



Nzatu v Board of Trustees National Social Security Fund & another (Constitutional Petition 8 of 2017) [2024] KEELRC 90 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 90 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CONSTITUTIONAL PETITION 8 OF 2017**

J RIKA, J

JANUARY 31, 2024

BETWEEN

MUTEMI NZATU PETITIONER

AND

**BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY
FUND 1ST RESPONDENT**

ETHICS AND ANTI-CORRUPTION COMMISSION 2ND RESPONDENT

JUDGMENT

1. This Petition was initiated at the High Court on 14th February 2017.
2. It was transferred by the High Court to the E&LRC, for want jurisdiction, on 14th February 2017.
3. It was received at the E&LRC on 16th February 2017.
4. It was scheduled for notice to show cause why it should not be dismissed for want of prosecution, on 27th September 2022.
5. The Court declined to dismiss the Petition for want of prosecution, directing that the Petition is heard and determined on the strength of the Parties' pleadings, affidavits, documents and submissions.
6. Parties confirmed filing and exchange of their submissions at the last mention before the Court, on 21st September 2023.

The Petition

7. The Petition is founded on the grounds outlined in the Petition, and on an affidavit sworn by the Petitioner on 14th February 2017.



8. He states that he was employed by the 1st Respondent as an Estates Officer 1, in 1996. He is a trained and qualified as a Quantity Surveyor. He was promoted to the position of Manager, Property Development on 26th May 2011.
9. The 2nd Respondent generated a report about corruption in public offices, which was the subject matter of the President's state of the nation address at Parliament, on 26th March 2015.
10. The President demanded that any public officer negatively mentioned in the confidential report, should immediately step aside.
11. The Petitioner learnt from the media around 2nd April 2015, that he was among the public officers mentioned adversely, in the 2nd Respondent's report.
12. He consequently stepped aside on 2nd April 2015.
13. Investigations by the 2nd Respondent followed, and were not concluded within 60 days as required by the law. They were concluded 8 months after the Petitioner stepped aside.
14. It was found that there was no evidence to sustain criminal or administrative charges against the Petitioner, in respect of the allegations of corruption, which related to the 1st Respondent's Regularization of Tassia II Housing Scheme, or the attendant award of tender for Infrastructure Development to China Jiangxi. It was recommended that the file is closed.
15. The Office of the Director of Public Prosecutions reviewed the file and reached the same finding and recommendation, through a report dated 16th December 2015. The 2nd Respondent communicated this outcome to the 1st Respondent's Chairman and Chief Executive Officer, on 21st December 2015.
16. When the Petitioner attempted to return to duty, he was advised by the Acting Managing Director of the 1st Respondent, not to resume duty, pending formal communication.
17. Instead, the 1st Respondent stopped payment of the Petitioner's salary in March 2016. On 3rd March 2016, he was issued a letter to show cause, based on the same allegations over which he had been cleared by the two investigatory and prosecutorial state agencies.
18. The Petitioner replied on 22nd April 2016 and 4th May 2016, highlighting that he had been absolved, and demanding to go back to his office.
19. The ODPP and the 2nd Respondent wrote to the 1st Respondent, on receiving a copy of the Petitioner's reply, to take the necessary remedial action by reinstating the Petitioner, or paying the Petitioner his dues to the date of retirement, in accordance with the *Leadership and Integrity Act*.
20. The 1st Respondent did not comply. It issued the Petitioner another letter to show cause before summarily dismissing him, on 31st August 2016, alleging that he engaged in an act of gross misconduct, by failing to appear for show cause hearing.
21. The Petitioner submits that the 1st Respondent violated his right to equal protection and benefit of the law under Article 27[1] of the *Constitution* and Regulation 19 of the *Leadership and Integrity Regulations* 2015. He submits that the 1st Respondent violated his right to dignity under Article 28 and right to fair administrative action, under Article 47 of the *Constitution*. He submits that the 1st Respondent acted contrary to the national values and principles.
22. The Petitioner prays for: -



- a. Declaration that the 1st Respondent violated the Petitioner's constitutional rights under Articles 10[1] & [2], 27, 28, 47, & 232 of the Constitution.
- b. Declaration that summary dismissal of the Petitioner was unconstitutional and contrary to the Leadership & Integrity Regulations 2015.
- c. General damages for violation of constitutional and statutory rights.
- d. 12 months' gross salary.
- e. All penalties and interest accrued on the Petitioner's mortgage from 1st April 2016 to 31st August 2016.
- f. Immediate reinstatement of the Petitioner, or payment of full employment benefits for the remainder of the service period, from the date of suspension.
- g. The members of the 1st Respondent to be removed and disqualified from holding public office under chapter 6 of the Constitution.

1st Respondent's Response.

23. The 1st Respondent opposes the Petition, relying on the Replying Affidavit of its Acting Managing Trustee / Chief Executive Officer, Dr. Anthony Omerikwa, sworn on 29th August 2017.
24. It is conceded that the Petitioner was employed by the 1st Respondent on 24th January 1996 as an Estates Officer 1. He rose to become the Manager, Property Development, from the year 2011.
25. Omerikwa states that the Petitioner was never suspended by the NSSF [represented by the 1st Respondent]. The Petitioner stepped aside on his own volition, through a letter dated 2nd April 2015. The issue of reinstatement does not arise. He stepped aside on his own volition.
26. Investigations alleged to have been carried out by EACC were not sanctioned by the 1st Respondent or carried out at its behest.
27. The Petitioner indeed resumed duty briefly on 18th December 2015, and thereafter ceased reporting altogether. The 1st Respondent never suspended him.
28. Investigations allegedly carried out by the EACC, did not bar the 1st Respondent, from carrying out any internal investigations, against the Petitioner, and taking disciplinary action, as his Employer.
29. Omerikwa states that the 1st Respondent terminated the Petitioner's contract ultimately, relying on its Human Resource Manual, and in conformity with the Employment Act 2007. Its processes and actions were independent, and not informed by the processes at the EACC and OPP.
30. The NSSF sustained massive losses between 2005 and 2015. It initiated investigations into the conduct of the Petitioner, in his role as the Manager, Property Development. Investigations revealed massive rot, in the Petitioner's docket.
31. The findings included the following: -
 - a. The Petitioner procured a contractor to partition and renovate the 1st Respondent's offices at Westlands, contrary to Public Procurement and Disposal Act, 2005.
 - b. He usurped the mandate of the CEO, acted against Board resolution, and wrote to Multiscope Consulting Engineers Limited, authorizing handover of Tassia II project. The 1st Respondent



was exposed to contractual claim of Kshs. 694 million, being mobilization fee and remainder of the contract sum.

- c. The Petitioner negligently approved major changes to the Hazina Trade Centre project, without the concurrence of the CEO and the 1st Respondent. The 1st Respondent was left exposed to a contractual claim of Kshs. 6.7 billion.
 - d. He allowed the handover of Hazina Trade Centre to the contractor before the 1st Respondent cleared with Nakumatt Holdings, the anchor tenant. The 1st Respondent was left with unnecessary claim of Kshs. 2.3 billion by Nakumatt Holdings.
 - e. He handed over the Nyayo Embakassi In Fills project site to the contractor, before change of user had been granted by the City County of Nairobi. The 1st Respondent risked contractual claim of Kshs. 2.3 billion.
 - f. He negligently allowed contract relating to the Milimani Executive Apartments to be executed without the project supervisors having been contracted. He misled the 1st Respondent that the internal team, had supervisory capacity, exposing the 1st Respondent to unwarranted risks and liabilities.
32. Further, the internal Audit and Risk department revealed irregular payments, made during procurement of lifts for the parking silo. The following anomalies, placed at the Petitioner's doorstep, were detected: -
- a. Variation of Mits Electrical Company Limited for supply, installation and servicing of Mitsubishi Elevators/ Lifts, from Kshs. 13.8 million to Kshs. 18.8 million.
 - b. He irregularly granted bailout in favour of Mits Electricals Limited, occasioning the 1st Respondent a cost overrun of Kshs. 14.2 million.
 - c. Marine insurance, freight port clearance and delivery to site were charged on the 1st Respondent twice, Kshs. 6.4 million having already been transferred to Mits Electricals Limited Cooperative Bank account for the same services.
 - d. There was a possible misapplication of Kshs. 16.6 million. There were no receipts / vouchers supporting these transactions. It could not be confirmed if payments went into the intended services.
 - e. There was no evidence that the Petitioner made any effort to recover amount for services alleged not to have been rendered by Mits Electricals Limited.
33. There was irregular procurement of clearance services attributed to the Petitioner: -
- a. Clearance service was procured from Ports Conveyors by the Petitioner for Kshs. 16.6 million, without following the prescribed procedure.
 - b. A request was made dated 21st March 2012 preferring Ports Conveyors as service provider. Payment was made to Ports Conveyors the following day, 22nd March 2012. It was not clear if the best bargain was obtained.
 - c. Payments above were not supported by documents.
 - d. Procedure above amounted to single sourcing.
 - e. Management under the Petitioner, overrode controls.



- f. Services by Mits Electricals were shrouded in unclear circumstances and there were allegations of non-specific performance, on contract obligations, which was wholly under the supervision of the Petitioner.
34. The 1st Respondent in its 169th meeting, recommended that administrative action be taken against the Petitioner, among other involved staff.
35. The 1st Respondent issued the Petitioner with a letter to show cause, dated 3rd March 2016. He responded unsatisfactorily, on 22nd April 2016. He was invited to appear before the Human Resource, Legal and Strategic Committee to answer to the allegations.
36. He did not show up on the scheduled date, 26th August 2016. He wrote on 25th August 2016, declining invitation.
37. In view of non-attendance, the 1st Respondent had no alternative, but to summarily dismiss the Petitioner. His terminal dues were computed, and he was advised to collect the payment, amounting to Kshs. 1,549,292.
38. Omerikwa underscores that the Petitioner was never suspended by the 1st Respondent. He stepped aside voluntarily. He absconded. The 1st Respondent urges the Court to dismiss the Petition with costs.

2nd Respondent's Response.

39. Mark Ndiema, a Forensic Investigator employed by the 2nd Respondent, swore a Replying Affidavit on 3rd May 2017, stating the 2nd Respondent's position.
40. He explains that the 2nd Respondent investigated alleged irregular approval by the 1st Respondent, of a budget of Kshs. 5.05 billion, for the regularization of Tassia 11 Housing Scheme, and the award of tender for the Scheme's Infrastructure Development to China Jiangxi International Kenya.
41. Ndiema carried out investigations on allegations of corruption and/or economic crimes relating to the project, to establish if an offence had been committed or not.
42. It was concluded by the investigations that there was no criminal culpability on the part of the Petitioner, with regard to the project.
43. The EACC forwarded its report to ODPP, indicating that there was no evidence to sustain criminal or administrative action against the Petitioner.
44. The ODPP concurred with the 2nd Respondent's findings and recommendations. The CEO of the 2nd Respondent communicated the findings and recommendation to the 1st Respondent.
45. Ndiema points out that the letter to show cause, addressed to the Petitioner by the 1st Respondent however, raises a number of issues, that were not within the scope of the investigations carried out by the 2nd Respondent.
46. They include: -
- a. The procurement of a contractor to partition and renovate Westlands offices.
 - b. The negligent handover of Hazina Trade Centre.
 - c. The negligent handover of Nyayo Estate in the fills project site to the contractor, without the approval of the City County of Nairobi.
 - d. Negligent execution of the contract relating to Milimiani Executive Apartments.



47. The 2nd Respondent's involvement was solely with respect to the budget approval for regularization of Tassia 11 Housing Scheme and award of tender for Infrastructure Development to China Jiangxi International Kenya Limited.
48. The 2nd Respondent is a stranger to the circumstances leading to the Petitioner's dismissal.

Issues.

49. These are whether the 1st Respondent violated the Petitioner's constitutional and statutory rights as identified in the Petition; and whether the Petitioner is entitled to the remedies pleaded.

The Court Finds

50. The Petitioner was employed by the 1st Respondent in 1996, as an Estates Officer 1. He was later promoted to the position of Manager, Property Development, a position he held until he left employment, on contentious circumstances.
51. He first wrote a memo to the 1st Respondent dated 2nd April 2015. He informed the 1st Respondent that he was stepping aside, following a Presidential directive, until investigations were completed.
52. The second exit from employment, was communicated by the 1st Respondent's Chairman, in a letter of summary dismissal dated 31st August 2016.

(a) Violation of constitutional and statutory rights.

53. The Petitioner explains that on 26th March 2015, the President of Kenya addressed the Nation from Parliament, vowing to double the Government's efforts in the fight against corruption, and directing all Public Officers mentioned in a confidential corruption report by the 2nd Respondent, to step aside pending conclusion of investigations against them.
54. He explains that State House sent a formal directive on or about 28th March 2015, requesting those who were mentioned in the confidential report, to step aside.
55. At paragraph 6 of his Petition, the Petitioner states that on or about 2nd April 2016 [2015?], he learnt from the media that he was one among many Public Officers listed in the confidential report.
56. He therefore stepped aside from his office, with effect from 2nd April 2015.
57. It is clear from this evidence, that the Petitioner initially left employment, what he calls stepping aside, on his own volition. His stepping aside was not at the instance of his Employer. It was at his own volition.
58. There were no instructions from the 1st Respondent, asking the Petitioner to step aside. He acted from reports he received from the press. Employers do not issue instructions to their Employers through press reports.
59. The President of Kenya, or state house, did not employ the Petitioner. The 2nd Respondent or the ODP, did not employ the Petitioner. He was not bound by the directives or instructions issued by other sources. He was only bound by the instructions of his Employer.
60. The Petitioner has not established that he stepped aside in accordance with the applicable Human Resource Manual, the *Employment Act*, or the *Anti-Corruption and Economic Crimes Act*.
61. The Petitioner went on self-imposed suspension, invoking the authority of the President. A Public Officer or State Officer is suspended and placed on half-pay by his Employer, only when he is charged



- with corruption or economic crime, under Section 62 of the [*Anti-Corruption and Economic Crimes Act*](#).
62. He ceases to be suspended if the proceedings are discontinued, or he is acquitted.
 63. There is nothing in the [*Anti-Corruption and Economic Crimes Act*](#), providing for Presidential directives, or self-imposed suspension.
 64. Suspension of an Employee under the NSSF Human Resource Manual, is governed by Chapter 8 on Discipline and Grievance Policy, clause 8.2 [b]. The Fund may suspend an Employee, when: -
 - a. The Employee is charged with corruption or economic crime.
 - b. If convicted by a Court of law of a criminal offence pending appeal.
 - c. Suspension should not exceed a period of 3 months, if the case is within the control of the Fund.
 - d. Employee will receive half pay while on suspension until his case is determined.
 - e. The Fund reserves the right to conditionally or unconditionally lift suspension.
 65. These disciplinary procedures on suspension, mirror the provisions of the law under the [*Anti-Corruption and Economic Crimes Act*](#).
 66. Having suspended his service with the 1st Respondent unilaterally on 2nd April 2015, the Petitioner purported to return to work uninvited by the 1st Respondent, on 18th December 2015.
 67. His conduct was very strange. First he absconded way back in April 2015. He stayed away for 8 months, purporting to resume duty on 18th December 2015. There was no communication from the 1st Respondent, suspending the Petitioner, or recalling him 8 months later.
 68. From the inception, it was the Petitioner who was in violation of the terms and conditions of service. He was away without the leave of his Employer, or other lawful cause, from the place appointed for the performance of his work. He walked away from the office, and back in office, at his own discretion, without the instructions of his Employer, unmindful of the terms and conditions of his service, the Human Resource Manual, the [*Employment Act*](#), the [*Anti-Corruption and Economic Crimes Act*](#). For 8 months, he was engaged in an act of gross misconduct under Section 44[4][a] of the [*Employment Act*](#), over which the 1st Respondent would have been entitled to summarily dismiss the Petitioner.
 69. The Court is not able to find any constitutional or statutory violations by the 1st Respondent or indeed the 2nd Respondent, against the Petitioner, concerning the period the Petitioner was on self-imposed suspension, between April 2015 and December 2015.
 70. His argument on Regulation 29 of the [*Leadership and Integrity Act*](#) is misconceived. The Regulation applies to officers who are suspended. The Regulation states that if the officer had been suspended, a public entity which employs that officer, shall reinstate the officer within 14 days of a finding by the 2nd Respondent, that there was no violation. Who suspended the Petitioner? He was never suspended. There were no allegations against him communicated by the 1st Respondent which were being investigated, and he was never asked to step aside by the 1st Respondent. His argument on the [*Leadership and Integrity Act*](#), is misplaced.



Violations after December 2015?

71. After the Petitioner ended his self-imposed suspension, he was issued a letter to show cause by the 1st Respondent, dated 3rd March 2016.
72. There were 6 allegations in the letter to show cause, which were not a replica of the 2nd Respondent's subject of investigations on corruption and confidential report.
73. The allegations were: -
 - a. The Petitioner procured a contractor to partition and renovate its offices at Westlands, Ongata Rongai and Block 'A' Social Security House Nairobi, contrary to Public Procurement and Disposal Act.
 - b. On 16th March 2015, he usurped the role of the Managing Trustee and wrote to Multiscope Consulting Engineers Limited, authorising the handover of Tassia 11 site to the contractor.
 - c. He approved major changes to Hazina Trade Centre project design, without the 1st Respondent's approval.
 - d. He allowed Hazina Trade Centre site to be handed over to the contractor, without clearance by the anchor tenant, Nakumatt Holdings Limited.
 - e. He handed over the Nyayo Embakassi in fills project site to the contractor without change of user approval, from the City County of Nairobi.
 - f. Lastly, it was alleged that the Petitioner allowed the contract relating to Milimani Executive Apartments project to be executed without project supervisors.
74. It was explained by the 2nd Respondent's Investigator, Mark Ndiema, in his Replying Affidavit that investigations by the 2nd Respondent related to alleged irregular approval by the 1st Respondent of a budget of Kshs. 5,053,520,521 for regularization of Tassia 11 Housing Scheme. The second limb of investigations related to award of tender for the Scheme's Infrastructure Development to China Jianxi Kenya Limited.
75. At paragraph 11 of his Replying Affidavit, Ndiema makes it clear that at least 5 issues in the letter to show cause issued upon the Petitioner by the 1st Respondent, were outside the scope of the investigations carried out by the 2nd Respondent.
76. The Petitioner's submission that he was cleared by the 2nd Respondent, with the concurrence of the ODPP, is misguided. 5 of the matters subject of the letter to show cause, were not investigated by the 2nd Respondent.
77. He replied to the letter to show cause, on 22nd April 2016. The Petitioner conceded in his reply, that all issues against him in the letter to show cause, had not been referred to the bodies constitutionally mandated to undertake investigations, except the issue regarding Tassia Project.
78. He did not state in his reply that he had been investigated by the 2nd Respondent on all matters subject of the letter to show cause, and exonerated with the concurrence of the ODPP, warranting his return to work.
79. After he replied, he was invited by the 1st Respondent for disciplinary hearing, scheduled for 26th August 2016. He was specifically advised about his right to be accompanied to the disciplinary hearing, by a management member of staff, of his choice, in accordance with Section 41 of the [Employment Act](#).



80. He declined invitation through his Advocates, in a letter dated 25th August 2016, claiming that his attendance, would have the effect of sanitizing illegalities committed against him by the 1st Respondent.
81. The 1st Respondent summarily dismissed the Petitioner on 31st August 2016, the Petitioner having failed to attend disciplinary hearing meeting.
82. The Court does not think that the 1st Respondent violated any of the Petitioner's constitutional or statutory rights. He was invited for disciplinary hearing, and opted to keep away. He did not subject himself to the disciplinary process, in accordance with the 1st Respondent's Human Resource Manual and the *Employment Act*. He did not show that the 1st Respondent terminated his contract unfairly, as required under Section 47[5] of the *Employment Act*.
83. It was entirely for the 1st Respondent, to determine whether administrative action should be taken against the Petitioner.
84. The Court does not think that even had the matters subject of the letter to show cause, all been investigated by the 2nd Respondent, that it was for the 2nd Respondent or the ODPP, to advise the 1st Respondent whether administrative action against the Petitioner was merited.
85. The 2nd Respondent and the ODPP could only advise the 1st Respondent on whether investigations found evidence to warrant prosecution under the *Anti-Corruption and Economic Crimes Act*.
86. Whether administrative action was warranted was entirely an employment decision, to be made by the Employer, within the confines of the Human Resource Manual.

Remedies.

87. The Court does not agree with the Petitioner that the 1st Respondent violated the Petitioner's constitutional rights under Articles 10 [1] & [2], 27, 28, 47 and 232. There was no violation under the *Leadership and Integrity Act*. The Petitioner was never suspended by the 1st Respondent.
88. The order for reinstatement is unmerited. The Petitioner absconded duty on 2nd April 2016, returning briefly on 18th December 2015. He was engaged in a continuous act of gross misconduct for 8 months. He could have justifiably been summarily dismissed, at the point when he alleged to have stepped aside, without being suspended by the 1st Respondent.
89. He again failed to attend the disciplinary hearing, and did not therefore give evidence, to absolve himself of the allegations subject matter of the hearing. Failure to attend the disciplinary hearing was itself an act of gross misconduct, an employment offence of insubordination under Section 44[4] [e] of the *Employment*.
90. The remedy of reinstatement would in the view of the Court be unreasonable, the Petitioner having taken the liberty to walk in and out of the workplace, and having opted not to subject himself to the disciplinary process. It would also be against Section 12 of the *Employment & Labour Relations Court Act*, placing a time limit of 3 years on the grant of the remedy of reinstatement, from the date of dismissal. The Petitioner was summarily dismissed on 31st August 2016- over 7 years ago.
91. The prayer for 12 months' gross salary in compensation is declined, the Court having concluded that the Petitioner was fairly and validly dismissed.
92. The prayer for "all penalties and interest accrued on his mortgage from 1st April 2016 to 31st April 2016," is completely misplaced, and without support in evidence. The Petitioner did not exhibit his



mortgage contract or establish in what way, the 1st Respondent could be linked to that contract, and assume liability.

93. What would be the legal foundation, for the Court to grant an order against the 1st Respondent Trustees, for their disqualification from holding public office, and for their removal from office?
94. Lastly, the Petitioner did not disclose any cause of action against the 2nd Respondent. The prayers in the Petition are not directed against the 2nd Respondent. The 2nd Respondent did not employ the Petitioner and did not suspend or summarily dismiss the Petitioner. It is difficult to understand why the 2nd Respondent was made a party to the Petition.

It is ordered:

- a. The Petition is declined.
- b. Costs to the Respondents.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 31ST DAY OF JANUARY 2024.

JAMES RIKA
JUDGE

