



**Njako v Competition Authority of Kenya & another (Employment and Labour Relations
Petition E136 of 2024) [2025] KEELRC 1284 (KLR) (7 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1284 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E136 OF 2024**

HS WASILWA, J

MAY 7, 2025

BETWEEN

DR PRISCILLA MUMBUA NJAKO PETITIONER

AND

THE COMPETITION AUTHORITY OF KENYA 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

JUDGMENT

1. By a Petition dated 2nd September 2024, the Petitioner sought for the following reliefs; -
 - a. A declaration be and is hereby issued that the deliberations and determinations and/or decisions of the Board of Directors of the 1st Respondent conducted on diverse dates in January 2024 and communicated vide the Internal Memo dated 24th July 2024, Ref:CAK/CS/01/23/5/A the effect of which was that the Petitioner would be surcharged a sum of Ksh. 1,227,769.20 is in contravention of Articles 10,19 (2), 20(2), 21(1), 22, 23,35,41,47 and 50(1) of *the Constitution*.
 - b. An order be and is hereby issued quashing the determinations and/or decisions of the Board of Directors of the 1st Respondent communicated vide the Internal Memo dated 24th July 2024,Ref:CAK/CS/01/23/5/A and the said surcharge be set aside.
 - c. An Order that the 1st Respondent be and is hereby ordered to pay the petitioner all salary, remuneration, benefits and/or emoluments that may have been deducted pursuant to the surcharge while the proceedings were pending in this Honourable Court.
 - d. General damages for breach of the Petitioner's fundamental rights under *the Constitution*.
 - e. An order of costs of this Petition be paid by the 1st Respondent.



Petitioner's Case

2. The Petitioner avers that she is an employee of the 1st Respondent and is entitled to a monthly salary and other emoluments as per the contract of employment.
3. The Petitioner avers that on 25th June 2024, she was verbally informed by the 1st Respondent's Manager Internal Audit, Mr Ochieng O. Ochiel that effective 1st July 2024 at the commencement of the 2024/25 financial year, she would be added into the 1st Respondent's financial books and records as a debtor for recovery of Daily Subsistence Allowance (DSA) advanced to her in relation to out of office assignments attended on various dates in the two preceding financial years.
4. Vide this verbal communication, the Petitioner learnt of an audit exercise conducted on various dates in January 2024 on the 1st Respondent's board's instructions and there was resolution of the board's Audit Committee which was adopted by the full board: the board resolved that the Petitioner be treated as a debtor for alleged failure to submit back to office reports related to 4 out of office trips.
5. The Petitioner avers that she responded by informing the 1st Respondent that she never attended a work-related meeting in Uganda; and she duly submitted back office reports for the trip to Belgium on 8th March 2023 and France on 12th December 2022; the last being a joint report prepared by herself and a colleague Mr. Boniface Kamiti whom she attended the meeting with and made a joint presentation.
6. The Petitioner avers that in a subsequent email of 26th June 2024, Mr. Ochiel clarified that the Board's resolution was not to assign her as a debtor but rather surcharge for failure to account for resources expended for out of office assignments. However, the Petitioner was not furnished with the said board resolution despite her request to be furnished with the same and the relevant policy guiding the planned surcharging.
7. The Petitioner avers that Mr. Ochiel sent her email on 27th June 2024 alleging that he left out an additional trip taken by her to Geneva on 2nd July 2023 and directed that she shares the back to office report for the same.
8. The Petitioner avers that she responded by pointing out that she accompanied the 1st Respondent's Acting Director General on the trip as a technical person and worked under his instructions, therefore, she did not envisage that she would have to prepare a back to office report. Further, on return, she presented a surrender of the advanced DSA which was approved at all relevant levels without any reference to the missing back to office report.
9. It is the Petitioner's case that her explanation in respect to the Geneva trip was ignored and Mr. Ochiel guided that she raises any query with the Board, notwithstanding being in the dark about the relevant process that had begun in January 2024 and the subsequent resolution with possible dire repercussions on her livelihood.
10. The Petitioner avers that she received an email from the 1st Respondent's Human Resource Department on 27th August 2024 referring to a resolution of the 2nd Special Board Audit Committee held on 12th January 2024 and approved by the full board on 31st January 2024 and attaching an extract of an Internal Memo Ref: CAK/CS/01/23/5/A from the Manager Internal Audit to the Director Corporate Services instructing the latter to effect the said resolution and implement a surcharge of the



sum of Kshs. 1,277,769.20 for the trips to Geneva and Thailand for failure to account for resources expended yet the Petitioner filed a surrender of the DSA advanced for all trips in question and the same were approved back in 2022 and 2023.

11. The Petitioner avers that her net pay as at August 2024 is Kshs. 148,316 and the surcharge scheduled to be effected from September 2024, will leave her without a salary for about 12 months in breach of her right to dignity and fair labour practices provided under Article 28 and 41(1) of *the Constitution*.
12. It is the Petitioner's case that the alleged Internal Audit was done in secrecy and the failure to her was in violation Article 10, 19(2), 47 and 50 (1) of *the Constitution*.

Respondents' Case

13. In opposition to the Petition, the Respondents filed a Replying Affidavit dated 18th October 2024 sworn by Onesmus O. Ochiel, the 1st Respondent's Manager, Internal Audit.
14. The Respondents aver that during a special meeting of the 1st Respondent's Board Audit Committee with the external auditor from the Office of the Auditor General held on 20th December 2023, the Chairman of the Committee instructed him to provide information on the Authority's expenditure on foreign travel for the financial years 2022/2023 and 2023/2024.
15. During special meeting, the findings of the special assignment together with the list of sponsored officers for different engagements indicating whether or not the officers had filed back to office reports in compliance with government directives; Circular No. OP/CAB.26/4A/VOL.I (54) dated 19th December 2022 as affirmed by Circular No. OP/CAB.304/018 dated 19th June 2023 which requires all returning officers to make individual back to office reports within 7 days of return.
16. The Respondents aver that the Board Audit Committee recommended that all officers who had not filed back to office reports be asked to file the same or be surcharged the amounts spent on the foreign trips. This recommendation was adopted by the full board on its 98th meeting on 31st January 2024 and the resolution was communicated to the 1st Respondent's Acting Director General on 16th February 2024.
17. The Respondents aver that the Board Audit Committee held a meeting on 16th April 2024 noted the management's delay to effect the board's resolution and mandated the Manager, Internal Audit to implement the resolution and report on the progress. The Manager, Internal Audit contacted all affected staff members including the Claimant both orally and in writing requesting them to submit the reports failure to which the resolution to surcharge them will be implemented.
18. The Respondents aver that the Petitioner responded via email confirming she attended the functions in question and submitted a number of reports requested. The Manager, Internal Audit responded requesting the Petitioner submits two reports which were not in the 1st Respondent's records.
19. The Respondents aver that the Petitioner referred him to the relevant file and the Manager, Planning Policy and Research, Ms. Mwarania, under whose custody the back to office reports are maintained was not aware of the said reports. The 1st Respondent's Manager, Internal Audit vide an email dated 27th June 2024 clarified to the Petitioner the specific reports had not been submitted.
20. The Respondents aver that the in her response, the Petitioner requested for policy provisions that requires her to submit back to office report upon return from official engagement abroad and she was referred back to the board which made the decision and the established channels to seek such clarification.



21. It is the Respondents case that the board resolutions were duly communicated to all staff members including the Petitioner and all concerned officers were given adequate time to file back to office reports: a number of officers submitted their reports, however, 6 officers, including the Petitioner did not file the reports necessitating communication to management for the surcharges to be effected.
22. The Respondents aver that as a public servant, the Petitioner is obligated to account for all resources spent sponsoring her on official engagement as per government guidelines issued from time to time.
23. It is the Respondents' case that the Special Audit Report that led to the board resolution to surcharge officers who did not file back to office reports was not an investigation as alleged by the Petitioner but a report to ascertain the amount of money spent on foreign travel by the 1st Respondent and confirm whether staff members were complying with government guidelines on the same.

Petitioner's Submissions

24. The Petitioner submitted on three issues: (i) whether the Respondents acted in contravention of *the Constitution*; (ii) what should be the fate of the said deliberations, determinations and/or decisions made by the Respondents; (iii) what are the appropriate orders for the court to make under the circumstances.
25. On the first issue, the Petitioner submitted that failure to submit back to office reports does not amount to failure to account for resources as these resources are accounted for by surrender of the Daily Subsistence Allowance. The Petitioner surrendered the same and it was approved and no one made any reference to any missing report, therefore, the Respondent is estopped from bringing up the issue long afterwards.
26. The Petitioner submitted that the Respondent is referring to Circular No. OP/CAB.304/018 issued on 29th June 2023 yet the Switzerland trip happened in 2023 and the one in Bangkok, Thailand happened on 27th to 30th June 2022; this is unlawful. Furthermore, the Petitioner attended the Switzerland trip together with Director General as a technical person therefore not required to file a back to office report.
27. The Petitioner submitted that the Respondents knew that the surcharge would adversely affect her livelihood for almost 12 months upon its implementation. This was in violation of her right to fair administrative action provided under Section 4 of the Fair Administrative Action Act which states: -

“Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–

- (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
- (b) an opportunity to be heard and to make representations in that regard;
- (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
- (d) a statement of reasons pursuant to section 6;
- (e) notice of the right to legal representation, where applicable;
- (f) notice of the right to cross-examine or where applicable; or



(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.”

28. The Petitioner submitted that the 1st Respondent failed to implement their action efficiently, lawfully and in a procedural manner. To date no documents containing the charges of the Petitioner or the supposed board resolution have been formally served to her. The 1st Respondent’s implementation of their administration duties were not cognizant of the provisions of Article 47 of *the Constitution* and the *Fair Administrative Action Act*.
29. The Petitioner submitted that the 1st Respondent acted ultra vires and in excess of their power. The 1st Respondent is a state corporation governed by the *State Corporations Act*, which Act creates the office of Inspector General (Corporations) given the power to effect surcharges in the case where a sum has not been duly accounted for under Section 19. The 1st Respondent ignored the law and engaged in actions they had no business engaging in and reached decisions they had no power arriving at, therefore, the decisions should be quashed.
30. On the second issue, the Petitioner submitted that the 1st Respondent casually informed of an alleged audit exercise she had no prior knowledge about in violation of the principles of national values and good governance provided under Article 10 of *the Constitution*.
31. The Petitioner submitted that the *Fair Administrative Action Act* provides that where an administrative action is likely to adversely affect a person, the person should be given written reasons for the proposed action: the 1st Respondent has not formally served the Petitioner with documents or records of the charges against her.
32. The Petitioner submitted that the surcharge would be in breach of her right to inherent dignity and fair labour practices outlined under Article 28 and 41 of *the Constitution* as it will have grave financial impact on the Petitioner as it seeks to den her a monthly salary for the next 12 months. This is unreasonable and impractical.
33. The Petitioner submitted that the surcharge is unlawful as it assaults the Bill of Rights as per *the Constitution*, it is contrary to the provisions of the *State Corporations Act* and the Fair Administrative Act and even if the surcharge was proper in form, it is still unfounded as the Petitioner was not non-compliant to begin with.
34. On the final issue, the Petitioner submitted that she has adduced sufficient evidence to show that the 1st Respondent violated her rights under Article 10, 19(2), 20(2), 21(1), 23, 28, 35, 41 and 47 of *the Constitution*. Therefore, she prays for a declaration that deliberations of the 1st Respondent’s Board contravened *the Constitution* and are ultra vires their powers and should be quashed.

Respondent’s Submissions

35. The Respondent submitted on four issues: Whether there exists a reasonable cause of action in the present suit; whether the orders sought in the Petition are capable of being granted; whether the Petitioner is entitled to damages; and who should bear the costs of this suit?
36. The Respondents submitted that there exists no reasonable cause of action against the Respondent for the reason that the surcharge complained about by the Petitioner is speculative and has not occurred and further, the probability of the same occurring is slim to none as the Back Office Report in question was already submitted to the 1st Respondent. The Petitioner was not surcharged and the said Back to Office Report was accounted for, there exist no basis for the present suit.



37. It is the Respondents' submission that the petition is premature for the reason that the Petitioner moved with haste to institute the suit prior to exhausting the 1st Respondent's internal administrative dispute resolution mechanisms provided for under the law, namely administratively raising and resolving the issue with the 1st Respondent's Board.
38. On the second issue, the Respondents submitted that all the prayers sought are incapable of being granted as the surcharge complained about is non-existent and the probability of the same occurring is slim to none as the Back Office Report in question was already submitted to the Respondent.
39. On the third issue, the Respondents submitted that the Petitioner is not entitled to any damages for the reason that her fundamental rights and freedoms were not infringed upon because the surcharge complained about did not occur and/or was anticipatory to say the least. Further, the Petitioner has failed to provide evidence of the violations of her fundamental rights and freedoms.
40. I have examined the averments of the parties herein. It is clear that the envisaged surcharge of the petitioner has not been effected. It is also clear that the internal disciplinary mechanism have not taken place to warrant the petition being alarmed. In any case no surcharge can happen without the petitioner being allowed to defend herself.
41. It is my finding that the petitioner approached this court prematurely and the petition should not be allowed to proceed. The same is struck out with no order of costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH OF MAY, 2025.

HELLEN WASILWA

JUDGE

