Arapkoko v Ethics and Anti-Corruption Commission (Petition E107 of 2022) [2024] KEELRC 271 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 271 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION E107 OF 2022

K OCHARO, J

FEBRUARY 16, 2024

BETWEEN

ABRAHAM LOROT ARAPKOKO ..... PETITIONER

AND

ETHICS AND ANTI-CORRUPTION COMMISSION ..... RESPONDENT

JUDGMENT

1. The petitioner filed the petition on 29.06.2022 through M/S Ochieng Teddy Advocates. The petitioner prayed for:

   a. A declaration that the Respondent's action of subjecting the petitioner to a disciplinary hearing after clearing him of any wrongdoing amounts to denial, violation and/or infringement of the Petitioner's fundamental rights and freedoms under Articles 24(1), 27(1), 41(1), 47(1)(2) and 50(1,2c) of *the Constitution* of Kenya.

   b. A declaration that the actions and conduct of the respondents of subjecting the petitioner to a disciplinary hearing after clearing him on several occasions are in breach of the *Fair Administrative Action Act*, its own terms and conditions or corporate services policies and procedures manual, 2020 and rules of natural justice.

   c. A conservatory order be issued against the respondents barring the hearing of disciplinary proceedings against the petitioner on suspected of committing an offence of causing an accident by reckless driving contrary to section 47 of the *Traffic Act*.

   d. An order that the petitioner be reinstated to work immediately with full pay.

   e. An order of compensation for breach of the petitioner's right.

   f. An order that the respondents bear the costs of the petition herein.

g. Any other relief that this court shall deem just, fit and appropriate to grant in favour of the petitioners.

2. The petition was based upon the petitioner's supporting affidavit and exhibits thereto filed together with the petition and further affidavit sworn on 11.10.2022. The petitioner's case is as follows:

a. He is retained in the employment of the respondent as an ethics officer and he reports to the Deputy Director, Ethics Compliance.

b. That he enjoys certain privileges such as driving the Commission motor vehicle, as authorized by a letter of authorization from the Chief Executive Officer.

c. On 27.06.2021 with the authority of the Respondent drove Motor vehicle KCF 534 U to Garissa for work-related duties.

d. On 28.06.2021 while driving to Garissa on official duties, the petitioner was involved in an accident along Garissa -Mwingi road, whereupon he sustained severe injuries and the subject motor vehicle damaged.

e. The accident was reported at Garissa police station under OB NO. 15/29/6/2021 and the police commenced investigations to identify the cause of the accident and who to blame.

f. Meanwhile as the investigations were ongoing the petitioner was getting medication and recuperating at Medina Hospital in Garissa.

g. That subsequently the police issued an investigation report stating that the petitioner was driving alone in the subject motor vehicle and therefore he was the only one who sustained injuries from the accident, and that the accident was unavoidable and therefore there was no one to blame for the said accident.

h. After recovering from the injuries sustained from the accident, the petitioner went back to work and was required to record an entry into the motor vehicle work ticket in explanation of the events leading to the occurrence of the accident.

i. The commission was required to claim compensation from its Insurers for the injuries he suffered and damage to the Motor vehicle.

j. The Commission conducted internal investigations whereupon neither the petitioner nor any person was found to blame for the accident, and thus the respondent proceeded to seek compensation from the insurance company, that is, Geminia Insurance Company.

k. The Insurer conducted its own investigations to understand and analyse the cause and liability if any for purposes of assessing its obligations in respect of the accident claim.

l. Subsequently, the respondent was compensated with an amount of Kshs 54,513 as satisfaction and discharge of claim under policy number WIP/NBI/2020/000171.

m. After the compensation the petitioner presumed that the events of 28.06.2021 and the resultant actions taken by the respective bodies and or authorities had placed matters of the accident to rest.

n. On 28.04.2022 the petitioner was summoned by one of the Directors of the respondent and was served with a letter dated 28.04.2022 which indicated that he was being interdicted by the respondent effective immediately for three months, on account of the accident.

o. As the petitioner left the office, the Deputy Director, Mr. Patrick Owiny issued him with a Notice to show cause dated 28.04.2022 which letter indicated that concerning the accident of 28.06.2021, the petitioner had given false information and was thus in breach of various laws, code of conduct and EACC Corporate services Policies and procedural manual, 2020.

p. The letters did not contain attachments demonstrating the false information allegedly provided.

q. The petitioner was required to give a response to the show cause letter within 24 hours and because of the short time frame, the petitioner requested the respondent through its Secretary via email on 29.04.2022 to provide the necessary documents, which request was never acted upon. The documents were not supplied at all.

r. The petitioner responded to the show cause letter through his letter dated 29.04.2022 and stated that two independent bodies had already conducted investigations and their reports were similar in that they both did not find fault and or liability on him.

s. After sending the response to the show cause letter, the petitioner was vide a letter dated 13.06.2022 informed by the respondent that the matter had been forwarded to the Staff Disciplinary and Conflict Resolution Committee for adjudication on 3 counts, namely:

   i. Reasonably and on sufficient grounds being suspected of having committed an offence of causing an accident by reckless driving contrary to section 47 of the *Traffic Act*, to the substantial detriment of his employer, the Ethics and Anti-corruption commission being an offence warranting summary dismissal as defined in clause 14.8.1 (vii) of the Ethics and Anti-corruption commission corporate services, policies and procedures manual, 2020.

   ii. Violation of clause 12. 11.1(i) and (v) of the Ethics and Anti-Corruption Commission Corporate Services, Policies and Procedures Manual, 2020 by failing to demonstrate honesty in the conduct of public and private affairs and misuse of property.

   iii. Violation of clause 14.8.1(ix) of the Ethics and Anti-corruption Commission corporate Services, Policies and Procedures Manual, 2020 by falsifying information.

t. On 24.06.2022 whilst reporting to his supervisor as was required in the letter of interdiction, the petitioner was given a letter dated 17.06.2022 notifying him of a disciplinary hearing to be conducted before the Staff Disciplinary and Conflict Resolution Committee on 05.07.2022.

u. The petitioner maintains that the respondent's actions have been tainted with unlawfulness and unfairness violating his constitutional rights and principles of natural justice, namely:

   1. Contravention of his inalienable right to a fair hearing as guaranteed under article 50(1) of *the constitution* of Kenya by denying him an opportunity to be heard before punishing him.

   2. Contravention of his right to fair administrative action as guaranteed under Article 47 of *the Constitution* of Kenya by breaching his fundamental rights without giving him proper reasons for interdiction.

   3. Contravention of the petitioner's right to fair labour practices as guaranteed under article 41 of *the Constitution* of Kenya by subjecting him to investigations and more so punishment for allegations that have already been detrimental by two authorities.

4. Contravention of the Commission's Corporate Services Policies and Procedures Manual by subjecting him to a punishment before the right procedure is followed and further subjecting him to a punishment which does not have a basis.

3. The respondent filed the replying affidavits of Douglas Olang the respondent's Human Resource Officer, Emily Kangai the petitioner's supervisor and Stephen Wanyama Nyongesa and investigator, all sworn on 25.07.2022. It was stated and urged as follows:

a. The petitioner is an Ethics Officer employed by the respondent and on 27.06.2021 he intended to accompany a legal officer to Garissa for the hearing of Garissa anti-corruption case no. E004 of 2019 Republic Vs. Julis Too.

b. A work plan was prepared by the petitioner and approved by the Director Ethics and Leadership allowing the petitioner to travel on 27.06.2021 and travel back on 30.06.2021 after attendance of the said case.

c. An official vehicle together with a driver employed by the commission was assigned to the team for purposes of the assignment.

d. On 28.06.2021 at around 9 pm the petitioner was involved in a road traffic accident in Garissa while driving the respondent's motor vehicle registration number KCF 534U Mitsubishi Lancer without authorization.

e. The respondent investigated the circumstances surrounding the accident through Stephen Wanyama and established the following:

i. The respondent team arrived in Garissa on 27.06.2021 at around 7:30 pm when the petitioner subsequently took control of the motor vehicle without authorization at 8:00 pm after his colleagues retreated to their accommodation.

ii. The petitioner used the motor vehicle to ferry an unknown female individual on the morning of 28.06.2021 while on his way to pick up the team from their accommodation for the day's work.

iii. The petitioner handed the motor vehicle back to the driver and subsequently at 3 pm on 28.06.2021 resumed use of the motor vehicle unauthorized.

iv. The petitioner used the motor vehicle to ferry the aforementioned individual on social excursions and consumed alcohol in the respondent's motor vehicle in the course of their frolics.

v. The petitioner drove recklessly and at high speed despite protests from the unauthorized passenger, eventually losing control of the motor vehicle and causing an accident with a trailer.

vi. The unauthorized passenger sustained injuries and was taken to hospital at medina in Garissa while the petitioner fled the scene and was eventually taken for treatment by the team he had travelled together with, as well as his colleagues from the Garissa office who became aware of the incident.

vii. The petitioner made a false report at Garissa police station based on which he obtained a non-injury abstract, falsified work ticket, recorded a false statement, drew a false scene of accident sketch and impressed upon police officers not to continue investigations.

viii. The false report also omitted the presence of an unauthorized passenger in the respondent's motor vehicle.

f. In light of the findings of the investigations, the respondent commenced disciplinary proceedings.

g. On 28.04.2022 the respondent issued the petitioner with a notice to show cause giving the respondent seven reasons for which disciplinary proceedings had been commenced.

h. the matter was then forwarded to the staff disciplinary and conflict resolution committee when the response by the petitioner was found unsatisfactory.

i. The petitioner was interdicted for 3 months through a letter dated 28.04.2022 informing him of the investigations and the contemplated disciplinary proceedings.

j. The petitioner was to receive 50% of his basic salary together with house and commuter allowance and medical benefits in full during the interdiction period.

k. The petitioner requested for relevant documents on 29.04.2022 and was to be supplied with the same prior to the disciplinary hearing.

l. On 13.06.2022 the petitioner was served with the charge sheet for purposes of the disciplinary hearing. On 17.06.2022 the petitioner was served with a notice of hearing to appear before the staff disciplinary committee and the charges were reiterated in the notice.

The Petitioner's Submissions.

4. The Petitioner identifies three issues that in his estimation emerge for determination; whether the Respondents have breached the Petitioner's rights as enshrined under *the Constitution*; whether the Disciplinary process as commenced by the Respondent against the Petitioner is marred with irregularities and stage-managed to dismiss the Petitioner and; whether the Petitioner is entitled to compensation for breach of his constitutional rights.

5. Counsel for the petitioner submitted that it is trite that administrative action must be legal, reasonable and procedurally fair. This is what Article 47 of *the Constitution* commands. To buttress these submissions, reliance was placed on the cases of Dry Associates Ltd v Capital Markets Authority and Another [2012] eKLR and Kenya Human Rights Commission & another v Non- Non-Governmental Organizations Co-ordination Board & another [2018] eKLR.

6. It was argued that the petitioner was interdicted before being given any opportunity to be heard. This the Respondent has not denied. Further, despite requesting documents prior to responding to the notice to show cause, the Respondent never supplied the petitioner with any of the requested documents to assist him in preparing for his defence and in allowing him to respond properly to the notice to show cause.

7. The Petitioner's Counsel urged this Court to note that the interdiction took place on the same date as the Petitioner was given the show cause letter. For an interdiction to be valid must meet the 3-dimension criteria. To bolster this submission, Counsel cited the holding in Fredrick Saundu v Principal Namanga Mixed Secondary School& 2 others.

8. It was further submitted that Article 41 of *the Constitution* of Kenya 2010, provides for the right to fair labour practices. A failure to supply an employee with documents to enable him to prepare for his defence is an affront to that employee's right under the stated Article. To support his point, Counsel cited the case of Reuwel Waithaka Gitahi & 2 Others v Kenya Revenue Authority [2016] eKRL.

9. Submitting on the alleged breach of the Petitioner's right to a fair hearing under Article 50 of *the Constitution* of Kenya, the Petitioner stated that he was taken through three investigations and in all of them he was found not to blame for the accident. First, the police investigated the matter and found the Petitioner not liable. Second the Respondent's Insurer for the accident motor vehicle, conducted its independent investigations, no culpability was attributed to him. Lastly, the Respondent carried out investigations into the events leading to the accident, and it is upon his exoneration from blame that he was allowed back to work. For the Respondent to require him to go through another investigation and disciplinary process shall be a breach of the Petitioner's right not to be subjected to double jeopardy.

10. Addressing the issue of whether the Disciplinary process as commenced by the Respondent against the Petitioner is marred with irregularities and stage-managed to dismiss the Petitioner, Counsel urged the Court to be cognizant of the fact that though the general principle is that the Court cannot interfere with an organization's internal disciplinary processes, the Court can rightfully depart from the principle where the justice of the case so demand, for instance, where it is satisfied that the process is marred with irregularities or is stage managed towards dismissal. To support these submissions, reliance was placed on the case of Ann Wambui Kamuiru V Kenya Airways – Cause No. 1684 / 2015.

11. The circumstances of this matter clearly show that the Respondent has a predetermined mind to dismiss the Petitioner.

12. On the reliefs sought Counsel submitted that this Court has the authority to grant damages for breach of an individual's rights against the violator. In the instant matter damages of Kshs. 1,000, 000 shall suffice.

13.The Respondent's Submissions.

14. The Respondent distils five issues for determination in this matter; whether the Honourable Court ought to intervene in a disciplinary process that is pending before an employer against employees; whether the Respondent's decision to initiate disciplinary proceedings against the Petitioner amounted to denial, violation/infringement of the Petitioner's fundamental rights and freedoms under Article 24,41[1][2] and 50[1][2][c] of *the Constitution* of Kenya; whether the Respondent's decision to initiate disciplinary proceedings against the Petitioner breached the Fair Administration Act, the Respondent's Corporate Services policies and Procedure Manual 2020 and the rules of natural justice; whether an order requiring the petitioner's reinstatement ought to issue and; whether the Petitioner is entitled to compensation.

15. The Respondent urged this Court to take note that no disciplinary hearing has yet commenced in respect of the Petitioner. The Respondent had merely instituted disciplinary proceedings against the Petitioner. The Petitioner was served with a notice for a hearing on 5th July 2022, and the matter could not move any further as a result of this court's order.

16. It was submitted that the Petitioner's petition is mistimed. To allow the same shall be tantamount to this Court usurping the role of the disciplinary panel. The Court cannot interfere with the disciplinary process unless there is an exceptional reason[s] to so do. To support this position reliance was placed on the case of Rebecca Ann Maina & 2 Ors vs Jomo Kenyatta University of Agriculture and Technology [2014] eKLR.

17. The Respondent's Counsel submitted that considering the circumstances of the matter as elaborated in the replying affidavits it comes out clearly that the Respondent was justified in initiating disciplinary proceedings against the Petitioner. The circumstances point to the fact that the Claimant had engaged himself in acts amounting to gross misconduct, within the meaning of section 44 of the *Employment Act*.

18. The proceedings were initiated in adherence with the cannons of fair procedure as contemplated under Section 41 of the *Employment Act*, and as per clause 14.6.2 of the Respondent's Corporate Services Policies and Procedure Manual.

19. The interdiction of the Petitioner was equally procedural as the same conformed with Clause 14.6.8 of the Manual.

20. The Petitioner's contention that his rights under Article 41 of *the Constitution* as he was not heard before the decision to interdict him was made, stands on quicksand. Where the interdiction is administrative, the employee cannot successfully argue that his rights under the stated Article were violated as the interdiction was not preceded by a hearing. To buttress these submissions, Counsel cited the decision in ELRC Appeal No. E003 of 2021, Lamu County Government v Muhammed Ali Shee.

21. Contrary to the contention in the Petitioner's Petition and the submissions by his Counsel, the Respondent didn't breach any provision of the Fair Administrative Actions Act. The petitioner was notified of the reasons for which the Respondent initiated the disciplinary proceedings, he was invited for a hearing, and sufficient and reasonable notice was given for the intended hearing. Though the Petitioner alleged that two investigation reports exonerated him from blame, he didn't place any before this court as proof. Further, the disciplinary action against the Petitioner was not commenced merely on grounds of his culpability for the accident.

22. The remedy of reinstatement sought by the Petitioner cannot be availed to him as he is still an employee of the Respondent albeit on interdiction. The contract of employment has not been terminated.

23. The Petitioner has failed to establish that his constitutional rights were violated. There cannot be any basis for a grant of the reliefs sought in his Petition, therefore.

Analysis and Determination.

24. I have carefully considered the material placed before this Court by the parties, and submissions by their respective Counsels and distil the following issues for determination; [i]. Whether this has jurisdiction to intervene in an internal disciplinary process by an employer [ii]. Whether the Respondent has breached the Petitioner's rights under Articles 41, 47, and 50 of *the Constitution* of Kenya, and [iii]. Whether the Petitioner is entitled to the reliefs sought.

25. The Respondent contended that this Court shouldn't interfere with the already initiated internal proceedings against the Petitioner as to so do will be tantamount to the Court usurping the role of the Respondent's Disciplinary Panel. With great respect, this position taken by the Respondent is in ignorance of the obtaining jurisprudence on this issue, and constitutional and statutory provisions that go a long way to protect employees from arbitrary, unreasonable, unjustified, illegal, and capricious actions of the employer, that may be, and or foster peace and orderliness in the world of work. No doubt that courts have Jurisdiction.

26. In the case of Lamu County Government & another v Muhammed Ali [2021] eKLR cited by Counsel for the Respondent, which he apparently decided to read selectively, Justice Manani held;

> " 22. . The second ground of appeal relates to the court's jurisdiction to intervene in disciplinary proceedings against employees commenced by an employer. The Appellants hold the view that the Court has jurisdiction to intervene in the

process. In their view, intervention by the court in the process interferes with the employer's prerogative to manage the workplace. 23. Whether courts have jurisdiction to intervene in an internal disciplinary process by an employer is, I think, a settled question. Courts have jurisdiction to do so. 24. However, this jurisdiction must only be invoked in the clearest of cases and usually as a last resort. The Court will only intervene where it is clear that to permit the process to go on will result in manifest injustice to the employee where the process itself is being conducted in a manner that materially derogates from the law or internal regulations agreed on by the parties".

27. In the case of Republic v County Secretary and Head of Public Service, Bomet County& another Ex parte Benard Sowek[2017] eKLR, Justice Wasilwa stated; "It is true as stated that Court should never interfere with internal disciplinary processes unless the process is in contravention of *the constitution* or legislation or is in breach of the parties' agreement/contract and the HR policies and Manual of the Parties or the process is manifestly unfair in the circumstances of the case." This is the same position that has been taken in many other cases among them; Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [Supra]; Mulwa Minuiafu Kombo v Kenya Airways [2013] eKLR and; Geofrey Mweobia v Water Resources Management Authority [2015].

Whether the Respondent has violated the Petitioner's Constitutional rights under Articles 41, 47, and 50 of *the Constitution* of Kenya, and the stipulations of its Manual.

28. The petitioner contended that his right to a fair hearing under the provisions of Articles 50[1] and 50[2][c] was violated by the Respondent. The Respondent interdicted him without giving him a hearing. I have crossly looked at the petition, the affidavit filed herein by the Petitioner and the submissions by his Counsel to decipher what informed this position taken and have no hesitation to conclude that it was informed by the holding by the Petitioner that the interdiction was a punishment. In my view, this position is wholly wrong. Why, shall come out shortly hereinafter.

29. Having stated as I have hereinabove, it becomes imperative for me to state at this point that interdictions just like suspensions fall under two categories, disciplinary, and administrative. The Petitioner might have missed the categorization and the difference between the two, hence the position he pushed. A disciplinary interdiction is a punitive measure for a reproachable Act made during work by an employee.

30. Indeed, and as submitted by Counsel for the Petitioner, Clause 14.7 of the Respondent's Manual lists interdiction as one of those punishments that may be handed down against an employee out of a disciplinary process. However, that is not to say that the Manual doesn't provide for administrative interdiction. It does. Clause 14.6.8 provides "where in the opinion of the Secretary /CEO or the Staff Disciplinary and Conflict Resolution Committee an accused is likely or has the potential to interfere with investigations, the employee will be interdicted from the exercise of duties pending determination of the case."

31. I have carefully considered the interdiction letter dated 28th April 2022 and I am certain that it placed the Petitioner under an administrative [read investigatory] interdiction. Further, I note that the procedure provided for in the Manual doesn't provide for a hearing before a decision to interdict, under Clause 14.6.8 is made. All that is required is for the Secretary or the Committee to, on the circumstances of the matter form an opinion that it is necessary to keep the worker off the workplace for a while pending the investigations or disciplinary proceedings.

32. In my view, preventive/ administrative interdiction must not be preceded by a hearing. The law expects that before the employer makes any punitive action against an offending employee, he or she must

adhere to the cannons of procedural fairness, the fundamental one being a fair hearing. A preventive interdiction never takes away an employee's right to be heard during the disciplinary hearing.

33. The Court in the Lamu County Government Case[supra] elaborately dealt with this issue, and I agree with its position. The Court stated;

> "27. In considering whether an interdiction has the potential of materially prejudicing an employee, the court needs to draw a distinction between disciplinary/punitive and administrative/preventive interdictions. Where an interdiction is disciplinary/punitive it is critical that an employee is heard prior to the decision to interdict. However, where it is administrative/ preventive pending further inquiry into the matter, the right to be heard at this preliminary stage is not absolute unless entrenched in statute or the contract of employment between the parties as the interdiction is only a precursor to an administrative process that will result into an eventual hearing of the dispute at a disciplinary session before the ultimate decision is rendered.
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> 28. George Ogembo in his book, ''Employment Law Guide for Employers, LawAfrica Publishing Ltd'' makes this helpful distinction. In his view and which I agree with, the Kenyan employment law does not have specific provisions requiring a pre suspension/interdiction hearing before the decision to interdict is rendered. This is particularly so for preventive interdictions. According to him, one has to turn to either the contract of service between the parties or some other specific statute regulating the relationship between the disputants to determine whether a pre suspension/interdiction hearing must be held before one is placed on suspension.
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> 29. This position is reiterated by Radido J in Kazungu Ngumbao Jeremiah & 3 others v Attorney General & 2 others [2015] eKLR. Referring to section 87 of the *National Police Service Act* as read with article 47 of *the Constitution*, the learned judge found that a police officer facing a disciplinary interdiction or suspension is entitled to a hearing before the decision to interdict or suspend is reached. But this is because section 87 of the *National Police Service Act* specifically requires that such disciplinary proceedings be subject to the dictates of article 47 of *the Constitution*."

34. Having found that the Petitioner's claim that his constitutional right under Article 50 of *the Constitution* was violated is wrongly premised on the fact that the interdiction was punitive, and on the premises foregoing, I hold that the Petitioner failed to prove that the right was violated.

35. I have considered the address of the Petitioner as flows from his pleadings and his counsel's submissions, on the alleged violation of the right to fair administrative action, no doubt it heavily revolves around the fact that the interdiction was punitive, arrived at without prior hearing of the Petitioner. As illustrated hereinabove, the position by the Petitioner stood on quicksand. It was founded on a misapprehension of the law and the stipulations of the Respondent's Manual.

36. To further support the allegation that his right under Article 47 of *the Constitution* had been violated, the Petitioner argued that, as the police had found him not to blame for the occurrence of the accident, and, as the Insurers of the accident motor vehicle compensated, him for the injuries suffered and, the Respondent for the damage of the motor vehicle, it was wrong and unreasonable for the Respondent to initiate disciplinary proceedings against him. Cautious not to prejudice the disciplinary proceedings

that may continue against the Petitioner hereafter, I can only say that the accusations on which the Respondent contemplated to act against the Petitioner are wider than the liability aspect of the accident.

37. The Petitioner further stated in his petition that his right under Article 47 of *the Constitution* was violated as the Respondent gave him insufficient time to respond to the show cause letter. I find this assertion lacking in merit. The time given in the show cause was per the Manual. In an employment contract, terms of the Human Resources Policies and Procedures Manual, for all intents and purposes become contractual terms. To hold as the Petitioner wants this Court to shall be tantamount to re-write a contract for the parties, a business which Courts for right sense always shy away from.

38. The Petitioner contended that the Respondent violated his rights under Article 41 when it interdicted him without granting him an opportunity to be heard and attempted to sanitize the wrong by issuing a notice to show cause. Having found as I have hereinabove, that the interdiction, the subject matter of this petition was preventive and that a hearing of the Petitioner prior, wasn't absolute, this claim must fail.

39. There is no contestation that the Petitioner was issued with a notice to show cause dated 28th April 2022. In my view, the notice was reasonably detailed as regards the accusations against the Petitioner, and the action that was intended by the Respondent.

40. The Court notes that indeed as stated by the Petitioner, he wrote an email requesting for documents on the 29th of April 2022 requesting for "Information/Documents". In response to the request, one Ellyjoy Bundi acknowledged receipt of the same and asked one Mr. Olang to assist. With this, if indeed there was a delay in getting the assistance, reasonably one could expect the Petitioner to notify Ellyjoy that her instructions had not been acted upon, requiring her further intervention and or seek an extension of the time within which to respond to the show cause letter. He opted not to but respond nonetheless. By his action, he waived the right to receive the Information/ Documents before the response.

41. However, the foregoing is not to say that he waived his right to have the documents /information within adequate time before the commencement of the disciplinary hearing.

42. In the upshot, I find the petitioner's petition herein lacking in merit. It is hereby dismissed. Each party is to bear its costs.

READ, DELIVERED AND SIGNED THIS 16TH DAY OF FEBRUARY, 2024.

OCHARO, KEBIRA

JUDGE

In presence of:

Mr. Ochieng for Petitioner

Ms. Kenduiwa for Respondent

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules,** which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering

justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of **Section 1B** of the **Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

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OCHARO KEBIRA

JUDGE