



**Ogenga v National Industrial Training Authority & another (Employment and Labour Relations Petition E225 of 2023) [2024] KEELRC 908 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 908 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E225 OF 2023**

**MN NDUMA, J  
APRIL 25, 2024**

**BETWEEN**

**STEPHEN OGENGA ..... PETITIONER**

**AND**

**NATIONAL INDUSTRIAL TRAINING AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner Stephen Ogenga, held the position of Director General of National Industrial Training Authority. The petitioner was interdicted from office by Hon. Aden Noor Ali, the chairman of the Authority, by a letter dated 24/11/2023. The letter stated that it had been reported that the 2<sup>nd</sup> respondent, EACC was conducting investigations into allegation of procurement irregularities in the award of tender for the supply, delivery, installation, commissioning, training, servicing, maintenance and repair of sewing and training machines at NITA.

“To facilitate the investigation pursuant to clause 11.16 of the NITA Human Resource Policy Manual; section 42 (7) of the *Leadership and Integrity Act* 2012; and Regulation 25 of the Leadership Regulation of 2015, it has been decided that you be and are hereby interdicted from exercising the duties of your office from the date of this letter pending finalization of the case.”

2. The petitioner was placed on half salary; full house allowance; and medical allowance. The petitioner was duly interdicted not to access NITA offices.
3. The petitioner appealed the interdiction to the chairman NITA vide a letter dated 28/11/2023.
4. In the said letter the petitioner highlighted the following salient issues inter alia: -



- a. This tender no. NITA/12/2017-2018 was procured and awarded in 2018 when I was not the accounting officer.
  - b. This contract was awarded by the then NITA Director General Mr. Paul Kosgei and witnessed by NITA Senior Legal Officer, Ms. Caroline Kibiwott.
5. The petitioner stated that he had fully cooperated with EACC on the matter. That the office of the Auditor General did not raise qualified opinions on the procurement through the audit period to date.
  6. That NITA had made no recommendations to invite EACC to conduct further investigations regarding the procurement.
  7. That all NITA staff who participated directly in the procurement process could have a conflict of interest.
  8. That the Board to review and lift his interdiction given that he had fully cooperated with the Board and EACC in the matter.
  9. In the petition the petitioner prays for an order in the following terms against the respondents jointly and severally:-
    - a. That the applicant was not under investigation for the irregular award of the tender in question but that the investigation was a general investigation on award of a tender for the supply, delivery, installation, commissioning, training, servicing, maintenance and repair of sewing and training machines.
    - b. That the 2<sup>nd</sup> respondent's investigations commenced more than three years ago and it is not reasonable to say that the applicant is being interdicted for twelve months for an investigation that started three years ago.
    - c. That the 2<sup>nd</sup> respondent has neither communicated its finding on the investigations nor has it recommended charges against the applicant to the Director of Public Prosecutions.
    - d. That the 1<sup>st</sup> respondent interdicted the applicant despite conducting internal investigations and finding that the procurement process was procedural and lawful.
    - e. That the 2<sup>nd</sup> respondent invoked section 42(7) of the *Leadership and Integrity Act*, No. 19 of 2012 and Regulation 25 of the Leadership and Integrity Regulations 2015, to justify its request to suspend the applicant for twelve months just because he is the Director General of the 1<sup>st</sup> respondent which is under investigations for allegations of irregular tender award.
    - f. That the applicant is caught in a political expedience of the executive and the 2<sup>nd</sup> respondent in an attempt to fight corruption without granting the applicant his rights to fair administrative action by failing to inform him of the outcome of the investigations and informing him of the complaint against him in respect of the tender award.
    - g. That the respondents have infringed the applicant's right by failing to inform him the particular allegations against him despite the fact that the 2<sup>nd</sup> respondent was not investigating him. The 2<sup>nd</sup> respondent was investigating allegations of the entire tender award which award process was commenced way before the applicant became the Director General.
    - h. That the respondents are discriminating the applicant by selecting him alone for interdiction in a complaint that involved several persons and departments as the investigation was on an irregular tender award and not against the applicant as a person.



- i. That the interdiction did not indicate that the applicant was under investigation and the alleged crime cannot be termed to be a collective responsibility that the Director General should take in case of an ongoing investigations, and
- j. The decision of the respondent was premeditated as the Board of the 1<sup>st</sup> respondent sat on Friday 24<sup>th</sup> November 2023 following a press conference by the State House Spokesman, Hussain Mohamed, that the Chief of Staff and the Head of Public Services purportedly directed the suspension of the applicant as the Director General following a recommendation by the 2<sup>nd</sup> respondent. Since the said press conference, the respondent has denied the applicant entry into his office.

### **The Facts and Grounds Relied Upon**

10. The salient facts relied upon by the petitioner are that his interdiction follows a press statement issued on 16/4/2023 by the state house spokesperson in a press release titled “war on corruption” That the investigation by EACC had commenced three years before and the complaint was not against the petitioner since he had not been appointed to the office then. That the investigation was not against him in person as Director General but against several persons who were involved in that process.
11. That the respondent’s staff cooperated with EACC during the investigation process by writing statements and availed necessary documents. That there is no basis for interdicting the petitioner on flimsy ground, that it was to pave way for investigations since the petitioner was not under investigation.

### **Cited Violations**

12. The petitioner cites violation of his right to equal protection and equal benefit of the law under Article 27(1) of Constitution of Kenya 2010. Violation of the right to be heard protected under Article 50(1) of Constitution.
13. Violation of Article 47 of Constitution in that the actions by the respondents did not constitute fair administrative action and violation of Article 236(b) of Constitution which protects all public officers against victimization in being dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of the law. That petitioner was not subjected to any due process before being interdicted on half pay.
14. That the petitioner has been subjected to ridicule in the eyes of the public having been labelled a corrupt officer without any hearing at all. The petitioner has suffered loss and damage. That the petitioner be accorded the reliefs sought.

### **Replying affidavit**

15. The acting Director General of NITA deposed to a replying affidavit in response to the petition that the petitioner is one of the six officers who were suspended pending investigation by EACC. That they were suspended vide a press release widely circulated in the local and social media. That the suspension was directed by the Chief of Staff and Head of Public Service.
16. That the EACC relied on section 42(7), of the Leadership and Integrity Act to redirect the 1<sup>st</sup> respondent to suspend the petitioner.
17. That section 42 (7) provides:-

Subject to Constitution and any regulations for the enforcement of the code of conduct made under this Act, a state officer may be suspended from office pending the investigation



and determination of allegations made against the state officer where such suspension is considered necessary.

Regulation 25(2) of the [Leadership and Integrity Regulations](#) provide:-

Suspension – shall apply where the officer is likely to:

- a. Conceal, alter, destroy, remove record, documents or evidence;
- b. Thereafter or otherwise interfere with witnesses;
- c. Interfere with investigation in any other manner.

18. On 22/11/2023 the Cabinet Secretary Ministry of Labour and Social Protection wrote to the chairperson of NITA to implement the recommendation of EACC to suspend the petitioner pursuant to Regulation 25(2) to safeguard the integrity of the investigations being conducted by EACC.
19. The Board interdicted the petitioner via a letter dated 24/11/2023 in terms of clause 11.16 of NITA Human Resource Policy Manual.
20. That the Board of the 1<sup>st</sup> respondent acted procedurally and duly informed the petitioner the allegations against him and the reason for the interdiction by the Authority. That by virtue of his position the petitioner was in a position to interfere with the investigations.
21. That the petitioner was the accounting officer who over saw the execution and implementation of the impugned tender and so it was necessary to interdict him.
22. That the action taken by the 1<sup>st</sup> respondent was lawful and justifiable.
23. The 2<sup>nd</sup> respondent filed notice of preliminary objection dated 11/12/2023 to wit:-
  1. That the petitioner has failed to demonstrate that there exists a dispute relating to or arising out of employment contrary to section 12 of the [Employment and Labour Relations Court Act](#).
  2. That the foundation of the advisory letter by the 2<sup>nd</sup> respondent recommending the suspension of the petitioner arises from allegations relating to corruption and economic crime under the [Anti-corruption and Economic Crimes Act](#) (ACECA).
  3. That the impugned suspension of the petitioner is not pursuant to the [Employment Act](#) but is a mandatory requirement in the enforcement of section 42 of the [Leadership and Integrity Act](#) (hereinafter LIA).
  4. That the petition and applications are an abuse of the court process and incompetent in law for failing to establish a breach of employment in the employer employee relationship as the impugned suspension is a temporary measure against persons under investigation.
  5. That the petition and application have been filed before this court against the directives of the Chief Justice Hon. D. Maraga issued on 26<sup>th</sup> June 2018, vide Gazette Notice No. 7262 (“Maraga Directions”) directing that all petitions on claims of infringement or the threatened infringement of Constitutional rights relating to corruption and/or economic crimes related matters shall be heard by the Anti-corruption and Economic Crimes Division of the High Court.
  6. That the petition and application herein ought to be heard by the Anti-corruption and Economic Crimes (ACEC) Division of the High Court.



24. The butt of the objection is that this court lacks jurisdiction to hear and determine this matter and same ought to be heard by the Anti-corruption and Economic Crimes (ACEC) Division of the High Court since the matter that led to the interdiction of the petitioner does not comprise a dispute relating to or arising out of employment.
25. The 2<sup>nd</sup> respondent in addition filed a replying affidavit to the petition sworn to by one Carren Meli, an advocate of the High Court and an investigator with EACC in which she deposes inter alia that – EACC received an allegation that in the financial year 2017/2018, NITA irregularly awarded Tender No. NITA/12/2017-2018 for the supply, delivery, installation, commissioning, training, servicing, maintenance and repair of sewing and training machines to M/s X provider limited at a contract sum of Kshs.28,411,020.00.
26. That EACC commenced investigations vide inquiry file no. EACC/FI/INQU/38/2019 to establish the veracity or otherwise of the allegation.
27. That evidence available indicates that the petitioner terminated the contract but when goods were delivered after the termination of the said contract, he reconstituted the contract implementation task and directed the Head of Supply Chain to inspect and accept the goods.
28. He approved the payment of Kshs.4,800,654.00 for the partial delivery of the said goods.
29. That following the above evidence, the investigators have recommended against the petitioner, charges of abuse of office and conspiracy to commit corruption offence for the sum of Kshs.28,411,620.00.
30. That pursuant to the above, EACC acted within its statutory mandate in issuing the impugned letter dated 10/11/2023 to the 1<sup>st</sup> respondent and so there was no malice and illegal action as alleged by the petitioner or at all.
31. That the 2<sup>nd</sup> respondent did not violate any rights of the petitioner under Article 27(1), 47, 50(1) and 236 of Constitution. That the investigations were not selective. That the suspension is not inconsistent with the provisions of Article 24(1) (e) of Constitution.
32. That the petitioner being a public officer holds a position of trust and is subject to the provisions of section 42(7), of LIA which apply to all public officers by virtue of section 52(1) of LIA.
33. That the suspension of the petitioner is extremely necessary due to his potential to interfere with investigations including tampering with evidence and intimidation of witnesses.
34. That in view of the allegations against the petitioner his continued holding of the esteemed public office is contemptuous and offensive to the spirit and letter of Article 73 and 232(1) of Constitution and section 8 of the LIA, General Code of Conduct and Ethics under part III of the Public Officers Ethics Act.
35. That chapter six of Constitution highlights the kind of conduct expected of all public officers. That the acts of the petitioner under investigation constitute both gross violation of Constitution and gross misconduct.
36. That the petition is an abuse of the process of the court and it be dismissed with costs.

### **Determination**

37. The parties filed written submissions which the court has carefully considered together with the depositions by the parties. The issues for determination are:-



- a. Whether the court has jurisdiction to hear and determine the case.
  - b. Whether the suspension of the petitioner from employment was lawful
  - c. Whether the petitioner is entitled to the reliefs sought.
38. With regard to the issue of jurisdiction, it need not be gain said that suspension or interdiction of a public officer from employment pending investigation is a matter that relates to employment and labour. The Court of Appeal in Prof Daniel N Mugendi and Kenyatta University, Benson Wairegi, Prof Olive M. Mugenda 2013 Eklr cited with approval Majanja J in Petition No.170 of 2012 – United States International University (USIU) v The Attorney General & Others where the court held that;

The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act 2011 has set out matters within the exclusive domain of that court. Since the court is of the same status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret Constitution and fundamental rights and freedoms, is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of Section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce, not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of Constitution within the matter before it.”

39. Accordingly, this court has jurisdiction to hear and determine this matter and the objection by the 2<sup>nd</sup> respondent is dismissed.
40. Regarding the issue whether the suspension was lawful, the court finds that EACC has the mandate to direct the suspension of a public officer under section 42(7) of LIA as read with regulation 25(2) on grounds of necessity. The necessity occurs where it is established that the person has the ability to interfere with investigations by either concealing or tampering with relevant documents and or interfering with potential witnesses by virtue of his position.
41. The petitioner deposed that the impugned award of the tender was done in the year 2018 before he was appointed to the organization. EACC however accuses the petitioner of having terminated the contract which awarded the impugned tender to M/s Xponics Limited for a sum of Kshs.28,411,620.00 but having done that, unlawfully went ahead to receive delivery of goods under the terminated contract and directed payment of Kshs.4,800,654.000 to M/s Xponics Limited.
42. The court is well aware that judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the process followed by the decision maker is proper and the decision is within the law, a court will not interfere.
43. In Republic versus Attorney General and 4 others exparte Diamond Hashim Lalji and Ahmed Hasham Lalji 2014 eKLR, the court held;

Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction. Whether the persons affected by the decision were heard before it was made and whether in making the decision, the maker took into account irrelevant matters or did not take into account relevant matters.”



44. A constitutional petition however, presents a different review of the decision taken by a superior against the subject on both the merit of the decision itself and the process of arriving at the impugned decision.
45. In this respect, the letter of interdiction dated 24/11/2023 written by the chairman of the Board to the petitioner speaks for itself. A plain reading of the letter leads to the conclusion that no specific charges were placed before the petitioner with a request to show cause why he should not be interdicted as directed by EACC.
46. It is also clear that the petitioner was not presented with any opportunity to be heard by the board of the 1<sup>st</sup> respondent before the interdiction.
47. The period of interdiction was not stated in the letter of interdiction dated 24/11/2023.
48. The letter did not refer to any meeting of the Board which took a decision to interdict the petitioner.
49. The petitioner filed an appeal against the decision to interdict him to the chairman of the Board dated 28/11/2023. There is no evidence that the respondents ever responded to the appeal on interdiction or gave the petitioner any opportunity to be heard on the appeal.
50. Accordingly, the court is satisfied that the respondent violated Article 236(b) of *Constitution* which provides;
  - 236 A public officer shall not be –
    - a. Victimized or discriminated against for having performed the functions of office in accordance with *Constitution* or any other law; or
    - b. Dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law. (emphasis added)
51. It behoved the Board of the 1<sup>st</sup> respondent to give the petitioner opportunity to show cause and/or to be heard before the punitive decision to interdict him on half pay.
52. It is clear that the investigations by EACC commenced in the year 2019. At the time of filing this suit, the petitioner had not been charged with any corruption and or economic crime to warrant keeping him under suspension at all or for a period of up to 12 months.
53. The 1<sup>st</sup> respondent did not refute the deposition by the petitioner that the office of the Auditor General did not qualify the tender that had been awarded by his predecessor in the year 2018, more than five years from the date this petition was filed.
54. The circumstances under which the tender was cancelled and receipt of and payment of some goods supplied to the 1<sup>st</sup> respondent have not been placed before this court at all by the 1<sup>st</sup> respondent.
55. This was not cited as the reason for the interdiction of the petitioner by the 1<sup>st</sup> respondent and so the petitioner had no opportunity to know the actual allegations made against him and to explain himself on the matter other than the reference to the matter by the 2<sup>nd</sup> respondent in its replying affidavit.
56. In conclusion the interdiction of the petitioner by the 1<sup>st</sup> respondent is arbitrary, unreasonable and disproportionate in the circumstances of the case.
57. The 1<sup>st</sup> respondent violated the cardinal rules of natural justice by not giving the petitioner opportunity to be heard before the indefinite suspension on half pay was meted on him.
58. This was a violation of article 236 (a) and (b) read with Article 50(1) of *Constitution* of Kenya 2010.



59. Furthermore, this action violated the right of the petitioner to fair and expeditious administrative action in violation of article 47 (1) read with section 4 of the Fair Administrative Action Act, 2015.
60. To date, about five months from the date of interdiction, the 1<sup>st</sup> respondent has not provided any report of investigations conducted by the Board.
61. It is clear that the 1<sup>st</sup> respondent which is an independent statutory body abdicated its mandate to lawfully discipline the petitioner and blindly followed instructions from 3<sup>rd</sup> parties without giving petitioner equal protection and benefit of the law in violation of the petitioner's right under Article 27(1) of Constitution.
62. Accordingly, the court allows the petition and issues the following orders against the respondents jointly and severally: -
- a. A declaration is hereby issued that the decision of the 1<sup>st</sup> respondent to interdict the petitioner from his employment as the Director General of the 1<sup>st</sup> respondent by a letter dated 24<sup>th</sup> November 2023 is unlawful and unfair.
  - b. An order of certiorari is hereby issued to bring into the court for the purpose of quashing the unlawful interdiction of the petitioner by the letter dated 24<sup>th</sup> November 2024 against the respondents and any resolution and decision resulting therefrom.
  - c. An order for judicial review is issued by way of mandamus directing the 1<sup>st</sup> respondent to reinstate the petitioner to his employment including the reinstatement of his full salary and employment benefits from the date of interdiction.  
  
The above remedies satisfy the damage and loss suffered by the petitioner and the court does not grant an award of damages to the petitioner.
  - d. The 1<sup>st</sup> respondent to pay the costs of the suit.

**DATED AT NAIROBI THIS 25<sup>TH</sup> DAY OF APRIL, 2024.**

**MATHEWS NDERI NDUMA**

**JUDGE**

Appearance:

Applicant in person

Mr. Ireri for 1<sup>st</sup> respondent

Ms. Roselyne Murugi for 2<sup>nd</sup> respondent

Mr. Kemboi, Court Assistant

