



Kharey v Northern Water Works Development Agency & another (Petition E216 of 2023) [2024] KEELRC 330 (KLR) (23 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 330 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E216 OF 2023**

B ONGAYA, J

FEBRUARY 23, 2024

**IN THE MATTER OF THE CONTRAVENTION
OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**IN THE MATTER OF ARTICLES 1,2,10, 19, 20,21, 22, 23(3), 27,
28, 29,30,41,47 & 50, 236 OF THE CONSTITUTION OF KENYA.**

-AND-

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 10,19,21,22,23,27,28,29,30,41,
AND 47 OF THE CONSTITUTION OF KENYA, 2010**

-AND-

**IN THE MATTER OF SECTION 5 & 17 OF THE EMPLOYMENT ACT -AND-
IN THE MATTER OF THE UNCONSTITUTIONAL AND UNLAWFUL VICTIMIZATION,
DISCRIMINATION AND DEMOTION IN RANK OF HARUN YARROW KHAREY**

-BETWEEN-

HARUN YARROW KHAREYPETITIONER (APPLICANT)

-VERSUS-

**NORTHERN WATER WORKS DEVELOPMENT
AGENCY.....1ST RESPONDENT**

**THE CEO, NORTHERN WATER WORKS
DEVELOPMENT AGENCY.....2ND RESPONDENT**

BETWEEN

HARUN YARROW KHAREY PETITIONER

AND

NORTHERN WATER WORKS DEVELOPMENT AGENCY .. 1ST RESPONDENT



RULING

1. The petitioner filed the instant application dated 22.11.2023 through the firm of Kusow & Company Advocates. The application is by the notice of motion under Article 10, 27, 28, 29, 41, 47, 50 and 236 of *the Constitution* of Kenya, Section 3, 5 of the *Employment Act*, Section 4 of the *Fair Administrative Action Act*, Section 3, 12 (1) (a), 12 (2) and 12 (3) of the *Employment and Labour Relations Court Act*, the inherent jurisdiction of the Court and all other enabling provisions of law. The petitioner prayed for orders as follows:
 - a. That the application be certified urgent and service of the same be dispensed with in the first instance (Spent).
 - b. That pending the hearing of the application inter partes, an order do issue staying and suspending the execution and implementation of the 2nd Respondent's communication contained in the letter dated 18th October 2023 demoting the Petitioner in rank to Job Evaluation Grade C1 from Grade NW4 (Job Evaluation Grade C5) and the 2nd Respondent's Internal Memo dated 7th November 2023 directing the Petitioner to handover all necessary documents to the Senior Internal Auditor (Grade NW5 or JE Grade C3) and which made the latter the in charge of the Internal Audit Department (Spent).
 - c. That pending the hearing and determination of the application, an order do issue staying and suspending the execution and implementation of the 2nd Respondent's communication contained in the letter dated 18th October 2023 demoting the Petitioner in rank to Job Evaluation Grade C1 from Grade NW4 (Job Evaluation Grade C5) and the 2nd Respondent's Internal Memo dated 7th November 2023 directing the Petitioner to handover all necessary documents to the Senior Internal Auditor (Grade NW5 or JE Grade C3) and which made the latter, the incharge of the Internal Audit Department (spent).
 - d. That pending the hearing and determination of the application, a temporary injunction do issue restraining the Respondents from frustrating the Applicant's job performance, victimizing, discriminating, terminating from employment, creating a hostile work environment and/or unfairly treating the Petitioner on account of performing his duties as per his job description and further, on account of filing this petition (spent).
 - e. That pending the hearing and determination of the main petition, an order do issue staying and suspending the execution and implementation of the 2nd Respondent's communication contained in the letter dated 18th October 2023 demoting the Petitioner in rank to Job Evaluation Grade C1 from Grade NW4 (Job Evaluation Grade C5) and the 2nd Respondent's Internal Memo dated 7th November 2023 directing the Petitioner to handover all necessary documents to the Senior Internal Auditor (Grade NW5 or JE Grade C3) and which made the latter, the incharge of the Internal Audit Department.
 - f. That pending the hearing and determination of the main Petition, a temporary injunction do issue restraining the Respondents from frustrating the Applicant's job performance, victimizing, discriminating, terminating from employment, creating a hostile work



environment and/or unfairly treating the Petitioner on account of performing his duties as per his job description and further, on account of filing this petition.

- g. That Costs of this Application be provided for.
2. The application is based on the supporting affidavit of Harun Yarrow Kharey, the petitioner herein, sworn on 22.11.2023 and upon the following grounds:
- a. That he is a victim of discrimination, unfairly treated and victimized on account of performing his duties as per his job description and on account of his deep rooted political opinion. That as a result the respondents in utter disregard to the rule of statutory provisions on integrity and honesty caused the petitioner's demotion, an act, which the petitioner termed as unlawful.
 - b. That the petitioner was appointed to the position of Internal Auditor Job Grade (NWWDA 4) on 6th May, 2021 on permanent and pensionable basis and was earning an initial basic salary of Kshs. 50,000/- – 95,200/-, house allowance of Kshs. 20,000/-, hardship allowance of Kshs. 27,200/-, commuter allowance of Kshs. 5,000/- and Kshs. 11,200/- per diem allowance.
 - c. That the petitioner was the only one in the Internal Audit Department and reported to the 2nd respondent administratively and functionally to the 1st respondent's board of directors through its Audit and Risk Committee. That being the only one the petitioner served as the head and in charge of the Internal Audit Department.
 - d. That at all time the petitioner executed his mandate independently, diligently and professionally until October 2021 when the former Board appointed the 2nd respondent as Acting Chief Executive Officer. That the 1st respondent proceeded to operate without a board for a period of six months from January 2022 to July 2022 during which period the petitioner maintains that no audit were conducted despite numerous requests by the petitioner. That the board latter resumed in September 2022 owing to the August 2022 General Election and extension of term effective August 2022.
 - e. The petitioner further voiced concerns with the 1st respondent's board vide his email of 6th September, 2022 voicing his grievances and frustrations which included denial of access to accounting and financial records, restrictions to his work and denial to access Electronic Resources Planning System which the 1st respondent runs on despite all other departments having access to the same.
 - f. The petitioner maintains that his concerns were never addressed thus straining his relationship with the 2nd respondent leading to victimization and further frustration thus infringing on his rights as an employee and creating a hostile and uncondusive work environment.
 - g. That the petitioner's victimization culminated in the recruitment of a purported senior Internal Auditor Job Group NW5 - the act the petitioner termed as a well-choreographed scheme aimed at taking control of the Internal Audit Department from the petitioner. The new recruitment was done under a new scheme, which was termed as a failure by the petitioner and as a result the respondents were forced to demote or downgrade the petitioner to scale NW6, which is an entry level position and was now expected to report to the Senior Internal Auditor
 - h. That in October 2022, the Salaries and Remuneration Commission approved a new salary structure for the 1st respondent as a state corporation and as a result, the agency was placed on a higher salary structure without decreasing effect to any staff. That as a result of the exercise all staff initially in grade NW4 transitioned to the new Job Evaluation (JE) Grade C5 save for



the petitioner who was demoted to move to two levels downwards to C1, a level equivalent to entry level and was earning a salary of Kshs. 86,025/-.

- i. The petitioner avers that his position of Grade NW4 is equivalent to JE Grade 5 under the new salary structure and ought to have been earning a basic salary of Kshs. 128,180/- to 193,381/-.
 - j. The petitioner maintains that the respondents conduct is unconstitutional, unlawful, and discriminatory as it violates his fundamental rights. He urged the Honourable Court to find the application with merit and to allow it in terms of the reliefs sought therein.
3. In response to the application the respondents filed a replying affidavit sworn by Andrew Rage Eysimkele, the Chief Executive Officer of the 2nd respondent, on 08.01.202, in which he denies all allegations of victimization, discrimination and demotion as alleged by the petitioner herein.
 4. The respondents maintain that the instant petition and application have prematurely been filed in Court as the petitioner is still an employee of the 1st respondent and has not exhausted the internal dispute resolution mechanisms (grievance procedure) as provided for in the 1st respondent's Human Resource Policies and Procedure Manual and in particular section 12 of the HR Manual that deals with issues related to victimization, discrimination and demotion. The section provides that an employee with a personal grievance not being a disciplinary matter should in the first instance approach his immediate supervisor to solve it. The immediate supervisor shall carefully consider any submissions made to him and endeavor to settle the matter or refer the case to the Head of Functional Area for appropriate action. If the employee is dissatisfied with the decision of the immediate supervisor, he or she may appeal to the CEO through the Head of HR and the CEO shall consider the investigation report and prepare a written response to the aggrieved employee giving reasons for the decision. If the aggrieved party is dissatisfied with the decision made, he or she shall be accorded the right to appeal to the Board. Further, section 12.3 of the Manual provides for negotiation, conciliation, mediation and arbitration as other internal mechanisms of resolving disputes that should be explored by the employee in the first instance. The petitioner disregarded the immediate supervisor being the CEO, wrote letters to the Board Chairman, and has failed to comply with the internal procedures on grievance management.
 5. The respondent further confirmed the petitioner's appointment to the position of Internal Auditor. The affiant further confirmed recruitment of a Senior Internal Auditor, which position is said to be more senior than the position held by the petitioner or applicant. That the petitioner unsuccessfully applied for the position and was in fact interviewed on 29th August, 2023.
 6. The respondents argue that the application filed by the petitioner is an afterthought and well choreographed to mislead this Honourable Court to enable the petitioner to gain a promotion through the backdoor.
 7. On the issue of salary, the affiant stated that the 1st respondent herein introduced a new salary structure which became operational in October 2023. That the new grading included grades NW4, NW5 and NW6 in the organizational structure, grading and staff establishment together with the approved remuneration structure of the 1st respondent. That in the old structure the position of Principal Internal Auditor and Senior Internal Auditor never existed. That the new structure provided for promotion and career progression. That the petitioner did not qualify for appointment or promotion due to the fact that this was his first appointment and had no prior experience as an Auditor. The respondents argue that on this ground the petitioner does not qualify for appointment or promotion to the non-existent position of Principal Internal Auditor as he seeks in his instant application and petition.



8. The respondents state that the petitioner or applicant through his application is seeking to only confuse the Honourable Court in misinterpreting the terms of C1, C3 and C5, which are known as Patterson band which is a job evaluation method used by the salaries and remuneration Commission (SRC) to evaluate the worth of a job in the new organizational structure and is not particularly used during transitioning in an organization. The respondents further aver that the petitioner is being deceptive and dishonest by selectively identifying a few employees of the 1st respondent who were transitioned and promoted to Principal level.
9. The respondents argue that the applicant herein is completely misguided in believing that his old grade 4 should reflect the same number after transition. It is the respondents' argument that the correct grade after transition for the applicant is NW 6, which is correctly comparable and similar to the old grade NWSB4. That the instant application seeks for the petitioner's promotion unmeritorious.
10. The respondents urged the Honourable Court to find the application devoid of merit and having failed to meet the threshold for grant of the orders sought and should be dismissed with costs to the respondents.
11. In further opposition to the application the respondents filed a notice of preliminary objection and grounds of opposition dated 4th December, 2023 raising the following grounds:
 - a. That at all material times, the Honourable Court lacks the original jurisdiction to hear and determine the Petitioner's/Applicant's Application & Petition as filed before this Honourable Court, considering that the Petitioner herein has not exhausted the internal dispute resolution mechanisms, contrary to the doctrine of exhaustion of internal dispute resolution mechanisms. In the instant matter, the internal dispute resolution mechanisms are contained in the 1st Respondent's Human Resource Policy and Procedures Manual, February 2021 (herein "HR Manual") which under Section 12 enumerates the process of addressing grievances by employees including such grievances as the grievances lodged before this Honourable Court by the Petitioner/Applicant in form of the Petition and Application herein. The internal dispute resolution mechanisms or grievance procedure is clearly outlined under Sections 12.2, 12.3 and 12.4 of the HR Manual which clearly, on the face of the record, the Petitioner/Applicant has not adhered to before commencing the instant court proceedings before this Honourable Court. (See the Annexed Human Resource Policy and Procedures Manual, February, 2021).
 - b. That at all material times, the Honourable Court lacks the original jurisdiction to hear and determine the Petitioner's application and petition considering that both the application and petition are essentially seeking to review (judicially review) the meritorious administrative actions or decisions of the 1st Respondent herein as demonstrated by the orders sought in the application and the petition, contrary to Section 9 (2) of the Fair Administrative Actions Act Cap No. 4 of 2015 which explicitly requires that a court should not review an administrative action or decision unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted. In the instant matter, the internal dispute resolution mechanisms as contained in the 1st Respondent's HR Manual have not been exhausted or adhered to by the petitioner without any justifiable reason making the petitioner's application and petition premature and as such, ought to be preliminary dismissed by the Honourable Court in accordance with Section 9(3) of the Fair Administrative Actions Act Cap No. 4 of 2015 and costs awarded to the Respondents herein.
 - c. That at all material times, the Honourable Court lacks the original jurisdiction to hear and determine the Petitioner's/Applicant's Application & Petition as filed before this Honourable



Court, considering that both the petitioner's application and petition are clearly in breach of the petitioner's employment contract as constituted in the petitioner's letter of appointment dated 6th May 2021, which unequivocally provided that the petitioner was unequivocally bound by the 1st Respondent's Human Resource Policy and Procedures Manual 2021. Accordingly, the petitioner's actions of instituting the instant court proceedings before the Honourable Court, wholly prima facie constitute a breach of contract, as the Petitioner/Applicant failed to exhaust internal dispute resolution mechanisms, as provided for in the 1st Respondent's Human Resource Policy and Procedures Manual, February 2021. (See Annexed the Letter of appointment dated 6th May 2021).

- d. That the Honourable Court is duty bound in accordance with Article 159 (2) (c) of *the Constitution* to promote alternative dispute resolution mechanisms including; negotiation, conciliation, mediation and arbitration as provided for by Section 12.3 of the HR Manual, which the Petitioner/Applicant blatantly disregarded and proceeded to institute the instant court proceedings before this Honourable Court. Accordingly, the application and petition ought to be preliminarily dismissed with costs by this Honourable Court in light of the foregoing and in a bid to promote alternative dispute resolution mechanisms.
 - e. That petitioner's application and petition are an abuse of the court process, do not disclose any reasonable cause of action, can only be regarded as scandalous, frivolous or vexatious and will highly prejudice the 1st Respondent herein, as per Order 2 Rule 15 of the Civil Procedure Rules 2010 because they essentially seek this Honourable Court to assume the role of the 1st Respondent and promote the petitioner to the non-existent position of a Principal Internal Audit Officer in the 1st Respondent's Organizational structure. This is especially relevant, considering that the petitioner herein admittedly unsuccessfully applied and was interviewed on 29th August 2023 for the highest advertised position of a Senior Internal Auditor in the organizational structure of the 1st Respondent. Unfortunately, the Petitioner was unsuccessful in his application to be the Senior Internal Auditor as another candidate who got the best results in the interview was hired by the 1st Respondent in the position of the Senior Internal Auditor. It is with this backdrop, that the petitioner herein as an afterthought instituted the instant proceedings before the Honourable Court. (See Annexed the Petitioner's/Applicant's Application Letter for the position of Senior Internal Auditor dated 7th August 2023 and Interview Report for the position of Senior Internal Auditor dated 29th August 2023).
 - f. That, petitioner's application dated 22nd November 2023 ought to be preliminary dismissed as it seeks substantive orders at a preliminary stage without all parties having been heard.
 - g. That the petitioner's application and petition both dated 22nd November 2023 are full of unsubstantiated baseless allegations, innuendos and assumptions without the Petitioner/Applicant presenting any probative, whole factual and cogent evidence that could assist this Honourable Court in making a just and fair determination.
 - h. That in the circumstances, the respondents herein pray that the application and petition both dated 22nd November 2023 which are wholly misconceived, scandalous, vexatious and an abuse of the Honourable Court process be struck out with costs to the respondents in limine under the court's inherent jurisdiction granted by Section 3A of the *Civil Procedure Act* Cap 21.
12. In a brief rejoinder to the replying affidavit, the petitioner filed a further affidavit sworn on 05.02.2024, in which the petitioner stated that he in fact petitioned the 1st respondent's board vide his letter dated 16th October, 2023 in line with section 12 of the 2nd respondent Manual. That in his letter the he



- maintains that he pointed out the case of discrimination in the manner in which implementation of the new salary structure and further that he was being victimized for performing his duties as per his job description. That all his previous complaints against the 2nd respondent remained unanswered and thus he believes that waiting for the board to deliberate on his concerns will render the exercise an academic one due to historical inaction of the board.
13. That section 12.2.3 requires a party not satisfied with the decision of the immediate supervisor to appeal to the CEO. That in absence of a decision by the board there is nothing to appeal against and thus the doctrine of exhaustion does not apply in his case.
 14. The petitioner maintains that he has been discriminated against, unfairly treated and victimized on account of performing his work as per his job description. That the respondents failed to apply the same standard accorded to the petitioner or applicant's colleagues during the transition to principal officers pursuant to the new grading structure. He asserts that contrary to the respondents' contentions he is equipped with the necessary qualification and experience to hold the position and that in the implementation of the new grading structure, employees were expected to transition accordingly.
 15. The applicant maintains that he has made out his case for grant of the orders he seeks in his application and that the respondents will not suffer any prejudice. Further, that he has proved his application raises a prima facie case for discrimination through a skewed implementation of approved grading and salary structure.
 16. The applicant urged the Honourable Court to find in his favour and allow the application as prayed.
 17. Parties thereafter filed and exchanged their written submissions. The Court has considered all the material on record for and against the application and returns as follows.
 18. In *Geoffrey Mworira –Versus- Water Resources Management Authority and 2 Others* [2015]eKLR the Court held thus, "The principles are clear. The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of *the Constitution* or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."
 19. In the instant case, the respondent has established that the Manual in section 12 provides for an elaborate and genuine internal grievance resolution or management system. The further evidence is that the Manual was incorporated in the parties' contract of service. The parties mutually agreed that the CEO, the 2nd respondent, is the applicant's immediate supervisor. The further evidence is that instead of first presenting his grievance to the CEO per section 12 of the Manual, the applicant has bypassed the CEO and written directly to the Board. The Court considers that the applicant should first exhausted the genuine internal grievance management system by presenting the grievance to the CEO as the immediate supervisor and if he is dissatisfied, he can then appeal to the Board. To that extent, the Court returns that the applicant has not established a threshold for the Court's intervention in the respondents' performance of the human resource functions in issue. Thus, to answer the 1st issue the Court returns that the prayers in the application pending the hearing and determination of the petition will not issue for want of a prima facie case.
 20. To answer the 2nd issue the Court returns that the preliminary objection will succeed only to the extent that the applicant ought to exhaust the internal grievance procedure. While the Court



recognizes alternative dispute resolution as per the constitutional and statutory provisions cited for the respondent, the applicant has as well elaborately pleaded in the petition allegations of violation or threatened violation of the cited provisions of the Bill of Rights. It is that the Court and not the internal grievance procedures is the proper forum to hear and determine the allegations about the Bill of Rights. To that extent, only the application will collapse but the main petition will be saved subject to parties' grievance procedures being exhausted of the dispute as far as it can be legitimately resolved in that procedure.

In the circumstances and in conclusion, the application is hereby determined with orders:

- a. The application is hereby dismissed for want of exhaustion of the internal grievance procedure.
- b. Pending further directions or orders in the petition, the petitioner to forthwith submit to the 2nd respondent his grievances within three days and the 2nd respondent to make decision thereon within 14 days and if the petitioner is dissatisfied to forthwith appeal to the Board; and parties are encouraged to compromise the dispute, in terms of the alternative dispute resolution mechanisms in section 12 of the Manual and, with a view of recording a consent as may be just.
- c. For avoidance of doubt, pending hearing and determination of the petition and per relevant provisions of section 46 of the *Employment Act*, 2007, the respondents by themselves, agents or their servants or officers shall not harass, victimize, or otherwise punish the petitioner on account of initiating the instant petition or invoking the grievance procedure in the Manual.
- d. To foster compromise, each party to bear own costs of the application in any event.
- e. Parties to agree on a convenient mention date for further orders or directions on the petition or for recording a compromise as parties may find appropriate.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 23RD FEBRUARY 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

