-doping Agency and World athletics.
- c. The Government considered the issue as a matter of national security and strategic interest within the Government, and a national anti-doping retreat was held in Kasarani on 13-14<sup>th</sup> December 2022, and an anti-doping steering committee was established with the mandate to develop and oversee the implementation of a strategic plan to address doping in Kenya using funds dedicated by the Kenyan Government.
- d. The Government committed 5 million dollars per year for a period of 5 years. The funds were to be appropriated specifically for the enhanced athletics anti-doping project (project). As part of the resolutions of the retreat, those funds were to be dispensed through the respondent.
- e. The respondent prepared and approved a budget for FY2023/2024, a procurement plan for FY2023/24 and a work plan for FY2023/24 for the project.
- f. The implementation of the project commenced in FY2023/24 and at the end of the said financial year the petitioner being the CEO reported to the respondent's board about pending bills estimated at forty six million.
- g. The board being unable to reconcile the petitioner's report on the estimated pending bills and the fact that an approved budget of Kshs 532,000,000/= had been approved for FY2023/24 for implementation. The respondent resolved and directed management to prepare a report on the pending bills and present the same before the full board through audit and risk management board committee.
- h. Management tendered the pending bills verification report for the FY2023/24 on 09.10.2024 before the respondent's audit and risk management board committee. The report is dated 04.10.2024.
- i. The audit and risk management board committee resolved to ascertain the authenticity of the report. The committee therefore proceeded on a three day retreat in Naivasha from 11-13<sup>th</sup> November, 2024 to conduct the verification exercise.
- j. The committee prepared a report titled "Report of the full board on review of the enhanced Kenya anti-doping program pending bills held in Naivasha from 11-13<sup>th</sup> November, 2024 at Enashipai Resort and Spa.
- k. The report disclosed a total of fifty eight pending bills worth forty eight million, ninety thousand, six hundred and ninety eight shillings and eighty five cents (Kshs 48,090,698.85).
- l. The committee noted in the said report that the pending bills generally had irregularities in the payment vouchers. The irregularities included but not limited to variation in prices and dates, missing requisite documentation, double professional opinions, duplicity in Local service orders, and outright fictions pending bills.
- m. The said report was tabled before the special full board meeting held on 16.12.2024.
- n. That the board deliberated on the said report and resolved that the petitioner herein was responsible and had engaged in improper conduct contrary to clauses 10.23.4.1(i), (ix)(xvi), (xviii) and (xx) of the ADAK human capital policy document on Gross misconduct offences by undermining financial management procedures and controls of the respondent by permitting



unlawful expenditure without requisite supporting documents thus occasioning the pending bills.

- o. The report by the audit and risk management board committee further showed that the petitioner implemented activities outside the approved work plan for the enhanced athletics anti-doping project for FY2023/24; outside the approved procurement plan for the enhanced athletics anti-doping project for FY2023/24; outside the approved budget for the enhanced athletics anti-doping project for FY2023/24; and, without the express approval of the respondent's board.
- p. That the position is confirmed by the petitioner in her supporting affidavit at paragraph 8 where she stated that " the pending bills came about because the respondent was expected to carry out extra doping control tests on athletes who were set to participate at the 2024 Paris Olympic games but had not been budgeted for".
- q. The petitioner is expected to know the correct procedure when undertaking activities using public funds. The petitioner is aware that she was expected to bring this issue before the board for approval.
- r. On 16.12.2024 the board deliberated and resolved to send the petitioner on a 90 days compulsory leave to pave the way for further investigations into procurement irregularities, the petitioner's professional misconduct and misappropriation of public funds.
- s. On 18.12.2024 the petitioner was served with a letter of even date sending her on a 90 days compulsory leave. Vide a letter dated 10.01.2025 the petitioner responded to the letter sending her on compulsory leave. In the letter, the petitioner admitted the existence of the pending bills and she further requested for the 13.11.2024 report.
- t. On 13.01.2025 the board held its 42<sup>nd</sup> full board meeting, wherein the petitioner's letter of 10.01.2025 was tabled. The board deliberated and resolved to invite her to appear before the audit and risk management committee on 17.01.2025 to offer clarity on the pending bills.
- u. On 13.01.2025 after the full board meeting the chairperson by letter of an even date, invited the petitioner to appear before the respondent's full board on 17.01.2025 at 8am to offer clarity on the pending bills.
- v. That on 17.01.2025 during the special full board meeting, it was resolved that the petitioner should appear before the audit and risk management board committee to offer clarity on the pending bills. The special full board meeting was then adjourned to 27.01.2025 to allow the audit and risk management board committee to convene and allow the petitioner to appear before it on the same day.
- w. On the same date 17.01.2025 the petitioner appeared before the audit and risk management board committee and was taken through the findings of the report of the full board on review of the enhanced athletics anti-doping project pending bills held in Naivasha from 11-13<sup>th</sup> November, 2024 at Enashipai Resort and spa by the audit and risk management board committee.
- x. The audit and risk management committee prepared a report pursuant to the meeting with the petitioner on 17.01.2025. The committee tabled this report before the full board during a special board meeting held on 27.01.2025.



- y. During the special full board meeting held on 27.01.2025 the board deliberated on the report and resolved that the responses provided by the petitioner were unsatisfactory and therefore resolved to interdict the petitioner with immediate effect and issue a show cause letter.
- z. It is the respondent's contention that the petitioner obtained minutes of its full board meetings illegally and the same should be expunged from the record, relying on the doctrine of fruits of a poisonous tree.
- aa. The respondent maintains that it has not violated the petitioner's rights with regards to the commenced disciplinary process and the same is justified on the following grounds:
  - i. The respondent had valid reasons to subject the petitioner to a disciplinary process as outlined in the show cause letter.
  - ii. The disciplinary process commenced by the respondent is in line with article 47, 48 and 50 of *the constitution*, 2010 on fair hearing.
  - iii. The ongoing disciplinary process is in line with section 18 of the *Anti-doping Act* 2016.
  - iv. The disciplinary process commenced is in compliance with the respondent's human capital policy document, April 2018, specifically under clauses 10.25.4 and 10.25.5.
  - v. The ongoing disciplinary process is in compliance with the petitioner's letter of appointment dated 24.08.22 under clause 22.
  - vi. That the notice of motion application and the petition dated 17.02.2025 is premature, misguided, misinformed and is intended to block the respondent from establishing the truth concerning the misappropriation of public funds.
  - vii. The notice of motion application and the petition dated 17.02.2025 is intended to bar the respondent from carrying its administrative duties of instituting disciplinary process against the petitioner.
  - viii. The suit is premature as the petitioner has not responded to the show cause letter to enable the respondent make a finding as to whether she is guilty or not of the offence/ allegations.
  - ix. The court should remain hesitant to interfere with the disciplinary process unless the same has violated the petitioner's right to fair hearing which ground has not been demonstrated.
- ab. It is the principle of law that where a statutory law provides for channels to address grievances, the process must be followed before one files a suit in a court of law.
- ac. The court must only be approached as a last resort after exhausting all available statutory channels.
- ad. The petitioner has not exhausted the channels provided by the prevailing statutes and the respondent's human capital resource document, before filing the instant suit.
- 4. The parties filed their respective submissions. The court has considered the parties' respective positions and makes finding as follows:
  - a. In in Geoffrey Mworira –Versus- Water Resource Management Authority & 2 Others [2015] eKLR the Court held as follows: "The principles are clear. The court will very 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 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 the 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." Those are the guiding principles on whether the Court should intervene in the impugned and initiated disciplinary process against the petitioner.

- b. In the instant and as submitted for the respondent, the disciplinary process is continuing in accordance with the law and applicable regulations. The applicant has not shown an applicable provision that has been contravened. The test for grant of the reliefs sought in the application has not been established. As submitted for the respondent it has not been shown that the applicant has established a prima facie case to justify the Court's intervention in the initiated and continuing disciplinary process.
- c. It is submitted for the applicant that the disciplinary hearing panel may be biased for example that a person previously directly involved in the preliminary preparation of the case may be a panel member. It is also submitted that some of the materials relied upon by the respondent to advance the disciplinary case may be doctored. The Court considers that such are matters the applicant should raise with the respondent towards a fair procedure and for her exculpation but not to interfere with the disciplinary process. Accordingly the application will fail.
- d. The respondent urged that the petition should be dismissed all together for want of show of rights violated and for want of exhaustion of the internal disciplinary procedure. However, there was no preliminary objection or application for the respondent in that respect. The issue of rights may be determined subsequently. The existence of internal process would not bar the applicant from seeking interim orders. In any event rule 56 of the Employment and Labour Relations Court (Procedure) Rules provides and guides as follows:
  1. The Court may at any time refer a matter to alternative dispute resolution.
  2. Parties in a proceeding may reach a consensus at any time before judgment is rendered and the parties shall file the consent within such period as the Court may prescribe.
  3. The Court shall record and adopt the consent reached by the parties as its own ruling or judgment in that matter.
  4. Where a matter is partially determined by virtue of a consent adopted by the Court, the issues that have not been resolved shall proceed before the judge hearing it.
  5. Where *the Constitution*, a written law, collective bargaining agreement, contract of service, policy, or other instrument provides for alternative dispute resolution mechanisms—
    - a. a person being party to a dispute may file a suit and seek appropriate interlocutory relief pending exhaustion of such alternative dispute resolution mechanisms or pending determination of the suit;



- b. want of exhaustion of such alternative dispute resolution mechanisms shall not operate as a bar to a suit for application for interim orders or alleging unconstitutionality or unlawfulness of the action, omission, decision or other matter in dispute pending such exhaustion; and,
  - c. a suit filed prior to exhaustion of such alternative dispute resolution mechanisms may be stayed and not struck out on account of such exhaustion.
5. In view of the findings, the application is amenable to dismissal with costs in the cause and the parties to take further directions for further steps in the petition.

In conclusion, the application is hereby dismissed with costs in the cause and parties to take directions for further steps on the petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS  
FRIDAY 14<sup>TH</sup> MARCH, 2025**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

