



**Kinyae v Public Service Commission & 2 others (Employment and Labour Relations
Petition E044 of 2023) [2024] KEELRC 791 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 791 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E044 OF 2023**

MN NDUMA, J

APRIL 11, 2024

BETWEEN

DAVID ISIKA KINYAE PETITIONER

AND

PUBLIC SERVICE COMMISSION 1ST RESPONDENT

**PRINCIPAL SECRETARY, STATE DEPARTMENT FOR HOUSING AND
URBAN DEVELOPMENT, MINISTRY OF LANDS, PUBLIC WORKS, HOUSING
AND URBAN DEVELOPMENT 2ND RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

1. The petitioner in the petition dated 6th March 2023 seeks an order in the following terms: -
 - (1) A declaration that within the intendment of Article 10 of the Constitution and resonating the intention of Article 232 (e) of the Constitution of Kenya, 2010 as read together with section 72 of the Public Service Commission Act, 2017, the respondents are bound to discharge their public duties in an open, transparent and accountable manner.
 - (2) A declaration that the actions of the respondents failing to allow the petitioner to resume work upon the expiration of his suspension on 28th February 2022 and making it an open-ended/indefinite suspension without taking any disciplinary action against him violates the petitioner's constitutional rights under Articles 28, 41 and 47 of the Constitution.
 - (3) A declaration that within the intendment of Article 47(2) of the Constitution, the respondents cannot take unfair and arbitrary administrative actions against the petitioner without following the due disciplinary process.



- (4) A declaration that within the intendment of Article 27 of the *Constitution* as read with section 72 of the *Public Service Commission Act*, 2017, the respondents cannot suspend a public officer when conducting investigations against him/her either by themselves or a third party entity until the investigations are concluded and the public officer charged in a court of law for allegedly committing an offence.
- (5) An order of *Certiorarito* bring before this honourable court to quash the suspension letter dated 31st August 2021 issued to the petitioner.
- (6) An order of permanent injunction be directed to the respondents, their agents, servants and/or officers to restrain from subjecting the petitioner to arbitrary decision making and unfair administrative.
- (7) An order be directed to the respondents, their agents, servants and/or officers to allow the petitioner resume work with immediate effect with full salary and benefits paid to him backdated from March 2022.
- (8) General damages for breach of the petitioner's constitutional rights.
- (9) Costs of the petition

Facts.

2. The petition is premised on facts and law set out on the face of the petition and attached documentation. The Petitioner says that sometimes in April 2021, the Ethics & Anti- Corruption Commission (EACC), commenced investigations against the Petitioner on the question of unexplained wealth, abuse of office and conflict of interest. The EACC then wrote to the Principal Secretary, State Department for Housing and Urban Development recommending suspension of the Petitioner for a period of 6 months pending the completion of its investigations.
3. That the Principal Secretary, State Department for Housing and Urban Development issued a suspension letter to the Petitioner for a period of 6 months ending on 28th February 2022. Aggrieved by the decision, the Petitioner appealed the decision to the Public Service Commission in a letter dated 4th October 2021. It is the Petitioner's view that the Public Service Commission had in its letter to the Cabinet Secretary, Ministry of Transport, Infrastructure, Housing and Urban Development and Public Works noted flaws in his suspension and had requested the Ministry to submit the case to the Ministerial Human Resource Management Advisory Committee for deliberation and re-submit the appeal with its comments. That it is not clear whether the appeal was ever resubmitted to the Commission.
4. The petitioner says he wrote a reminder letter to the 1st Respondent on 23rd February 2022 requesting that the suspension be lifted which the Commission responded to by writing to the Principal Secretary, State Department for Housing and Urban Development on 2nd March advising that the issue be addressed with a view to lifting suspension. That the period of suspension has since lapsed and there has been no communication whatsoever from the 1st Respondent or the 2nd Respondent as to when he shall resume work

The Law.

5. The petition is premised on Article 236(1) of the *Constitution* that protects a public officer from being subjected to disciplinary action without due process.



6. That the 1st respondent being an independent commission under Article 248 of the Constitution ought to exercise its mandate independently without any control from any other person and or authority as the EACC purports to do.
7. That section 62(1) of the Anti-corruption and Economic Crimes Act 2003 provides that a public officer or state officer who is charged with commission of economic crime shall be suspended on half pay, with effect from the date of the charge until the conclusion of the case provided that the case shall be determined within twenty four months.
8. Section 72 of the PSC Act, 2017 obligates the commission to communicate to the suspended public officer the progress and action taken towards conclusion of the disciplinary case. The response to any inquiry by the public officer shall be done within 30 days failing which the officer may apply for the lifting of the suspension.
9. That the 2nd respondent has never given an update of the progress to the petitioner despite expiry of the suspension period or if a disciplinary process will be undertaken against the petitioner.
10. Accordingly, the respondents have violated Article 47, on the right of the petitioner to fair administrative action. Article 28, which guarantees human dignity to the petitioner and Article 41 that guarantees fair employment practices to the petitioner.
11. That the indefinite suspension without any tangible step being taken against the petitioner is discriminatory and a violation of Article 27 of the Constitution that protects the petitioner from any form of discrimination. That the court grants the reliefs sought.

Reply by 1st respondent.

12. The 1st Respondent in the replying affidavit of the Deputy Commission Secretary, Remmy Mulati, dated the 23/03/2022 say that it is true the Petitioner has been on suspension for a period beyond the 6 months prescribed in the Public Service Commission Human Resource Policies and Procedures Manual which prescribes that discipline ought to be conducted within six months. That the case has taken longer because it emanates from the investigations by the EACC.
13. The 1st Respondent deposes further that it was indeed concerned by the length of time taken to conclude the case hence the letter dated 2nd March, 2022. The Ethics and Anti-Corruption Commission filed suit no. ACEC E027 of 2022 seeking to recover ksh 233,486, 767.97 from the Petitioner being the amount he and other Respondents received from Nairobi Metropolitan. That the Petitioner, being the head of supplies influenced tenders to favour companies he was the beneficial owner of.
14. The 1st Respondent says that it would have wished that the case be finalized expeditiously but its hands are tied. That section 62 of the Anti-corruption and Economic Crimes Act provides that an officer charged with an economic crime shall be suspended at half pay from the date of the charge until the conclusion of the case, provided that the case shall be concluded within 24 months. The asset recovery suit was filed in August, 2022 and the twenty-four months will lapse in August, 2024. The suit was filed under fast track and is likely to be concluded way before August, 2024.
15. That should the recovery case be determined in favour of the Petitioner, then the Respondents will have no option but reinstate and release him and release to him the half salary which is withheld. On the other hand, if the Petitioner's suspension is lifted and he is reinstated, and the court finds against him, it will be difficult to recover what will already have been paid to him.



Petitioner's further affidavit.

16. The Petitioner in the further affidavit states, inter alia, that although he is a public officer, he has not been charged in any court of law with corruption or economic crime to warrant invocation of the provisions of section 62 of the ACECA Act which the Public Service Commission is relying on to justify the unlawful, unwarranted and prolonged suspension that he has been subjected to since August 2021. The Petitioner further deposes that he has also not been charged with a serious criminal offence to warrant suspension under section 71 of the PSC Act, 2017. That section 42 (7) of the Leadership and Integrity Act, 2012 relates to State Officers only and hence not applicable to a public officer like him.
17. The Petitioner says that he is aware that it is common practice in the Public Service that once an officer has been subjected to investigations touching on his integrity and more particularly involvement in corrupt conduct while in service, the employer is entitled depending on the circumstances and level of investigations to suspend such an officer to await completion of investigations or conclusion of criminal proceedings. However, his case is unique in the sense that investigations were concluded and the EACC filed an asset recovery suit but did not charge him with any criminal offence. The essence of such suspension is to protect and preserve evidence and witnesses who could otherwise be interfered with which is not the circumstances in his case. Therefore, continued suspension is not only unfair but illegal.

Determination.

18. The court has carefully considered the depositions by the parties and the submissions filed by the parties and has delineated the following issues for determination:-
 - (i) Whether the respondents have violated the procedural imperatives in the conduct of the disciplinary case against the petitioner.
 - (ii) Whether the respondents have violated Article 27, 41, 47 and 48 of the Constitution protecting the petitioner as set out in the petition.
 - (iii) Whether the petitioner is entitled to the reliefs sought.
19. The respondents admit that they have kept the petitioner on suspension under half pay for a period of over six months.
20. The 1st respondent admits that it was concerned with the period taken to finalise the matter hence its letter to the 2nd respondent dated 2/3/2022.
21. That after the said letter by the 1st respondent, the 2nd respondent filed suit No. ACEC E927 of 2022 in the Anti-corruption and Economic Crimes Division seeking to recover Kshs. 233,486,767.97 from the petitioner being an amount EACC alleges that the petitioner and other respondents, in that suit, received from Nairobi Metropolitan and the 2nd respondent.
22. It is averred in the pleadings in the aforesaid suit, that the petitioner being in charge of supply chain influenced tenders to favour companies he was the beneficial owner of.
23. That the hands of the 1st respondent are tied much as it would have wanted to expeditiously finalise the disciplinary action.
24. That the respondents are relying upon section 62 of the Anti-corruption and Economic Crimes Act, which provides that an officer charged with an economic crime shall be suspended at half pay with



- effect from the date of the charge(s) until the conclusion of the case provided the case shall be concluded within twenty-four months.
25. That the civil-recovery suit was filed in August 2022 and the twenty four months will lapse in August 2023.
 26. That if the recovery case is determined in favour of the petitioner the respondents will have no option but to reinstate the petitioner and release the withheld half salary to him.
 27. That if the suspension is lifted before the conclusion of the case and the court finds against the petitioner it will be difficult to recover the monies that will already have been paid to him.
 28. That it is in the interest of justice that the status quo remains until conclusion of the civil recovery suit.
 29. In the further affidavit, the court notes that the petitioner insists that the suspension is unlawful having gone beyond six months period that the 1st respondent admit is provided by law. That the respondents admit that there is a civil suit filed against the petitioner to recover the sum of Kshs.223,486,767.92 and no criminal charges have been brought against the petitioner.
 30. That it is common cause that there is no law, relied upon by the respondents to suspend the petitioner or any other employee for that matter provided there are no criminal charges preferred against the employee.
 31. The petitioner has also denied that he was at any time the head of supply chain asserting that he held the position of Senior Deputy Director, supply chain management at the state department of Housing and Urban Development.
 32. The court finds that the suspension can only be sustained in terms of section 62 of the [Anti-corruption and Economic Crimes Act](#), 2003 if there are criminal charges pending against the petitioner.
 33. It being evident that the petitioner has not been charged in any court of law with a corruption or economic crime offence, then the respondents have failed to demonstrate any justification to keep the petitioner under suspension based on the facts before court.
 34. Accordingly, the action being sustained against the petitioner is a violation of the petitioner's right to fair employment practices.
 35. The impugned action is also a violation of the petitioner's right to fair administrative action based on the known law of the land.
 36. Provided there is no justification to suspend the petitioner in the first place based on section 62 of the [Anti-corruption and Economic Crimes Act](#), there is no justification to sustain the suspension of the petitioner on half pay.
 37. The action by the respondents violate the human dignity of the petitioner by unlawfully depriving him of his employment and full income.
 38. The respondents also deny the petitioner the full benefit of the law in violation of Article 27 of the [Constitution](#) of Kenya 2010. Furthermore, the petitioner has the right to equal protection and equal benefit of the law which includes the full and equal enjoyment of all rights and fundamental freedoms unless lawfully curtailed by a court of law after due process which is not the case in the present matter.
 39. Accordingly, the court finds that the petition has merit and grants the petitioner an order in the following terms:



- (1) Declaration is issued that within the intendment of Article 10 of the Constitution and resonating the intention of Article 232 (e) of the Constitution of Kenya, 2010 as read together with section 72 of the Public Service Commission Act, 2017, the respondents are bound to discharge their public duties in an open, transparent and accountable manner.
 - (2) A declaration is issued that the actions of the respondents failing to allow the petitioner to resume work upon the expiration of his suspension on 28th February 2022 and making it an open-ended/indefinite suspension without taking any disciplinary action against him violates the petitioner's constitutional rights under Articles 27, 28, 41 and 47 of the Constitution.
 - (3) An order of *Certiorariis* issued to bring before this honourable court the suspension letter dated 31st August 2021 issued to the petitioner and quash the same accordingly.
 - (4) An order is issued directed to the respondents, their agents, servants and/or officers to allow the petitioner resume work with immediate effect with full salary and benefits paid to him backdated from March 2022.
 - (5) Costs of the petition be borne by the respondents.
40. For the avoidance of doubt, the harm caused the petitioner by the respondents is fully vindicated by the remedies aforesaid and no further award of damages is warranted in the circumstances of the case.

DATED AT NAIROBI THIS 11TH DAY OF APRIL, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Peter Wanyama for petitioner

Selina Iseme for 1st respondent

Mulili for Attorney General

Mr. Kemboi, Court Assistant

