



**Onsongo & 2 others v Naivasha Water Sewerage & Sanitation Company Limited
(Petition E020 of 2023) [2024] KEELRC 76 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELRC 76 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E020 OF 2023
HS WASILWA, J
JANUARY 25, 2024**

BETWEEN

**DOUGLAS B ONSONGO 1ST PETITIONER
MOFFAT W KAMUNYA 2ND PETITIONER
ELIUD SIOMI 3RD PETITIONER**

AND

**NAIVASHA WATER SEWERAGE & SANITATION COMPANY
LIMITED RESPONDENT**

RULING

1. This Ruling is in respect of the Petitioner's Application, Notice of Motion dated 20th September, 2023, filed under certificate of urgency pursuant to sections 8 & 9 of the *Law Reforms Act*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 53 of the *Civil Procedure Rules* 2010 and Articles 2,3(1), 10,20,22(1), 23(1)&(3), 47(1), 165(3)(b) of the *Constitution*, seeking for the following Orders:-
 1. Spent.
 2. That pending the hearing and determination of the petitioner/Applicant's instant Application, Conservatory Orders of Injunction and prohibition do issue restraining the Respondents jointly and severally, their agents, servants, functionaries, members and or officers from proceeding with the suspension of the Applicants from Employment.
 3. That pending the regularization of the basis and process of the purported allegations and disciplinary process, the suspension letter slapped on the petitioners/ Applicants be and is hereby nullified and the petitioner/applicant allowed access to their place of work, office and duties undeterred.



4. That pending the hearing and determination of this Petition, Conservatory Orders of injunction and Prohibition do issue restraining the Respondents jointly and severally, their agents, servants, functionaries, members and or officers from proceeding with internal process referred to as suspension from Company service.
5. That costs of this Application be provided for.
2. The application is based on the grounds on the face of the application and the supporting affidavit sworn on 19th September, 2023 by Douglas Bosire Onsongo, the 1st petitioner,
3. The deponent stated that they were suspended from work on the 13th September, 2023, pending investigations and disciplinary hearing, however that the Respondent has premeditated the process and has already informed its suppliers and general public that the Applicants have been removed from office.
4. He contends that they were not given sufficient time to respond to issues raised in the Show cause letter, because the time taken between the show cause and the suspension was 6 days from 5th to 13th September, 2023.
5. It is averred that the suspension of the applicant is predicated on malice as the Respondent was resisting the formation of a trade Union, which the applicants were acting as interim officials of Naivasha Branch of water Sector workers.
6. He states that the suspension is tantamount to constructive dismissal especially when the Respondent has already sent messages to supplies that the applicant has been removed from office.
7. The deponent stated that the Respondent has not accorded them fair hearing in breach of Articles 25 and 47 of the Constitution. Further that the Notice to show cause lacks particular since it has blanket accusation of aiding illegal water connections and despite demand, the Respondent has refused to give particulars of these accusations.
8. The affiant states that the disciplinary process is not merited but is malicious, unjustified and intended to oppress the Applicants and thus they stand to suffer more loss if the Respondent's decision is implemented.
9. He added that the applicants have financial commitments with various financial institutions and sacco, which if interrupted will cause them financial embarrassment and ruin.
10. In the affidavit, the applicant stated that their woes began when they made a proposal to form a trade Union branch within the working force of the company, an idea which the management of the Respondent strongly opposed and they were even threatened by the managing director to effect that they shall take drastic action against them.
11. The affiant reiterated that the bulky messages sent to clients and suppliers that their services had been terminated is a clear indication that the process to be followed by the Respondent is not fair but choreographed with a premeditated end of terminating their services.
12. Additionally, that no investigations have been carried out so far, when they are already on suspension.
13. Its based on this belief that the Applicant urged this Court to allow their application in the interim and preserved their jobs until the petition is heard and determined.
14. The application is opposed by the Respondent who filed a replying affidavit sworn by Alice Nyaguthii Ngorongo, the Respondent's Human Resource Manager, on the 27th September, 2023.



15. The deponent stated that the Petition and the application is full of falsehood only meant to misled this Court and serve selfish interest of the Petitioners.
16. He stated that the Respondent has been receiving cases of water and sewer connections illegalities, tampering of customers meters and taking of bribes by the employees. Following these complaints, the Respondent carried out comprehensive inquiry, which led to identification of the three petitioners as the main suspects.
17. Consequently, the Respondent issued them with Notice to show cause why disciplinary action should not be taken against them and upon further inquiry that led to customers giving written statements and naming the three petitioners for being involved in these misconduct, the Respondent suspended them from 13th September, 2023.
18. The affiant denied the allegations that the applicants wanted to form a trade Union and also denied allegations that they sent messages to supplies informing them of removal of the Applicants from office.
19. She maintained that the applicants were suspended on the basis of aiding illegal connections and receiving bribes from clients and not in relations to joining and forming a trade Union.
20. The affiant states that on 19th September, 2023, they send invitation letters for disciplinary hearing scheduled for 28th September, 2023 and seeking confirmation of convenience of the disciplinary date to reach the Respondent by 26th September, 2023. However, before the disciplinary hearing was conducted, the Applicants herein filed this Petition, which in effects avoided the disciplinary process, as such the petition is premature.
21. The deponent stated that the Notice to Show cause dated 5th September, 2023, was worded in clear terms and gave sufficient particulars of the offense committed as such the allegations that the Notice to show cause lacked particulars was unfounded.
22. The deponent stated that the applicants herein were placed on suspension in accordance with chapter 12 of the Respondent's Human Resource Manual and paid half salary as dictated by the said provision and the law, hence, the Respondent did not breach any law.
23. The Respondent urged this Court to dismiss the Application herein with costs to allow the Respondent proceed with the disciplinary hearing.
24. The application was canvassed by written submissions, with the Applicants filling on 26th October, 2023 and the Respondents on 11th December, 2023.

Applicants' Submissions.

25. The Applicants submitted from the onset that the process initiated by the Notice to Show Cause dated 5th September, 2023 and culminated to the suspension within 6 days did not afford them an opportunity to mount a reasonable response to the allegations levelled against them.
26. It was submitted that the applicants did not receive fair hearing because the timeline to respond to the allegations before the suspension was too short, the allegations were without proper particulars, the Responses to the show Notice to show cause was not considered before the suspension and the process was stage managed because the Respondent communicated to its suppliers and customers of termination of employment of the applicants before disciplinary hearing.
27. Based on these arguments, the Applicant argued that the prayers sought in the application are justified and urged this Court to allow them as prayed. To support this argument, they relied on the case of



Fredrick Saundu Amolo (Suing through the Executive Secretary KUPPET Kajiado County Branch) v Principal, Namanga Mixed day Secondary School and Others where the Court held that:-

“I find that the Court can only intervene in an employer’s internal disciplinary proceedings until they have run their course, except in exceptional circumstances – that is where grave injustice might result or where justice might not by other means be attained. The hearing of the claimants has not run its course, but the procedure adopted with sanction before according him a fair chance to be heard in the presence of his Union or a fellow employee of his choice not accorded to him. This far the court will interference with the proceedings as by not so doing grave injustice will be occasioned to the claimant.”

Respondent’s Submissions.

28. The Respondent submitted that the Petition filed alongside the Application herein is an omnibus petition which fall short of the threshold set out in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR, thus the petition and the application should be dismissed on that ground alone. To support this argument, the Respondent cited the case of *Commission for Human Rights and Justice v Land Settlement Board of Trustess & 5 others* [2021] eKLR where the Court held;-

“The principles of drafting Constitutional Petitions were clearly captured in the case of *Anarita Karimi Njeru v Republic* [1979] eKLR. Trevalyan J (as he then was) and Hancox J (as he then was) stated as follows:-

“We would however again stress that if a person is seeking redress from High Court on a matter which involves a reference to the *Constitution* it is important (if only to ensure that justice is done to his/her case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

29. To buttress its argument, the Respondent cited the case of *Sisilia Nyakoe & Another V Attorney Genral & 4 others* [2021] eKLR where the learned Judge held that;-

“ Counsel for the Petitioners completely became evasive and did not provide any substantive argument as to whether the Petitioners had met the threshold elaborated hereinabove and whether the issues raised were within the private law purview hence could be instituted in an ordinary way. He submitted only on Articles 22 and 258 of the *Constitution* of Kenya, 2010 that gives every party a right to file a Petition in court where his rights as well as rights of others have been infringed or threatened to be infringed. He however failed to recognize that in as much as the said articles would ordinarily give the Petitioners a chance to come to court, they were required to ensure that they stated with a reasonable degree of precision their complaints against the Respondents, the provisions of the *Constitution* that the Respondents had infringed, and the manner in which the said provisions were infringed. From paragraph 24 to 27 of the Petition, the Petitioners highlight the provisions of the Constitutions that they claim to have been violated by the Respondents but they fail to elaborate on the manner in which the said provisions were violated. I therefore agree with counsel for the Respondent that the Petitioners’ Petition does not meet the threshold of what constitutes a Constitutional Petition.”

30. On whether the Court should stop the disciplinary process based on facts raised in the petition, it was submitted that as a general rule, a court of law should not interfere with an employers’ disciplinary



process unless in exceptional circumstances. In this they cited the case of [*Joseph G Naituli v Egerton Unoversity & Another*](#) [2007] eKLR where the Court held that; -

“In the present application, if this court issued the injunction to restrain the Council Disciplinary Committee from conducting the disciplinary hearing in respect of the alleged breach of terms and conditions of service by the plaintiff it would amount to the court’s interfering with the internal management of the 1st defendant. As stated earlier in this ruling, the plaintiff and the 1st defendant entered into a contract for personal service which either party is at liberty to terminate at any time. This court cannot interfere with the disciplinary mechanism established under the statutes of the 1st defendant unless it is alleged that there would be breach of the rules of natural justice. In such circumstances, an aggrieved party would be at liberty to apply for judicial review and not seek an order of injunction to stop the said disciplinary proceedings from taking place. In the premises therefore it is clear that the plaintiff has not established a prima facie case that he is entitled to the order of injunction sought. This court does not have jurisdiction to stop the Council of the 1st defendant from disciplining its employees. This court lacks any powers to direct or order parties who have entered into a service contract to perform the said service contract or to perform it in a particular manner.”

31. The same view was upheld by the Court in the case of [*Judith Mbayab Tsisiga v Teachers Service Commission*](#) [2017] eKLR and the case of [*ASL v National Bank of Kenya Limited*](#) [2018] eKLR.
32. Based on these case law, the Respondent urged this Court not to interfere with the disciplinary process and allow the same to proceed to its logical conclusion. He argued that it is in the interest of justice that this Court allows the internal mechanisms of the Respondent to be completed before the Court can intervene. To support this argument the Respondent relied on the case of [*Mercy Oyugi V Kenya Ports Authority*](#) [2018] eKLR where the Court held that;-

“All the Respondent has done is to initiate disciplinary proceedings against the Claimant, under the Respondent’s Disciplinary Handbook. There are specific allegations made against the Claimant. Serious allegations, bordering on criminal activities, have been made against the Claimant. It is in the interest of the Claimant to be heard, and clear her name, before the Disciplinary Committee of the Respondent. The Respondent has the prerogative to investigate these allegations, and discipline the Claimant. Termination of the Claimant’s contract is one of the sanctions the Respondent is allowed to impose upon the Claimant, if the allegations against the Claimant are established after hearing. The complaint by the Claimant that the letter to show cause gave the wrong Employment Number is a minor issue, which does not prevent the Claimant from submitting to the disciplinary process. Her denial that she presented fake Certificates to her Employer, should be made at the disciplinary hearing forum. She has already asked for a personal hearing. Why then come to Court, asking the Court to restrain the Respondent from imposing a valid penalty, even before the matter has been heard? The Court does not think that the Claimant has established a prima facie case with high probability of success. She has not shown that she stands to suffer irreparable injury that cannot be compensated with damages, if the disciplinary proceedings go on. Should the Respondent terminate Claimant’s contract unlawfully and unfairly, the Claimant has the remedies of compensation, reinstatement or re-engagement, under the [*Employment Act*](#) 2007. The Application has no merit.”



33. The Respondent submitted that the argument that the applicants were not granted fair hearing is without basis as the disciplinary hearing was ongoing and in fact that the case herein was filed immediately invitations for disciplinary hearing were served on the applicants, thus stopping the disciplinary process.
34. The Respondent submitted that disciplinary proceedings are time bound and should be done within 6 months, if further delay is occasioned then the disciplinary process is prejudiced. Based on this, the Respondent urged this Court to maintain status quo and allow the disciplinary process to run to its logical conclusion before making any further orders because to direct otherwise could be making final orders at preliminary stage. In this they relied on the case of *Joseph Mutuura Mberia & Another V s Council Jomo Kenyatta University of Agriculture and Technology (JKUAT)* [2013] eKLR where the Court held that;-
- “The issue of the possible embarrassment, prejudice, incontinence together with possible damage and loss caused by the suspension of the claimants, I must immediately point out that this is the case with each and every suspended employee. This would always be the possible result of any suspension. If this would be a basis for the Court to intervene in suspension proceedings, then virtually all suspension cases would be urgent and directly end up in the Court. This would fly in the face of the clear intentions of the legislature found in specific provisions in the *Employment Act* dispute resolution process, and undermine the effective and orderly resolution of employment disputes in the manner prescribed by law and the very essence of having Labour Officers, CBA and recognition agreements with Trade Unions. All employees who get dismissed or suspended and believe that they are innocent, have their reputations tarnished by their dismissals or suspensions. They will eventually get an opportunity to be heard where the employer should justify the charges against them. Should they fail to do so; such employees will be reinstated with no loss of benefits. Without going into the merits and demerits of the main cause, I accept that some damage to the claimant’s reputations would have been done. This court however is not in the business of ensuring that an employee’s reputation should not be tarnished. If so, it will open the flood gates and this court will be inundated with many such applications.”
35. In conclusion, the Respondent reiterated that they are running out of time in concluding the disciplinary process and urged this Court to allow them finish the process to beat the timelines of 6 months. In any event that there are no exceptional circumstances that the Applicants have tabled before this Court to warrant the granting of the Orders sought.
36. Based on the foregoing, the Respondent urged this Court to dismiss the Application and the Petition.
37. I have examined the averments and submissions of the parties herein.
38. There is one issue for this court to determine and this is whether this court can grant interim reliefs stopping the disciplinary process already instituted against the petitioners.
39. From the proceedings herein, the applicants were suspended vide letters dated 13th September, 2023 for reasons of allegation of facilitating illegal connection and meter reversals.
40. The duration of the suspension was not stated but it was indicated that this was to pave way for investigations.
41. The applicants indicated to this court that following their suspension, the respondents customers were informed that the applicants were not allowed to transact any business on their behalf.



42. In the applicant's view, the Email exhibited at page 35 of their documents show that the respondents have a pre-determined position against them without giving them an opportunity to be heard.
43. As submitted by the respondents herein this court has held that courts should restrain from interfering with the internal disciplinary processes of an employer.
44. This court has reinstated (see *Joseph G. Naituli* Case) (*Supra*) & *Judith Mbayab Tsisiga* (*Supra*) that courts cannot interfere with the disciplinary process unless it is alleged that the process is flawed.
45. And in any case where the process is as appears flawed, the court's duty is not to stop the process altogether but to direct a proper fair process to proceed.
46. In the matter before court, the applicants proceeded to this court immediately they were suspended and stopped any further disciplinary process. They aver that they are targeted for union activities.
47. The evidence of their union activities has not been exhibited before court.
48. That notwithstanding, the applicants must also demonstrate before this court the flawed process instituted by the respondent which has also been done.
49. The only flaw from the applicants affidavit is failure to grant them evidence of the illegal connections.
50. In view of the above arguments, I find the application to stop the disciplinary action altogether cannot stand.
51. I will therefore allow the respondents to proceed with a proper disciplinary process but details of the allegations and their investigation report should be served upon the applicants before the hearing.
52. This process must not exceed 6 months as per the respondents HR Manual.
53. Costs in the petition.

RULING DELIVERED VIRTUALLY THIS 25TH DAY OF JANUARY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Mwangi holding brief for Karanja for Respondent – present

Geke for Petitioners – absent

Court Assistant – Fred

