



**Mwamati v Tana Athi Water Works Development Agency & another  
(Petition E024 of 2025) [2025] KEELRC 1466 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1466 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E024 OF 2025**

**MN NDUMA, J  
MAY 15, 2025**

**BETWEEN**

**FREDRICK TITO MWAMATI ..... PETITIONER**

**AND**

**TANA ATHI WATER WORKS DEVELOPMENT AGENCY ... 1<sup>ST</sup> RESPONDENT**

**HON REGINAH MUIA NDAMBUKI ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Serving before court is a Notice of Motion application dated 14<sup>th</sup> February 2025 by the Petitioner/Applicant seeking an order in the following terms:
  1. Spent
  2. That pending hearing and determination of the application and petition, the honourable court do make an interim order staying the dismissal of Petitioner by the 2<sup>nd</sup> Respondent contained in the letter dated 7<sup>th</sup> February 2025
  3. That pending hearing and determination of this application and petition, this honourable court do make an order restraining Respondents either by themselves, employees' servants and/or agents from advertising, shortlisting candidates, interviewing and or appointment in the position of Chief Executive Officer for the 1<sup>st</sup> Respondent.
  4. That pending hearing and determination of this application and petition this honourable court do issue temporary injunction restraining the Respondents either by themselves employees, servants and/or agents from harassing, intimidating and/or terminating the employment of the Applicant/Petitioner for the remainder of his term in relation to similar allegation.



5. That pending hearing and determination of the application and petition, the court do issue any order just and expedient for achieving the ends of justice.
6. That the costs of this application be borne by the Respondents
2. The application is premised on grounds 1 to 31 set out on the face of the Notice of Motion and buttressed in the supporting affidavit of the Applicant.
3. The nub of the application is that the Applicant who was engaged by the Respondents as the Chief Executive Officer in a three years contract from 1<sup>st</sup> July 2020 which contract was renewed for a 2<sup>nd</sup> term period of three more years with effect from 1<sup>st</sup> July 2023 to 30<sup>th</sup> June 2026 was dismissed from employment by the 1<sup>st</sup> Respondent by a letter dated 7<sup>th</sup> February 2025.
4. The Applicant states that the said dismissal is unlawful, unfair and a violation of his constitutional rights set out in the petition for lack of any valid reason and same is devoid of procedural fairness.
5. The Applicant deposes that he had served the 1<sup>st</sup> Respondent diligently, professionally and with utmost good faith as is reflected in work scoring of 90:84% in evaluation earning him commendation of exemplary performance in the financial years of 2022 and 2023 from Principal Secretary Ministry of Water Sanitation and Irrigation Dr. (Eng.) Joseph Njoroge, CBS on 4<sup>th</sup> May 2022 and Cabinet Secretary Hon. Alice Wahome on 16<sup>th</sup> January 2023 stemming from the initial award recognition as champion award by the Principal Secretary while acting as the Chief Executive Officer (CEO) of the 1<sup>st</sup> Respondent on 20<sup>th</sup> December 2018 by the Principal Secretary Mr. Joseph Irungu CBS.
6. That the 2<sup>nd</sup> Respondent in disregard of the said exemplary performance and disregard of Article 41, 47, 50 and 236 of *the Constitution* of Kenya 2010 the relevant provisions of law, suspended the Applicant on 22/11/2023 which suspension was declared to be irregular, unprocedural, illegal and unconstitutional null and void ab initio by this court in Petition E229 of 2023 vide a judgment dated 9/5/2024 by Hon. Justice Byram Ongaya.
7. That upon return to work, upon conclusion of Petition E229 of 2023 the 2<sup>nd</sup> Respondent again suspended the Applicant for the 2<sup>nd</sup> time vide a letter dated 3/7/2024 for reasons that he had been arrested and arraigned at Kitui Law Court vide criminal case MCA No. 003 of 2024 to face economic crime charges.
8. That the 2<sup>nd</sup> suspension was said by Respondents to be guided by provision of section 10.10.6 of Tanathi Water Works Development Agency Human Resource Management Policy which states that
 

Where an employee has been charged with corruption or economic crime, such officer shall stand suspended from exercise of his duties pending determination of the case. Such an employee shall be entitled to payment as stipulated in the *Anti-corruption and Economic Crimes Act* and
9. Section 62 of the *Anti-corruption and Economic Crimes Act* 2003 which states that:
 

“62. Suspension, if charged with corruption or economic crime

  - (2) A public officer or state officer who is charged with corruption or economic crime shall be suspended at half pay with effect from the date of the charge until the conclusion of the case provided that the case shall be determined within twenty-four months
  - (2) A suspended public officer who is on half pay shall continue to receive the full amount of any allowances.



- (3) The public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted
10. And Section 71(1) of the *Public Service Commission Act* 2017 which states that;
- “Where a public officer has been charged with a serious criminal offence such an officer shall be suspended pending consideration of his case.”
11. That on 2<sup>nd</sup> October 2024, Chief Magistrate David Mburu delivered a ruling in MCAC E003 of 2024 discharging the Petitioner alongside other co-accusers who are also employees of the 1<sup>st</sup> Respondent stating at paragraph 50 that
- “in the premise I find the application dated 24<sup>th</sup> September 2024 to be merited and proceed to allow it as prayed. Consequently, I hereby discharge each of the accused persons pursuant to the provisions of section 87 (e) of the *Criminal Procedure Code*.”
12. That the Respondents allowed co-accused employees alongside the Applicant to immediately resume duties while discriminated on the Petitioner whom they kept on continued suspension beyond the ruling for no reason at all despite the Applicant protesting the action by a letter dated 3/10/2024 requesting the 2<sup>nd</sup> Respondent to lift the suspension.
13. That the Respondents served the Applicant with three letters as follows:
- i. First letter dated 12<sup>th</sup> November 2024 (one month and 10 days after the discharge of criminal case by magistrate court) received on 14<sup>th</sup> November 2024 at 12:20 p.m. lifting the suspension in line with the court ruling of 2<sup>nd</sup> October 2024
  - ii. Second letter dated 13<sup>th</sup> November 2024 received on 14<sup>th</sup> November 2024 at 12:23 p.m. interdicting the Petitioner
  - iii. 3<sup>rd</sup> letter dated 13<sup>th</sup> November 2014 received on the 14<sup>th</sup> November 2024 at 12:25 p.m. being a show cause letter for alleged 10 incidences of gross misconduct for action and/or inaction that allegedly took place between January 2023 and September 2024.
14. That the Applicant having been interdicted was to show cause for alleged 10 incidences of gross misconduct which the Applicant states were concocted and imaginary. That alleged misconduct arose between January 2023 to September 2024 within the period the Applicant was under suspension.
115. That Applicant sought court’s intervention vide Petition No. 187 of 2024, against the Respondents’ action whereupon the court granted interim orders staying the unlawful disciplinary process, however upon the ruling on the application on 19/12/2024 the court allowed the Respondent to conclude the internal process.
16. That by a letter dated 20/12/2024 the 2<sup>nd</sup> Respondent requested for evidence and/or documents in order to respond to the notice to show cause letter including:
- a. Duly signed minutes of the 1<sup>st</sup> Respondent board meetings held between 1<sup>st</sup> January 2023 to 1<sup>st</sup> December 2024
  - b. Human Resource board paper on conversion of staff in job group 2 and 3 from permanent and pensionable to contract.
  - c. Human Resource board paper on recruitment of Mr. Kinyua Martin and Daniel Ouma and all related documents including their contracts of employment.



- d. All correspondence between TAWWDA and the County Government of Kitui on vacation of agency premises especially TAWWDA letter dated 18<sup>th</sup> May 2023 reference number TAWSB/Legal
  - e. A copy of contract between TAWWDA and Vima Contractors Ltd and details of CMM No. 093 of 2022.
  - f. A copy of police report and occurrence book number in the alleged loss of engine for motor vehicle number KBS 070 K
  - g. A copy of contract between TAWWDA and contractor for Kitonyini borehole, payment documents together with accompanying approval/payment certificates.
  - h. Salaries and Remuneration Commission letter on remuneration structure for TAWWDA for the cycle of 2021/22-2024/25.
  - i. Evidence on alleged violation of confidentiality
  - j. Parameters used in evaluating how the board arrived at the score of 49.42%
  - k. Evidence for alleged violation of section 7, 8, 9 and 10 of Leadership and Integrity Act 2012
17. That the Applicant received only a portion of the requested documents vide a letter dated 13/1/2025, on 20/1/2025 almost 4 weeks after the request for documents.
  18. That notwithstanding, the Applicant made a comprehensive response to the notice to show cause on 20/1/2025 stating that since there was no evidence on alleged misconduct, no disciplinary action should be taken against the Applicant.
  19. That the Applicant was invited to a disciplinary hearing on 24/1/2025 but the hearing did not take place and vide a letter dated 24/1/2025 received by the applicant on 27/1/2025, additional documents as set out under paragraph 20 of the grounds of Notice of Motion were provided.
  20. The Petitioner was then invited to attend a 2<sup>nd</sup> disciplinary hearing on 7/2/2025 disregarding concerns raised by the Applicant and thereafter hurriedly dismissed the Applicant from employment by a letter of the same date received by the applicant on 10/2/2025 without any valid evidence and in violation of Articles 41, 47, 50 and 236 of the Constitution and (section 10.3 and 10.4 (10)) and 18 (v) of Human Resource Management Policy and Procedure Manual. That the minutes shared by the Respondents are inaccurate and doctored including minutes dated 14/4/2023 upon which the 1<sup>st</sup> Respondent doctored the allegations in the notice to show cause on failure to implement resolutions of the Respondents by the Applicant by failing to prepare board reports.
  21. The Applicant disputes all the allegations relied upon to dismiss him as set out in grounds 22(a) to (f) of the Notice of Motion.
  22. That the said dismissal is unconstitutional, unlawful and unfair and the court should grant the interlocutory reliefs sought pending the hearing and determination of the petition.

### **1<sup>st</sup> and 2<sup>nd</sup> Respondents' Replying Affidavit**

23. The Respondents oppose the application dated 14/2/2025 vide replying affidavit of the Corporation Secretary of the Board of the 1<sup>st</sup> Respondent Mr. Oyugi Ronald Nyakwaba who deposes as follows:



24. That he was fully conversant with the facts of the case and at the outset raises preliminary objection set out at paragraph 4 and 5 of the replying affidavit as follows: -

That on a preliminary, to the extent that paragraphs 4, 5, 6, 7, 8, 9, 19, 11, 12(iv), 14 and 15 of the motion and paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13(vii) 15 and 16 of the supporting affidavit to the motion make reference to proceedings in Nairobi ELRC Petition No. E229 of 2023 (Fredrick T. Mwamati vs Tanathi Water Works Development Agency and 2 others, Kitui MCAC E003 of 2024, Republic vs Fredrick Tito Mwamati and 11 others, Nairobi ELRC Petition no. 187 of 2024 (Fredrick Tito Mwamati vs Tanathi Water Works Development Agency and Another) the same are irrelevant and inapplicable; and that this court by law and on account of the twin doctrines of res judicata and functus officio is excluded from reopening and replying on the proceedings therein and/or importing the same into this cause. The same should not form a basis for granting the prayers sought herein and the ultimate suit.

25. Further, and on a preliminary, I am informed by my counsels on record, which advise I believe to be true that the orders sought herein cannot issue on the grounds that: -

- a. The Petitioner/Applicant is inviting the court to usurp lawful powers/responsibilities of an employer/the board. The court is being asked to substitute its orders with the disciplinary prerogative of the respondents. The courts should not accept this invitation;
- b. There is nothing capable of being stayed. The Respondents' decision was issued on February 7, 2024 and it has already taken effect. Asking for a stay is tantamount to asking for reinstatement in a roundabout way;
- c. Reinstatement to employment is a remedy sparingly available at the interlocutory stage. It is a remedy considered by the court substantively after hearing parties on merit.
- d. The basis and the grounds upon which the application is made are matters which cannot be determined by the court at an interlocutory stage. The application essentially alleges that the termination of employment was not substantially justified and that fair procedure was allegedly not followed. These are not matters for determination at an interlocutory stage. Parties must be substantively heard on merits.
- e. Save for the prayer for reinstatement, which in any event cannot issue at this stage prayers 3 and 4 are framed in wide terms and are not capable of being responded to.

26. The deponent sets out the particulars of the contract of employment of the Applicant dated 29/5/2023 as the CEO of the 1<sup>st</sup> Respondent which contract was to expire on 1<sup>st</sup> July 2026. The deponent sets out duties and responsibilities of the Applicant to include:

- a. Promoting sound corporate governance and ethical standards.
- b. Implementing the resolutions of the Board of Directors and acts as the day-to-day secretariat of the affairs of the Board of Directors;
- c. Protecting and enhancing the Agency's corporate image;
- d. Being in charge of the day to day running of the Agency in accordance with the laws of the country
- e. Performing the Agency's duties diligently and faithfully;



- f. Upholding the duties and obligations spelt out under the *Employment Act*, 2007 and
  - g. Observing the Agency's Rules and Regulations
27. The deponent concludes that the Applicant reported to the Board and under clause 25 of the contract termination of the employment of the Applicant was contemplated for lawful reason(s)
  28. The deponent states further that the Applicant did not make satisfactory response to the notice to show cause despite having been provided with all relevant documents he had requested before responding and before attending the disciplinary hearing.
  29. The Respondents deny violation of Articles 41, 47, 50 and 236 as set out in the petition and application. The deponent states that a fair procedure was followed before dismissing the Applicant from employment and all concerns raised by the Applicant were addressed before the hearing took place. That the Applicant failed to satisfactorily explain the charges of misconduct set out against him. That the dismissal was for a valid reason and followed a fair procedure. That the Applicant had violated section 7, 8, 9 and 10 of the *Leadership and Integrity Act*, which violation transcended all charges.  
That the application lacks merit and it be dismissed with costs.

## **DETERMINATION**

30. The court has carefully considered the deposition by the parties, the written submissions filed by both parties and lists of authorities and has delineated the following issues for determination: -
  - i. Whether the Applicant has satisfied the requirements for grant of conservatory order/ mandatory injunction pending the hearing and determination of the petition.
  - ii. Whether matters raised in the notice of motion and supporting affidavit under paragraphs 4,5,6,7,8,9,10,11,12,(iv), 14 and 15 and paragraphs 5,6, 7,8,9,10,11,12,13,(iii) 15,and 16 of the supporting affidavit are res judicata and the court is functus officio.
31. The answer to the first issue is based upon the principles upon which the court may issue conservatory orders in public domain and mandatory injunction with the effect of reinstating a dismissed employee pending the hearing. In short, the Applicant seeks to have this court reinstate him to the position of CEO of the 1<sup>st</sup> Respondent from which he had been dismissed for reasons provided in the letter of dismissal dated 7<sup>th</sup> February 2025.
32. The Applicant further prays the court to stop any process of filing the now vacant position of CEO of the 1<sup>st</sup> Respondent pending the hearing and determination of the suit.
33. The matters raised for determination in the application are well settled in the elaborated cases of *Giella versus Casman Brown and Co. Ltd KIE 739 EA 358* and expanded in the Supreme Court by decision of *Gatarau Peter Munya versus Dickson Mwendu Githinji and 2 others [2014] KLRC*.
34. The interlocutory orders sought by the Applicant in prayers 2 seek to “staying the dismissal of Petitioner by the 2<sup>nd</sup> Respondent contained in the letter dated 7<sup>th</sup> February 2025.”
35. The orders sought under prayer two constitute mandatory injunction which is an order directing someone to take a specific action in this case to reinstate, the Applicant rather than prohibit the Respondents from doing something. This is an equitable remedy sought at interlocutory stage and may only be granted if special circumstances are established because the same bear an element of finality.



36. Courts are generally hesitant to grant mandatory injunctions and they require that Applicant demonstrate a strong case and the existence of exceptional circumstance beyond the threshold in *Giella v Cassman Brown supra* which set out the principles of grant of interim injunction as follows: -
- a. That the Applicant has a prima facie case with a probability of success.
  - b. That if the interlocutory injunction is not granted the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages and
  - c. That if the court is in doubt, the balance of convenience favour the grant of the interim injunction.
37. These requirements were elaborated by the Supreme Court in the *Gatarau Peter Munya (supra)* case as follows:
- ...Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within public agencies as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues as the prospects of irreparable harm” occurring during the pendency of a case: or “high probability of success” in the Applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant courses.”
38. It was strongly submitted by the Applicant that the violations demonstrated in the application and petition present a prima facie case in favour of the Applicant likely to succeed upon hearing of the case on merits. The Applicant posits further that he would suffer irreparable harm not reparable by an award of damages if he is not reinstated to the position he held and in the alternative the Respondents are prevented from filling up the position of the CEO of the 1<sup>st</sup> Respondent pending the hearing and determination of the petition.
39. The Respondents on the other hand submit that the Applicant was found guilty of serious abuse of public trust in the execution of his contractual duties as the CEO of the 1<sup>st</sup> Respondent, matters that will be fully demonstrated upon hearing the petition on the merit. That the court should decline the misconceived invitation by the applicant to grant the interim reliefs sought.
40. The Respondent relied on the decision in *Thomson Kerongo and 2 others versus James Omariba Nyaoga and 3 others [2017] e KLR* where it was held: -
- Due process is an internal disciplinary process to be exercised by an employer. The court is not expected to enter into the boardroom of the employer to micromanage their affairs ... The court will only interfere where there is breach of the process and even so, only with a view to setting the process right.”
41. That in the present matter the orders sought amount to reinstatement of a dismissed employee before hearing the petition on the merits on action that would nullify the mandate of the employer before full facts of the case on merits has been ventilated. That there is nothing to stay therefore, since the process is complete and the Applicant will have opportunity upon hearing of the case on the merits to receive full benefit of the court process.



42. That in any event the court has the discretion to reinstate the Applicant upon conclusion of the hearing of the petition and or make an appropriate order of damages if the petition is found in favour of the Applicant.
43. The court returns that the Applicant has failed to prove that he would suffer irreparable harm if the court does not grant the interim reliefs sought. The court is well armed with reliefs to vindicate and protect the rights of the Applicant upon hearing and determination of the petition.
44. Furthermore, the court is satisfied that public interest is in favour of not reinstating an employee found guilty of misconduct by an employer before the court fully determines whether the employer had a valid reason to dismiss the employee and also determine if a fair procedure was followed in arriving at the decision to dismiss.
45. That the court is only able to determine these matters upon hearing facts of the petition on the merits.
46. The Applicant has not demonstrated special circumstances that warrant grant of the mandatory injunction vide prayer 2 and grant of conservatory orders vide prayer 3 in the circumstances of this case.

### **Res judicata and Functus Officio**

47. The court has not found it necessary to venture into the facts of this case, at the interlocutory stage. However, the cause of action of the petition is the dismissal of the Petitioner after the cited previous cases had been heard and determined. The court finds this plea to be unmerited and same is not upheld by the court.
48. In the final analysis, the application is dismissed for lack of merit

**DATED AT NAIROBI THIS 15<sup>TH</sup> DAY OF MAY 2025**

**MATHEWS NDUMA**

**JUDGE**

Appearance:

Mr. Tonge Yoya for Applicant

Mr. Nyaencha for Respondent

Mr. Kemboi – Court Assistant

