



Omuomo v Chief Executive Officer, Independent Electoral And Boundaries Commission (IEBC) & another (Employment and Labour Relations Judicial Review E009 of 2023) [2025] KEELRC 1464 (KLR) (15 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1464 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS JUDICIAL REVIEW E009 OF 2023
MN NDUMA, J
MAY 15, 2025

BETWEEN

CALISTO OYUGI OMUOMO APPLICANT

AND

CHIEF EXECUTIVE OFFICER, INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) 1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC) 2ND RESPONDENT

JUDGMENT

1. The ex-parte Applicant filed a notice of motion application dated 17th March 2023 pursuant to leave granted by the court on 21st February 2023 seeking an order in the following terms: -
 1. That an order of certiorari be granted by this honourable court removing into the Employment and Labour Relations Court and quashing the decision of the Respondents contained in the letter dated 19th January 2023, dismissing the Applicant from IEBC with immediate effect and any other consequential actions arising from the said letter and that the withheld salary amounting to Kshs. 2,579,466.08 be paid.
 2. The costs of and incidental to the application be borne by the Respondents.
2. The application was brought pursuant to Order 53 Rule 1(3), Order 51 Rule (1) of the Civil Procedure Rules 2010 and section 8 and 9 of the [Law Reform Act](#) and all other enabling law.



Facts of the case

3. The Applicant's case is anchored in the supporting and supplementary affidavits, documents attached thereto and the statement of facts.
4. The summary of the facts of the case is that the ex-parte Applicant was employed by the 2nd Respondent, Independent Electoral and Boundaries Commission (IEBC) as the Kisumu County ICT officer in March 2022 vide a letter of appointment dated 16th June 2014 on permanent and pensionable terms. The Applicant was subsequently transferred to Bomet as the County ICT Officer in March 2022.
5. The Applicant earned a gross salary of Kshs. 161,216.63 and deposes he served the 2nd Respondent diligently and faithfully until the Applicant was dismissed from service on 19th January 2023.
6. The Applicant deposes that the said dismissal was unprocedural, unlawful and unfair.
7. The Applicant deposes that he was served with a notice to show cause letter dated 9/9/2021 written by the Human Resource Manager of the 1st Respondent. The letter contained allegations that the Applicant had engaged in dual – employment which conduct breached rules and regulations of the 1st Respondent and amounted to gross misconduct. The Applicant was required to respond to the charges within 14 days and that he was likely to face disciplinary action in respect of the charges in absence of clear explanation.
8. The 1st Respondent further stopped payment of the salary of the Applicant with immediate effect and the Applicant did not receive any salary until he was dismissed from employment by the letter dated 19th January 2023, a period of 16 months but he remained in service and continued to work during the said period.
9. The Applicant deposes that he responded to the notice to show cause by a letter dated 17th September 2021, in which he explained that he was partly engaged in a temporary service position with Maseno University. That he provided IT services to Maseno University, during his free time and never absented himself from work and the commission and his supervisor would confirm that. That he had since stopped the temporary provision of service to Maseno University.
10. That the Respondents did not take any further action against the Applicant until sometimes in February 2022, when the 1st Respondent visited IEBC Kisumu County Office and the Applicant, mentioned his case to him since almost six (6) months had elapsed while he was still not receiving any pay despite that the six-month limit for interdiction was about to end. That the Chairman requested to be furnished with details of the Applicant's case and the supervisor of the applicant, the County Election Manager (CEM) sent an email to the 1st Respondent appraising him of the case.
11. The Applicant states that he received a letter dated 17/2/2022 from Director Human Resources in which the Director castigated the Applicant for breach of communication protocols for approaching the 1st Respondent directly regarding his pending case. The Applicant was further informed that investigations on the charges against him were still ongoing.
12. That the Applicant was never provided with a report of the investigations in violation of section 12.11.4(viii) of the IEBC Human Resource and Procedure Manual 2020.
13. That the Respondent remained silent on the matter until 23rd December 2022 when the Applicant was summoned to appear before a disciplinary hearing on 3/1/2023 before a commission Disciplinary



- Committee. That the Applicant attended the hearing in relation to the notice to show cause dated 9/9/2021 for holding two positions.
14. The Applicant states that he was an officer in IEBC Job Grade 6, but the letter invited him to attend commission disciplinary committee which deals with persons in job grades 1-5 (CEC's only) in terms of section 12.5.1 of the IEBC HR manual 2020.
 15. That the hearing was conducted by two commissioners and he then received the letter of dismissal dated 19th January 2023 in which he was informed that after considering the written defence when he appeared before the disciplinary committee on 3rd January 2023, a decision had been made to dismiss the Applicant from employment with effect from 19th January 2023 for gross misconduct and that the Applicant had six (6) weeks to appeal the decision. The Applicant adds that the disciplinary process had commenced in September 2021 and concluded on 19th January 2023. That as at the time of dismissal, the Applicant had not been paid salary for one year and four months (16 months) in the sum of Kshs. 2,579,466.08.
 16. The Applicant deposes that he filed an appeal stating that his matter was heard by two commissioners namely Molu Boya and Abdi Yakus Guliye sitting in a Human Resource Manager Advisory Committee (as opposed to Directors and his immediate supervisors) thereby denying the Applicant the right of appeal to the commission Disciplinary Committee as required by law.
 17. The Applicant deposes that at the hearing, he requested repeatedly to be given opportunity to present evidence of his presence at work but was denied. The Applicant states that he testified that he had never missed a day of work and that he would prove it. The Applicant states that commissioner Professor Guliye retorted to him that he might have been sneaking here and there and the matter was abandoned.
 18. The Applicant deposes that he then received a letter dated 30th January 2023 from the commission and as at the time of filing suit he had not received any response from the commission on the appeal.
 19. That the appeals committee is comprised of Commissioners and as at the time of filing suit, the commission did not have any commissioners as the Chairman and two other Commissioner's term had ended. That three other Commissioners resigned in December 2022 while another was under suspension facing Justice Muchelule Tribunal.
 20. That the disciplinary process was illegally constituted and in breach of section 12.4 of the IEBC Human Resource Policy and Procedure Manual. That further no witnesses were called to testify against the Applicant and no documents were produced to show that the Applicant held two positions at the time of the hearing. That the hearing lasted barely three (3) minutes.
 21. That the letter of dismissal does not refer to the disciplinary proceeding that was conducted by an illegally constituted disciplinary committee but instead alludes to a 284th plenary meeting held on 6th January 2023 which allegedly deliberated on the case and found the Applicant guilty of gross misconduct yet on the said 6th January 2020, the commissioners were conducting a senatorial by-election at Elgeyo Marakwet.
 22. That the disciplinary hearing should have been conducted and concluded within 6 months but was done after 15 months in violation of Applicant's right to fair administrative action.
 23. That in terms of section 12.11.4 of the IEBC, the disciplinary case ought to have been submitted by the supervisor to the management Disciplinary committee which hears cases for employees in position 5-10 (excluding CEC). That the management Disciplinary Committee is then mandated to make recommendation to the commission secretary.



24. That the disciplinary hearing should be conducted expeditiously efficiently, lawfully, reasonably and in a procedurally fair manner in accordance with Article 47 of the Constitution, the Fair Administrative Action Act No. 4 of 2015, Employment Act 2007 and other relevant laws.
25. That the disciplinary committee was bound to compile a report with all relevant information on the case. That the conduct by the Respondents violated Article 41(1) of the Constitution on fair labour practices and also violated Article 47(1) and (2) by reason of the inordinate delay in processing the disciplinary hearing and by failing to provide a report with reasons for the dismissal to the Applicant.
26. Wherefore the Applicant prays to be granted the relief sought.

Replying Affidavit

27. The Respondent filed replying and further affidavit by Hanen Adalla in which the officer states that the Applicant was initially employed by IEBC by letter dated 16/6/2017 as County ICT Officer Kisumu County at a monthly salary of Kshs. 55,380.00 effective 19/6/2017.
28. That the contract of employment specifically precluded the Applicant from being engaged directly or indirectly in any other business or occupation other than his employment without the written consent of the 2nd Respondent.
29. That on 1/9/2021, the 2nd Respondent received a letter dated the 31st August 2021 from the Vice Chancellor Maseno University seeking clarification and/or confirmation of the employment status of the Applicant with the 2nd Respondent. The letter further informed the 2nd Respondent that the Applicant had been an employee of the university as a Network Technician since July 2017 on full-time basis.
30. That by serving two public institutions at the same time, the Applicant was not only in breach of the Applicant's contract of employment but also the Constitution of Kenya 2010. In addition, the Applicant conduct undermined the provisions of the IEBC Act No. 9 of 2011.
31. This led to the issuance of notice to show cause dated 9/9/2021 by the 2nd Respondent. The Applicant responded to it on 17/9/2021 in which he admitted having entered into a contract of employment with Maseno University on the 4th July 2017. That this was during the subsistence of the contract of employment with the 2nd Respondent. That investigations were started into the matter. That by a letter dated 22/12/2022, the 2nd Respondent invited the Applicant to appeal before its Disciplinary Committee on 3/1/2023. The Applicant was accorded the right to be accompanied by a member of the 2nd Respondent's staff of choice.
32. That the hearing took place in accordance with internal rules and procedures. The Applicant attended the hearing and was accorded opportunity to be heard in accordance with the law.
33. That on 13/1/2023, the deponent was directed vide a letter to implement the decisions of the commission's 284th plenary meeting. That by a letter dated 19/1/2022 the 2nd Respondent dismissed the Applicant from service with immediate effect.
34. That the application be dismissed for lack of merit. That this matter cannot be resolved by way of Judicial Review (JR) application. That this is a mundane employee-employer dispute that can be resolved by way of a claim before court where evidence is adduced to give opportunity to the court to determine matters of fact.
35. That the claim for unpaid salary cannot be made by way of an order of certiorari sought by the Applicant here.



36. That the 2nd Respondent received a letter of appeal dated 30/1/2023 from the Applicant. That the appeal is yet to be heard and so this application was filed prematurely.
37. That the Applicant did not seek exception not to exhaust internal dispute resolution mechanisms in terms of section 9(4) of the Fair Administrative [Act No. 4 of 2015](#). That the Applicant has not demonstrated exceptional circumstances to warrant this premature filing of the application.
38. That the orders sought are inefficacious in the circumstance of the case since the position previously held by the Applicant does not exist and the payment of salary cannot be sought in this manner.
39. That the application is incompetent, fatally flawed, incurably defective and an abuse of court process.
40. The Respondents filed the IEBC Human Resource and Administrative Manual (Policies and procedures) reviewed on 19th March 2020 vide a supplementary affidavit dated 20th March 2023.

Determination

41. The court has carefully considered the application and all supporting documents together with the replying and further affidavit by the Respondents. The court has also considered written submissions by both parties and has delineated the following issues for determination:
 - a. Whether the judicial review application filed by the ex-parte Applicant is inappropriate to address the cause of action raised therein and should be struck off therefore.
 - b. If the answer to (a) above is in the negative whether the application has merit and the Applicant is entitled to the reliefs sought.

Issue 1

42. The cause of action disclosed in the substantive motion by the Applicant arose from dismissal of the Applicant from his employment as the County ICT Officer by a letter dated 19th January 2023.
43. The cause of action stated in the said letter of dismissal is that upon conducting a disciplinary hearing, it was established that the Applicant had taken full time employment with Maseno University effective July 2017, while still an employee of the IEBC on permanent basis since 19th July 2017.
44. The Applicant was said to have deliberately served two public institutions and received compensation accordingly as per the terms of service contrary to the laws in force prohibiting public servants from dual employment. The Respondents further cited Article 77(1) of the [Constitution](#) which provided that “[2] full time state officer shall not participate in other gainful employment.”
45. The IEBC Act, 2011 Fourth Schedule section 21(1) (b) was also relied upon and it provided that

A member of the Commission shall not during tenure of office be eligible for appointment to another public office.”
46. The matter arose when the Vice-Chancellor of Maseno University wrote a letter dated 31/8/2021 to the Chief Executive Officer of IEBC titled “Confirmation of Employment Status for Mr. Calisto Oyugi Omuomo.” In the said letter the Vice Chancellor Prof. Julius O. Nyabundi stated “Mr. Omuomo is employed at Maseno University as a Network Technician since July 2017 on full time basis. The background check is important for mutual benefit.”



47. Following this letter, the Applicant was issued with a notice to show cause letter dated 15/9/2017 to explain why disciplinary action should not be taken against him for misconduct for holding two jobs in different public institutions.
48. In the response to the notice to show cause the Applicant expressly admitted to have taken up a job with Maseno University while still serving IEBC on a permanent and pensionable basis. The only denial by the Applicant was that the job held with Maseno University was not on a permanent and pensionable basis. However, the Applicant stated that he was on 4th July 2017, granted employment on one - year contract by Maseno which contract was renewable on mutual agreement. The Applicant also admitted that the one-year contract was renewed three times. It is not in dispute that the salary of the Applicant was withheld and not paid from 15th September 2021 until the date of dismissal.
49. The real issue in dispute in this matter is whether the Respondent in the circumstances of the case followed a lawful procedure in disciplining the Applicant, whether the Respondent had a valid reason to dismiss the Applicant from employment and whether a Judicial Review application is appropriate to resolve the dispute at hand.
50. The dispute is one arising wholly from an employment contract between the Applicant and the 2nd Respondent. The action to dismiss the Applicant and to withhold his salary is one wholly governed by the provisions of the *Employment Act* 2007 under sections 41,43, 44, 45 and 47. The appropriate remedies that the Applicant ought to have sought is reinstatement to the position previously held with the 1st Respondent without loss of any remuneration from the date the salary was stopped on 15th July 2021 and not to seek the court to issue an order of certiorari to quash the decision of the 1st Respondent to stop the salary a decision taken on 15/7/2021 and more than 18 months from the date the application was filed on 21st February 2023.
51. With regard to the decision to dismiss the Applicant on 19th January 2023, the application was filed within the 60 days period applicable with regard to Order 53 applications. However, the dismissal was simply a termination of the contract of employment between the Applicant and the 1st Respondent without notice, a matter which ought to be addressed fully in a claim filed in terms of the *Employment Act*, 2007.
52. In the case of Staff Disciplinary Committee of Maseno University and 2 others versus Ochonge Okello [2012] KECA 46 K42, the Court of Appeal set aside the judgment of the trial judge granting the orders of certiorari and prohibition stating thus:-

I find that the breach or threatened breach of the Appellant’s contract of employment was not a public act or matter of public law but was a matter of contractual relationship between the Respondent and the Appellant governed by private law. It was not therefore an appropriate action justifying the granting of orders of Judicial Review. The Respondent, may well have had a genuine grievance. His remedy however, lies under private law which covers disputes relating to contractual relationship. Therefore, the High Court erred in granting the orders of Judicial Review as Ochongi did not have public law right capable of protection under the supervisory jurisdiction of the court.”

53. Furthermore, In Peter Ndegwa Kamenju versus Commandant Law Enforcement Academy, Kenya Wildlife Service (KWS) and another [2019] KEELRC 2433 KLR, High Court differently constituted dismissed a similar Judicial Review application stating thus;

From the foregoing I find that not only did the Applicant sue the wrong persons but he also came to court through the wrong vehicle.



Finally, the prayers sought were not made by the Respondents in the nature of the exercise of public authority. It was a decision of an employer in the exercise of disciplinary control over an employee which is a matter of contract under private law. For these reasons the application must fail with the result that it is accordingly dismissed.”

54. Finally, in *Maurice Adongo Anyegu versus Kenyatta International Convention Centre* [2018] eKLR, the Court of Appeal affirmed that:

In so far as the Appellant’s claim was employment claim governed by the *Employment Act*, the court best suited to interpret the provisions thereof was the Employment and Labour Relations Court in a claim instituted in a normal manner as opposed to Judicial Review proceedings. This is especially since the Appellant was also seeking other reliefs such as salary arrears which transcend the reliefs available in Judicial Review proceedings. Whether the circumstance in a case allow reinstatement would also be best determined by the same court taking into account the provision of the *Employment Act*, viva voce evidence to test the veracity of competing claims as opposed to affidavit from evidence which is dynamic issues or associated with Judicial Review proceedings”

55. The application suffers all the deficiencies explained by the Court of Appeal above.

56. Whereas it is true that the Applicant raises issues of violation of constitutional provisions and in particular Article 47(1) and (2) and 41(1) of the *Constitution*, again, these matters fall within the jurisdiction of this court donated to it by the *Constitution* under the provisions of Article 22 of the *Constitution* which grant every person – “the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened”. Persons who desire to have these constitutional rights vindicated and or protected are guided to approach this court or the High Court in terms of the *Constitution* of Kenya (Protection of Rights and Fundamental freedoms practice and procedure Rules, 2013) made by the Hon. the Chief Justice in terms of Article 22(3) as read with Article 23 and Article 165 (3)(b) of the *Constitution* of Kenya 2010.

57. It is apposite to note that these Judicial Review proceedings are brought by way of petitions and the reliefs available to persons who approach the court in such manner are stipulated under Article 23(3) to include

- a. a declaration of rights
- b. an injunction
- c. a conservatory orders
- d. a declaration of invalidity of any law that denies, violates, infringes or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;
- e. an order for compensation and
- f. an order of Judicial Review

58. The Judicial Review contemplated under Article 23(f) should not be confused at all with a judicial review application brought, seeking prerogative orders of certiorari and mandamus and brought like the present application as expressly stated by the Applicant herein under “Order 53 Rule 1 of the Civil Procedure Rules, 2010.”



59. Accordingly, this application is inappropriate as filed to deal with contractual issues between the Applicant and the 2nd Respondent and is dismissed on that basis alone.
60. For completeness, however, the court has noted that although the Applicant had admitted the misconduct, he was accused of by serving two public institutions at the same time and for considerably long periods without detection, the Respondent took an inordinately long period to process the disciplinary hearing between the period 15/7/2021, when the Applicant was issued with a notice to show cause and his salary stopped at the date of dismissal, which came about sixteen (16) months later on 19th January 2023. The court also finds that the Applicant had filed an appeal against the dismissal which appeal was still pending as at the time of filing this suit. The matters of procedural fairness arising from the set of facts are amenable to resolution in terms of the contracts of employment between the parties herein and the Human Resource and Administration Manual (Policies and Procedure) of 19/3/2020, that governed disciplinary matters between the parties.
61. The manner in which the Applicant approached the court would not allow the dispute of facts in this respect to be fully ventilated and appropriate remedies granted.
62. Accordingly, the application is dismissed in its entirety and parties to bear their own costs of the suit.

DATED AT NAIROBI THIS 15TH DAY OF MAY 2025

MATHEWS NDUMA

JUDGE

Appearance:

Mr. Wasonga for Ex-parte Applicant

Mr. Mukele for Respondent

Mr. Kemboi – Court Assistant

