



**Oruma v Central Rift Valley Water Works Development Agency
(CRVWDA) & another (Employment and Labour Relations Petition
E005 of 2024) [2024] KEELRC 1962 (KLR) (30 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1962 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS PETITION E005 OF 2024**

**HS WASILWA, J
JULY 30, 2024**

BETWEEN

ENGINEER SAMUEL KIPAMPI ORUMA PETITIONER

AND

**CENTRAL RIFT VALLEY WATER WORKS DEVELOPMENT AGENCY
(CRVWDA) 1ST RESPONDENT**

**CABINET SECRETARY, MINISTRY OF WATER, SANITATION AND
IRRIGATION 2ND RESPONDENT**

JUDGMENT

1. By a petition dated 26th February, 2024, the Petitioner sought for the following Reliefs; -
 - a. A declaration be issued that the 1st Respondent has breached Article 10(2)(b) as read together with Article 27 of the *Constitution* in its actions against the petitioner by the communication of 26th September, 2023 and 19th February, 2024.
 - b. A declaration that the intended disciplinary action against the Petitioner violates the Petitioner's right to a fair trial contrary to Article 25(2) of the *Constitution*.
 - c. A declaration that the Petitioner's right to fair administrative actions has been or is likely to be breached in violation of Article 47 of the *Constitution* as read together with section 4 of the *Fair Administrative Action Act*.
 - d. A declaration that the 1st Respondent's decision of 26th September, 2023 to send the Petitioner on compulsory leave was contrary to the 1st Respondent's Human Resource Policy and Procedure Manual, biased and was not based on the Board of the 1st Respondent's independent decision thereby null and void.



- e. A declaration that the 1st Respondent's interdiction of the Petitioner and the issuance of Notice to Show cause dated 19th February, 2024 before the conclusion of the intended or awaited investigations and or without giving the Petitioner the benefit of the investigations Report , if at all, is contrary to well-known rules of natural justice and is thus a violation of the Petitioner's right to fair trial and administrative action, hence null and void.
 - f. A declaration that the 1st Respondent's decision to subject the Petitioner to the disciplinary process is actuated by malice, ill-will and other illegal and unlawful considerations hence null and void.
 - g. An order of injunction stopping any further disciplinary proceedings against the Petitioner by the 1st Respondent based on the current allegations and procedure which is biased.
 - h. An order quashing the 1st Respondent's decision as communicated in the letter dated 26th September, 2023 and 19th March, 2024 with the consequence that the petitioner is allowed to resume his duties as the Chief Executive Officer of the 1st Respondent.
 - i. Damages for violation and or threatened violation of the petitioner's constitutional rights.
 - j. Any other or further reliefs as may be appropriate.
 - k. Costs of the Petition.
2. The Petition herein is expressed under the following provisions of the law; -
- i. That pursuant to Article 3 of the Constitution, every person has an obligation to respect uphold and defend the Constitution of Kenya. More specifically (and in the context of this petition), both the Petitioner and the Respondents have an obligation to ensure that all persons, natural or justice, perform their mandate and functions in strict compliance with the law and the Constitution.
 - ii. That the national values and principles of governance outlined in Article 10 of the Constitution bind all state organs, state persons whenever any of them (a), applies or interprets this Constitution (b)enacts, applies or interprets any Law or (c) makes or implements public policy decisions.
 - iii. That pursuant to Article 19 of the Constitution, the Bill of Rights is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies and that the purpose of recognizing and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and promote social justice and the realization of the potential of all human beliefs.
 - iv. Article 20 (1) the Bill of Rights applies to all and binds all state organs and all persons,(2)Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of thought or fundamental freedom.
 - v. the Constitution of Kenya, 2010 has declared several fundamental rights as belonging to all persons Pursuant to Articles 19 and 20 but the following specific rights have been violated by the Respondents.
 - a. Right to a fair trial under Article 25 (c).
 - b. Equality and freedom from discrimination - Article 27.
 - c. Human Dignity Article 28.



- d. Fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and the requirement that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action - Article 47.
- vi. Access to justice-Article 48, which enjoins the state to ensure access to justice for all persons and if any fee is required, it shall be reasonable and shall not impede access to justice.
- vii. Under Article 22(1) of the *Constitution* of Kenya, 2010: Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
- viii. Article 23 of the *Constitution* deals with Authority of courts to uphold and enforce the Bill of Rights and provides that the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial violation or infringement of threat to, a right or fundamental freedom in the Bill of Rights.
- ix. In *Judicial Service Commission Vs Gladys Boss Shollei & Another* [2014] eKLR. The Court of Appeal cited with approval the holding in *United States International (USIU) Vs Attorney General & 2 Others* [2012] eKLR and emphasized the jurisdiction of the Employment and Labour Relations Court to hear and determine matters of violation of rights where Justice D. Majanja stated thus:- “Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is in the province of the Industrial court. To exclude the jurisdiction of the industrial court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 2 of the Industrial Court Act 2011 or to interpret the *Constitution* would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining stable and consistent Petition of employment and Labour Law. Litigants and ingenious Lawyers would contrive causes of action designed to remove them from the scope of the Industrial court. Such a situation would lead to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current Industrial Court.”
- x. Article 258 of the *Constitution* empowers every person to institute court proceedings claiming that the *Constitution* has been contravened, or is threatened with contravention;
- xi. Article 259 of the *Constitution* enjoins everyone to interpret the *Constitution* in a manner that; (a) promotes its purposes, values and principles ;(b) advances the rule of Law, and human rights and fundamental freedoms in the Bill of Rights; (c) permits the development of the Law; and (d) contributes to good governance.
- xii. In *Fair Administrative Action Act*; section 4 provides for Administrative Action to be taken expeditiously, efficiently, lawfully;
 - 1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 - 2. Every person has the right to be given written reasons for any administrative action that is taken against him.
 - 3. where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision;



- a. prior and adequate notice of the nature and reasons for the proposed administrative action;
- b. An opportunity to be heard and to make representations in that regard;
- c. Notice of a right a review or internal appeal against an administrative decision, where applicable;
- d. A statement of reasons pursuant to section 6;
- e. Notice of the right to legal representation, where applicable;
- f. Notice of the right to cross-examine or where applicable; or
- g. Information, materials and evidence to be relied upon in making the decision or taking the administrative action.

Background facts

3. The facts leading to the filing of this Petition is that the Petitioner herein was first Appointed as the Chief Executive Officer of the 1st Respondent on 30th April, 2021 in acting capacity for a period of one-month effective 1st May, 2021, which was extended for another period of 5 months to 31st October, 2021 or until a substantive CEO was appointed.
4. He stated that when the substantive position of CEO of the 1st Respondent was eventually advertised, he put in his application, got shortlisted and attended interview, where he emerged the best and officially appointed on 6th January, 2022 as the CEO for a three years' term, effective 26th October, 2021 to 25th October, 2024.
5. He stated that he served diligently, that he was given a letter of commendation for exemplary performance for the year 2021/2022 on the 16th January, 2023. He stated that it was not until February, 2023 that his woes began. He gave the chronology of the event as follows;
 - i. On 10th February, 2023 the 1st Respondent was served with a petition No. 1 of 2023 filed in Nakuru High Court by the erstwhile CEO Eng. Hosea K Wendot, but that he was named as a respondent.
 - ii. on 14th February, 2023 the Honourable Court issued ex-parte final orders in the petition, inter alia, reinstating Engineer Hosea K. Wendot to the position of the Chief Executive Officer, but without revoking the appointment of the petitioner.
 - iii. Aggrieved by the Court's decision, the Petitioner moved court for orders of stay and setting aside the orders of 14th February, 2023. In addition, the 1st Respondent also moved the court for similar order of stay and setting aside of the Orders.
 - iv. That after protracted legal battles before the High Court, the Honourable Court acceded to the 1st Respondent's counsel's objection to the jurisdiction of the court and ordered the matter to be transferred to the Employment and Labour Relations Court for hearing and disposal.
 - v. The file was then transferred to this Court and given a new number ELRC Petition No. E005 of 2023 and given a hearing date for 27th April, 2023 and judgement slated for 25th May, 2023, where the Court dismissed the case with costs.



- vi. Prior to the delivery of judgement, On 23rd May, 2023, the petitioner received a letter from the Ethics and Anti-Corruption Commission requesting for documents and information, Ref No. EACCC6 8/5 VolLIV(38) in respect to Tender No. CRVWWDA/LVS/AFDB/KTSWSSP =/W/BOMET/2019-2020 for construction of water supply and sanitation system for Bomet, Longisa and Mulet Towns.
- vii. On 24th May, 2023 the petitioner responded to the letter pledging full cooperation and compliance and on 17th August 2023, the petitioner received yet another letter from the Ethics and Anti-corruption Commission on the same subject, Ref EACC.6/8/5 VOL. IV (81) inviting a number of persons for interview and statement recording and once again the petitioner pledged full cooperation.
- viii. On 1st September, 2023, the petitioner received yet another letter from the Ethics and Anti-corruption Commission, Ref. EACC.6/8/5 VOL. IV (87) inviting another set of persons from the 1st Respondent for interview and statement recording and again the Petitioner pledged and ensured cooperation.
- ix. While the Ethics and Anti-corruption commission was still undertaking its investigations and while no one had complained about interference with the ongoing investigations, the Head of Public Service wrote a letter dated 22nd September, 2023 under Reference Number OP/CAB.9/201/11 directing the Board of Directors to take action to have the Chief Executive Officer vacate office.
- x. The letter by the Chief of Staff and Head of Public Service, Honourable Felix K. Koskei was followed by a press release from the state House Spokesperson, Hussein Mohammed on 23rd September, 2023, reiterating the directive to have the petitioner and another Chief Executive Officer of another state Agency suspended.
- xi. He states that the action by the Chief of Staff and Head of Public service, was unprecedented and was described in the mainstream media as “uncharacteristic” since such action would only have been expected from the parent ministry concerned with the agency.
- xii. Following the directive from the Chief of Staff and Head of Public Service the 1st Respondent through the chairperson of the board of directors wrote to the Cabinet Secretary, Ministry of Water, Sanitation and Irrigation a letter, Ref. No. CRVWWDA,Vol. 111/01 dated 25th September 2023 requesting for approval of Special Board Meeting to be held on 27th September 2023.
- xiii. That the then Cabinet Secretary, Ministry of Water, Sanitation and Irrigation, the Honourable Alice Wahome wrote back on the same day 25th September 2023, a letter RefNo. MWSIWTR/ADM/CS/Vol 11/47, approving the request for a Special Board Meeting. Subsequently, the petitioner was notified of the Special Board meeting as the Secretary to the Board and he was asked to notify all the Board members, which the petitioner did.
- xiv. On 26th September, 2023, while the petitioner was in his office, he was ambushed and told that there was a Special Board Meeting that very morning. Nonetheless, that he organized the board room for the impromptu meeting and attended the said meeting as the secretary of the Board until he was asked to leave the board room to allow the members to discuss the matter which was touching on him. The petitioner obliged and he retreated to his office to continue undertaking his duties.



- xv. A few minutes later, he was summoned by the chairperson of the 1st Respondent, and verbally informed of his suspension and he was asked to wait for a letter to that effect. The Affiant stated that when he was summoned to the board room, there was a battery of journalists waiting in the board room to take his photographs as if the information had already been leaked to them.
 - xvi. He avers that while that was still unfolding, a contingent of police officers had already barricaded the institution and armed officers were on hand to forcefully evict him from the office, when he was not resisting. Consequently, he was arrested and manhandled out of the said office. Contemporaneous with the police barricade, a press podium had been assembled and mounted to announce the petitioner's suspension from office.
 - xvii. Later that day, he was handed another letter of 26th September, 2023 placing him on compulsory leave and on the same day, the chairperson of the 1st Respondent led fellow director for a presser which was later carried in the standard newspaper of 28th September, 2023 titled "Tender charges that saved state shilling 14 Million and landed the CEO in trouble". This was despite the chairperson indicating categorically that no money was lost by the 1st Respondent.
 - xviii. He stated that in spite of the Respondent's chairperson confirming that no money was lost, he was interdicted by the letter of 19th February, 2024 and on the same day, he was served with Notice to show cause for gross misconduct and negligence of duty.
6. The petitioner avers that the issue of variation and adjustments was explicitly provided for in the contract itself at clause 13 and the procedure thereof. In any case that the variation and adjustment was preceded with a written request for approval as contemplated under the contract. Further that the request for approval for variation and adjustment was not the sole decision of the petitioner but rather the issue was discussed and approved at the multi-sectoral team meeting held at Maji house on 3rd August, 2023. Therefore, the petitioner has done or did nothing wrong regarding the contract in question.
 7. It is his case that while the report of investigation by the Ethics and Anti-Corruption Commission is not yet out or is yet to be made available to the petitioner, the 1st Respondent, in yielding to the external pressures decided to initiate disciplinary proceedings against the petitioner.
 8. He contends that no objective and fair disciplinary process can take place under the watch of such a board beholden to external forces and which is completely devoid of independence and the process is just but a charade designed engaged in as a fait accompli.
 9. The Petitioner urged this Court to intervene and stop the illegal process.
 10. The Suit was opposed by the 1st Respondent who filed a grounds of opposition dated 28th February, 2024 based on the following grounds; -
 1. That the Notice of motion dated 26th February, 2024 is bad in law.
 2. That the Notice of motion and the Petition forming the basis thereof dated 26th February, 2024 run a foul the now established doctrine in Kenya that Constitutional Petitions must set out with reasonable precision that which is complained of the Constitutional provisions which have been infringed and the manner of infringement. This requirement was set out in the celebrated case of Anarita Karimi Njeru Vs the Republic [1976-1980] KLR 1272 and reinforced in the Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR.



3. That the Notice of Motion and the Petition dated 26th February, 2024 offend the well-known doctrine of Constitutional avoidance which requires parties to seek reliefs through other legally appropriate forums as opposed to invoking the Constitutional jurisdiction of the Court in the first instance.
 4. That the matters raised in the petition are ordinary employment matters and there are internally provided mechanisms for addressing such grievances which the 1st respondent has followed in the case of the Petitioner.
 5. That the allegation by the Petitioner that he has not been provided with an investigation report is a pre-emptive allegation since all that is required of the Petitioner at this point is for him to respond to the Notice to show cause and only when a decision is made to continue with the process thereafter can he be entitled to such a report(s).
 6. That in addition, the Petitioner has not made any request for information from the 1st Respondent that he might deem necessary to respond to the Notice to show cause and the same has been denied for him to allege a violation or a threatened violation of his right. The claim is thus speculative and is of no basis in law.
 7. That the disciplinary process has been initiated against the Petitioner based on credible allegations of misconduct and he has been afforded an opportunity to answer to the allegations through a very credible process and hence the contention that the process is characterized by a pre-determined outcome is nothing but a threadbare cliché that has often been used by persons who want to avoid an otherwise legal process.
 8. That Constitutional Petitions must not be allowed to be used to usurp the roles and powers of other institutional processes legally established to deal with matters falling within their competence.
 9. That the matters in dispute between the Petitioner and the 1st Respondent are strictly contractual and they should be handled as such without hiding behind a constitutional petition to evade a valid process for dealing with the matters in issue.
 10. That the respondent is a public institution established and sustained by public funds and as such considerations of public interests should override private rights of individuals.
 11. That since the Petitioner's rights are founded on contract, there are well known remedies which can avail to the petitioner in the unlikely event that he is successful.
 12. That the entire petition forming the basis of the Notice of Motion Petition is nothing but a conjecture of falsehoods and speculation and the same does not meet the threshold of a constitutional petition.
 13. That the entire petition and the Notice of Motion Petition are brought in bad faith and with the sole aim of frustrating a legitimate process from taking place.
11. In addition to the grounds of opposition, the 1st Respondent filed a replying affidavit sworn by Hon. Samuel Nderitu, the chairperson of the 1st Respondent's board, on 7th March, 2024. In the affidavit, the affiant stated that he was appointed vide Gazette Notice Number 7028 (VOL. CXXVNO.126) of 2nd June, 2023 and therefore has authority to swear the affidavit.
 12. He stated that the petitioner is the Chief Executive Officer of the 1st Respondent herein but that he is currently on interdiction awaiting a disciplinary process.



13. He avers that the circumstances leading to the interdiction of the Petitioner is that the 1st Respondent was the Lead Agency in the contract of the construction of water supply and sanitation system for Bomet-Longisa-Mulot towns.
14. That the contract had other stake holders to wit; the Lake Victoria South Water Works Development Agency; the Bomet water company and the County Government of Bomet. Further that the project was being financed by the African Development Bank (AfDB) , while the Contract was awarded to the China Railway NO. 10 Engineering Group, a corporation incorporated under the Laws of China with its Subsidiary Offices in Nairobi Kenya.
15. He states that the contract Number was: CRVWWDA/LVS/AFDB/KTS WSSP/W/ BOMET/2019-2020 and the contract amount was Kshs. 1,783,260,806= (One Billion Seven Hundred Eighty Three Million Two Hundred and Sixty Thousand Eight Hundred and Six only. Additionally, that under the contract, the Chief Executive Officer of the Lake Victoria South Water Works Development Agency, was designated as the Engineer (herein after called “the Engineer”).
16. The affiant stated that the contract was explicit that steel pipes were to be used in the project and also had a provision for variations and adjustments at clause 13 which variation could be initiated either by the Engineer or the Contractor as the case may be and that when the contractor initiates a variation, a written request must be made to the Engineer for consideration and the Engineer may accept or reject the request. However, in case the Engineer accepts the request for variation, s/he then makes recommendations to the Employer, but in case the Engineer rejects the request s/he returns the request to the Engineer’s Representative who then transmits it to the contractor.
17. It is stated that upon receipt of the recommendations approving variation from the Engineer, the Employer is required to forward the report to the Contract Implementation Team (CIT) for analysis and recommendations. If CIT is in agreement with the variation recommendations, then the Employer must forward the report to the financier, in this case, the African Development Bank (AfDB) for “NO OBJECTION and in the event that the CIT gives its approval to the request and the financier equally approves the request by signing a “NO OBJECTION” the Employer then forwards the proposal to Engineer for onward transmission to the contractor for implementation.
18. It is stated that in this case the Contractor made a request for variation of steel pipes to Glass Reinforced Pipes “GRP” pursuant to clause 13.2 of the General Conditions of the Contract on 28th May, 2022 as per attached variation proposal marked “SNMS”. Then the Engineer’s Representative analyzed the request and forwarded its recommendations to the Engineer , essentially advising against the proposal as per attached forwarding letter and recommendations dated 11th June, 2022.
19. On 23rd June, 2022, the Engineer’s, Representative wrote to the contractor advising’ that steel pipes be maintained in the project and on 30th June, 2022 the Engineer responded to the proposal for variation and rejected the request. In the intervening period on 24th June, 2022 the contractor sent an invite to the Employer, the Engineer and the Engineers Representative to make a formal visit to GRP manufacturing factory in Turkey which trip was illegal for the following reasons: At the time, variation from steel pipes to GRP had not been approved for such a visit to be necessary. That notwithstanding the anomaly, the petitioner herein and the contractor travelled to Turkey and inspected the GRP pipes as confirmed in the attached letter dated 8th December, 2022.
20. On 31st October, 2022 the contractor re-submitted its proposal for variation to the Engineer’s Representative but since the re-submitted proposal was similar to the earlier proposal, the Engineers Representative responded on 14th November, 2022 informing the Contractor that the proposal failed



for not answering to the fundamental concerns raised by the Engineer in his earlier letter of 30th June, 2022.

21. That undeterred by the Engineer and his representative's responses the contractor wrote to the Employer directly on 8th December 2022 seeking approval for variation from steel pipes to GRP and on 10th January, 2023, the petitioner herein in his capacity as the Chief Executive Officer of the 1st Respondent unilaterally gave approval.
22. On learning of the "approval" by the petitioner of the proposal from the contractor, the Engineer's Representative wrote on a letter dated 16th January, 2023 outlining conditions to be fulfilled by the contractor before implementing the "approval".
23. In compliance, on 5th May 2023 the contractor submitted; Revised designs; Method statement for the construction of pipes and GRP specifications and on 23rd May, 2023 the Engineer's Representative forwarded the documentation received from the contractor to the Engineer for review and advise.
24. After reviewing the Contractor's submitted documentation, the Engineer drew attention to the requirement of a "No Objection" from the financier (AfDB) for the proposed variation to be implemented. Consequently, on 13th June, 2023 the Engineer's Representative wrote to the petitioner herein requesting for a no objection letter from the financier (AfDB) to the proposed variation.
25. That On 15th June 2023, the petitioner sent an email to the Engineer asserting his authority as the Chief Executive Officer of the 1st Respondent but without availing the requested letter.
26. In the meantime, on 23rd March, 2023 the financier (AfDB) had written an email to the project coordinator, Mr. Charles Murage informing him of a complaint it had received that the contractor had sought approval for change from steel pipes to GRP and the bank requested for the evaluation report leading up to the approval.
27. On 6th and 20th April, 2023, the project coordinator wrote to the financier (AfDB) assuring it that he would soon send the report but none was send and on 22nd August, 2023 the financier wrote a letter outlining its frustrations concerning the requested information.
28. On 11th September, 2023, the Director General of (AfDB) African Development Bank for Regional Development and Business Delivery office, East Africa, wrote a letter to the permanent Secretary, Ministry of Water and Sanitation, State Department for Water noting the following observations: That the steel pipes be used in the project ,the project completion date lapsed on 3rd July, 2023 without any request for time extensions, time extension approval for all prior review contracts is mandatory, there was patent violation of governance in the financial agreement. That non-compliance with procurement or financial management guidelines would lead to suspension of disbursements for the program and that the bank would suspend all works and services on the program by 31st October, 2023 unless all the necessary documentation and information was received by the bank.
29. He stated that while all this was going on, the Ethics and Anti-corruption Authority became seized of the matter and commenced investigations into the alleged violations by the petitioner since he is the one in charge of the day today operations of the 1st Respondent and none of the issue herein had been brought to the attention of the board until the 12th September, 2023 when the Permanent Secretary Ministry of Water and Sanitation wrote to the Board of Directors of the 1st Respondent that the board became aware of the issues surrounding the project.
30. He avers that when the issues were brought to the attention of the Board of Directors, it was decided that a board meeting be constituted to discuss the matter and a request was made to the Cabinet



Secretary concerned and approval was given for the meeting. Subsequently, the meeting was convened to discuss the issues surrounding the said project and it was resolved to send the petitioner on compulsory leave pending investigations. Soon thereafter, following intensive internal investigations it was resolved that the petitioner be interdicted and a disciplinary process be initiated against the petitioner as per the letter dated 19th February, 2024.

31. Afterward, the Petitioner was issued with a Notice to show cause outlining all the alleged violations and particulars thereof for response. Therefore that there was enough reasons to take disciplinary action against the Petitioner.
32. The affiant maintained that there has been no violation or threatened violation of petitioner's rights at all in this process. That the assertion that the Board of Directors of the 1st Respondent is not independent is patently false since had that been the case, the petitioner would have been suspended and interdicted much earlier when the Ethics and Anti-Corruption Authority commenced investigations against the petitioner.
33. That contrary to the assertion by the petitioner that the disciplinary process is being undertaken without any investigation report, the Board conducted its own internal investigations and it is on the basis of that investigation that the board decided to interdict the petitioner. Additionally, that the absence of an investigative report is not in any way prejudicial to an employee who is called-upon to respond to a notice to show cause.
34. He avers that there is no requirement that an investigative report must be given to an employee together with a Notice to show cause letter. Further that the petitioner did not make any assertion that he made a request for the report and the same was denied for his right to information to crystallize under Article 35 of the Constitution.
35. On the assertion that the Chairperson of the Board of Directors of the 1st Respondent issued a presser confirming that no losses had resulted from the variation from steel pipes to GRP, it was stated that the information was based on what was supplied to the board by the petitioner as the C.E.O of the 1st Respondent who unknown to the Board had been withholding very vital information concerning the whole issue from the board.
36. The affiant stated that the petition does not meet the threshold for constitutional petitions as stated in the famous Anita Karimi case. Equally, that it does not meet the test of ripeness for determination by this Honourable Court.
37. He contends that Constitutional Petition No. E005 of 2023 had nothing to do with the case, as the former was instituted by the erstwhile CEO seeking to be reinstated to his position but that the Court dismissed that suit. Therefore, that the same is not related at all to this case.
38. The 2nd Respondent also opposed the Petition and filed grounds of opposition dated 5th March, 2024 and based on the following grounds; -
 1. That the petitioner has failed to demonstrate with reasonable precision or to adduce any evidence before this Court to prove the allegations against the 2nd Respondent.
 2. That the Notice of Motion dated 26th February 2024 and Petition dated 26th February 2024 are bad in law in that the matters raised in the Petition are purely employment matters and there are internally provided mechanisms for addressing such grievances with the 1st Respondent which the 1st Respondent has also reiterated in paragraph 4 of their Grounds of Opposition dated 28th February 2024.



3. That the 2nd Respondent believes that the said disciplinary process initiated against the Petitioner is based on credible allegations of misconduct as stated by the Respondent in their Grounds of Opposition and the Petitioner has been afforded an opportunity to answer to the allegations through a very credible process and the petitioner's contention that the process is characterized by a pre-determined outcome is nothing but sentiments not based on any evidence adduced before this Honorable Court.
 4. That the Petitioner has filed this Notice of Motion and Petition dated 26th February 2010 to try and force this Honorable Court to interfere and usurp the roles and powers of other institutional processes legally established to deal with matters employment falling within their competence.
 5. That the entire Petition and Notice of Motion are brought in bad faith and with the sole aim of frustrating a legitimate process from taking place.
39. On 6th March, 2024, the 2nd Respondent filed another set of grounds of opposition based on the following grounds; -
1. That to the extent that the Petitioner has not appeared and/ or made representations before the Board of the 1st Respondent, his claims of a biased Board and external interference / influence are unsupported and speculative. They are mere apprehensions that should not form the basis for granting the interim orders sought.
 2. That the Petitioner seeks to prematurely impeach a disciplinary process under the primary jurisdiction of the 1st Respondent's Board thereby violating the doctrine of exhaustion and deference. The issues raised by the Petitioner are not ripe for determination by this Court.
 3. That the Petitioner's claims are not based on any cogent evidence or known legal concepts but are based on innuendos, nebulous and vague notions incapable of being proved in law or by way of evidence. To wit: - allegations of lack of independence of the 1st Respondent's Board; allegations of political witch-hunt; allegations of discrimination based on ethnicity and political affiliation and allegations of investigation reports of organizations and individuals who are not parties to these proceedings and alleged ouster bids by external forces.
 4. That to the extent that the Petition, as filed herein, is not supported by a Supporting Affidavit as is required under Rules 11(1) & (2) of the Mutunga Rules, the same is fatally defective and cannot sustain the granting of the interim orders. The Petition is defective for want of an affidavit.
 5. To the extent that the exhibits 'SKO-11', 'SKO-14', 'SKO-15', 'SKO-22' and 'SKO-23' as annexed to the Petitioner's Affidavit in support of the Petition are documents that belong to the 1st Respondent; they were obtained in contravention of Section 80 of the *Evidence Act*, Cap. 80 Laws of Kenya and the *Access to Information Act*, 2016 and are therefore inadmissible ad initium and it follows that they are incapable of advancing the Petitioner's claims herein. The 2nd Respondent seeks, on a preliminary, to have these documents expunged from the Record.
 6. Further that exhibit 'SKO-23' contains incomplete, unsigned and unverified minutes and therefore does not constitute evidence of the corporate act of the Ministry of Water, Sanitation and Irrigation approving the change and use of the GPR Pipes instead of the contractually stipulated steel pipes, which is under active investigations by the Ethics and Anti-Corruption Commission.



7. That to the extent that exhibits ‘SKO-12’, ‘‘SKO-13’ and ‘SKO-18’ are newspaper articles and cuttings with no evidentiary value, the same are incapable of advancing the Petitioner’s claim herein.
 8. That paragraph 17 of the Supporting Affidavit to the Motion, is an invitation of this Court to substitute its processes / decisions with those of the 1st Respondent’s human resource function without a demonstration on part of the Petitioner that the disciplinary process is manifestly unconstitutional or unfair.
 9. That in toto the Motion filed herein is unmerited and an abuse of this Court’s processes. The interim orders sought should be declined and the same should be dismissed with costs to the 2nd Respondent.
40. The Petition herein was canvassed by written submission, where all the parties relied on their previously filed submission in support of the Application.

Petitioner’s Submissions

41. The Petitioner submitted on the merit of the suit by relying on the case of *Mulwa Msanifu Kombo Vs Kenya Airways [2013] eklr* where the court was of the view that it will only interfere with disciplinary process in cases where the process has commenced or is continuing unfairly. To reinforce its position, the Petitioner cited the case of *Geoffrey Mworira Vs Water Resources management Authority & 2 others [2015] eklr*, where it was held that;-

“The court will intervene in an administrative disciplinary procedure if it is established that the procedure relied on by the employer offends fairness or due process by not upholding the rules of natural justice, or, if the procedure is in clear breach of the agreed or legislated or employer’s prescribed applicable policy or standards, or, if the disciplinary procedure were to continue it would result into manifest injustice in view of the circumstances of the case. The court will normally not intervene if it is established that there exist mechanisms between the employer and the employee such as appeal or revision that the employee could invoke internally to remedy the dissatisfaction that would otherwise justify the court’s intervention and, the employee has not exhausted such internal mechanisms.”

42. It was submitted that the Respondent is mandated under Article 232 of the [Constitution](#) to protect, promote, uphold and observe the principles of Public Service. Further that the 1st Respondent’s Human Resource policy and procedure Manual, provides that the state corporation shall be guided by National values and principles stipulated under Article 10 and 232 of the [Constitution](#). Therefore, that the disciplinary process ought to comply with these values and the provisions of Article 47 of the [Constitution](#).
43. From the foregoing, the Petitioner submitted on whether the 1st Respondent was proper in commencing disciplinary process, when EACC investigations were going on and argued that the board was devoid of jurisdiction as the matter has been referred to EACC for investigation, therefore that the matter ought to await the outcome of the investigation of EACC before further action can be taken in line with 1st Respondent’s clause 10.39.
44. On whether the Petitioner’s right to fair hearing in the disciplinary process has been violated or not, it was submitted that the Petitioner was placed on compulsory leave and then interdicted without being accorded any hearing. It was argued that no charges had been leveled against him before he was interdicted. That, the meeting held on 26th September, 2023 was not sanctioned by law as the same



was not approved by the cabinet secretary as is required under the law. To emphasize on the need to promote the right to fair hearing, the Respondent cited the case of *Kenny Kinako Vs Ringer Kenya Limited* [2016] eKLR, where the court held that:-

“the internal hearing contemplated under section 41 of the *Employment Act*, should be undertaken in good faith by giving the employee a fair chance to be heard. Where the employer has internal disciplinary rules and regulations, the employee should have these in advance so as to familiarize himself with the contents and abide as appropriate.”

45. Accordingly, it was submitted that the Petitioner was not granted the right to fair hearing because he was invited to a impromptu meeting which he had not been given prior notice to be able to respond to any queries adequately.

46. The Petitioner submitted further that before an employee is interdicted, the same must be based on fair reason and implemented on fair procedure as was stated by Justice Monica Mbaru in *Fredrick Saundu Amolo Vs Principal Namanga Mixed Day Secondary School & 2 Others* [2014] eKLR. where the Court held that:-

“Therefore, before an interdict can be found to be valid, the same must be based on fair reasons and must be implemented pursuant to fair procedure. This is what can be cited as the 3-dimension criteria; First, the employer must have a justifiable reason to believe the employee has engaged in serious misconduct to form what is commonly called a prima facie case; Secondly, there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct, or some relevant factor that would place the investigation or the interest of the affected parties in jeopardy; and Thirdly, the employee is given the opportunity to state his case or be heard before any final decision to interdict is made.”

47. On whether the interdiction for indefinite period was in violation of fair labour practices, it was submitted that the Petitioner was sent on compulsory leave on 26th September, 2023 and interdicted on 19th February, 2024, more than 7 months down the line with no end of these proceedings on sight. He argued that since no timelines of the disciplinary process was given, the same was unfair and may amount to constructive dismissal as stated in *Charles Gatheru Ndirangu Vs Presbyterian Foundation (Sued on behalf of PCEA Mihuti Parish)* [2016] eKLR, *Joseph Ndungu Vs Mastermind Tobacco (K) Ltd* [2014] eKLR and the case of *Banuel Mariera Vs Awanad Enterprises Ltd* [2014] eKLR. In which court held that:-

“Consequently the court finds on balance of probability that the claimant’s employment was constructively terminated by the respondent. The foregoing finding is founded on the fact that although the claimant’s suspension was with full pay, the respondent never paid him any salary during the suspension. Secondly, the suspension was indefinite and the claimant was supposed to handover all the company property. Lastly the claimant was never called back to work even after the alleged investigations with respect to the lost cargo failed to implicate him.”

48. The Petitioner submitted also that the 1st Respondent’s Regulations only provide for interdiction and compulsory leave but does not give the timelines, however, that the Public Service Commission’s Regulations 2020, under Regulation 62 provide for compulsory leave and interdiction to be done within a period not exceeding 30 days. Further that before such a public officer, is interdicted, the committee should seek approval of the Public Service Commissions, which was not sought in this case.



49. The Petitioner submitted further that the letter by Hon, Felix Kosgei, the chief of staff and head of Public Service, prompted the process for his interdiction, as he expressly directed in his letter of 22nd September, 2023 at paragraph 3 that the Petitioner should be placed on leave and vacate the office immediately. He argued that unless the Petition is allowed and the entire disciplinary process halted, the process is not guaranteed to be objective. Further that the fact that the meeting purposed for 27th September, 2023 was brought forward to 26th September, 2023 without any reason, leaves more questions than answers as to the objective of the committee, which should be construed against the Respondents. In support of this, he relied on the case of Waruinge Vs Chuna Co-operative & Credit Society [2023] KEELRC 2730(KLR), where the court opined that;-

“ the claimant further accuses the Respondent’s CEO of having pre-determined her fate in the dispute. She accuses him (the CEO) of having made up his mind to get rid of her long before the DC sat to determine her fate. Further, she avers that the CEO acted as accuser, witness and prosecutor in the cause against her. She accuses him of a having prepared a skewed investigations report on the matter with the sole intention of prejudicing her position before the DC. The claimant asserts that the CEO’s actions were motivated by bad faith.”

50. On whether the Board was independent, it was argued that the board succumbed to pressure to have the Petitioner vacate office pursuant to direction of the Chief of Staff and head of Public Service, in breach of fundamental principle of independence of the Board. Further that the move by the Board violated the laid down best practices of Corporate Governance as espoused by the Mwongozo Protocol (The code of Governance for State Corporations) 2015, on independence of the Board, as the board did not apply their minds independently on the validity of the allegations against the Petitioner and whether they warranted the disciplinary sanctions demanded by the chief of staff. To support this, the Respondent relied on the case of Waruinge Vs Chuna Co-operative & Credit Society(Supra). Furthermore, that the pre-determined decision taken by the board offended the basic tenets of natural justice.

51. On whether there are valid reasons to subject the Petitioner to disciplinary process, it was submitted that the Respondent subjected the Petitioner to disciplinary process on basis of alleged contract variation on purported loss of 14 Million, which loss, the chairperson of the 1st Respondent confirmed that no money was lost. Further that the investigations had not completed as such the basis for disciplinary action had not crystalized. Also, that the variation of contract was done by the contractor and several other people, aimed at cutting costs of the project and meeting the project timelines among other benefits.

52. On whether the 1st Respondent observed the legal provisions and standards on fair administrative action when subjecting the Petitioner to disciplinary process. It was submitted that the Respondent committed fundamental breaches of the legal provisions on Fair Administrative Action in the impugned disciplinary process initiated against him contrary to the provisions of Article 47 of the Constitution as read with section 4 of the Fair Administrative Actions Act. It was argued further that the Petitioner was not given information, material and evidence the committee used in making the decision to interdict him in violation of his right guaranteed under Article 35 of the Constitution.

53. On whether the Petitioner’s right to dignity was violated, it was submitted that the Petitioner was treated in inhuman manner in the way in which he was hounded out of his office and manhandled by a contingent of police officers in the full glare of the cameras contrary to Article 28 and 10 of the Constitution. Additionally, that interdiction process was aired in both print and television stations eroding the presumption of innocence of an accused person. In support of this, the Petitioner relied on



the case of Fredrick Saundu Amolo Vs Principal Namanga Mixed Day Secondary School & 2 Others [2014] eKLR.

54. In Conclusion, the Petitioner submitted that he has demonstrated that he deserves the Orders sought and prayed for the Petition to be allowed with costs.

1st Respondent's Submissions

55. The Respondent herein submitted on ten issues, Whether the Petition meets the threshold for constitutional petitions, Whether issues raised in the petition are justiciable, Whether the Board has jurisdiction/mandate to initiate and undertake disciplinary proceedings against the petitioner herein, whether it was within the 1st Respondent's prerogative to suspend and initiate disciplinary proceedings against the Petitioner, Whether the suspension of the Petitioner before Notice to Show cause was illegal in law, Whether the Petitioner was sent on indefinite suspension and whether the Petitioner's rights were violated, Whether this Honourable Court should intervene in a matter involving internal disciplinary Proceedings, Whether the Petitioner's right to fair hearing has been violated, Whether the illegally obtained evidence should be expunged and who should bear the costs of the application.
56. On whether the petition meets the threshold for constitutional petitions, it was submitted that the Petition fails to adhere to the now established doctrine in Kenya that constitutional petitions must set out with reasonable precision that which is complained of; the constitutional provisions which have been infringed and the manner of infringement. In support of this, the Respondent relied on the case of Anarita Karimi Njeru vs The Republic (1976-1980) KLR 1272 and the case of Mumo Matemu vs Trusted Socie 5 Others [2013] eKLR.
57. On that note it was submitted that the petition referred to several Articles of the *Constitution* in its title. However, that the body of the petition did no provided particulars as to the allegations and the manner of the alleged infringements. Therefore, it fell short of the very substantive test. To support this, the Respondent relied on the case of Dr. Rev. Timothy Njoya Vs The Hon. Attorney General and Kenya Review Authority HC Constitutional and Human Rights Division Petition No, 479 of 2013 , where the court stated;
- “The Petitioner cannot come to court to seek facts and information he intense use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which the *Constitution* has been violated by whom and even state the Article of the *Constitution* that has been violated and the manner in which it has been violated.”
58. It is the Respondent's submissions that the petitioner's submissions raised issues that are not specific to the violations he alleges in the petition. It is clarified that issues such as jurisdiction of the board, the right to fair hearing, violation of right to fair labor rights and the independence of the board were not pleaded with the necessary specificity making it difficult for the Respondent to respond with accuracy and specificity. Additionally that the said submissions is a departure from the petition contrary to the rule that a party is bound by the pleadings as was held in the cases of Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR and the case of Raila Amolo Odinga & Another vs. IEBC & 2 Others [2017] eKLR . Hence the petition has failed to satisfy he test set out in the case of Anarita Karimi case.
59. On whether the issues raised in the petition are justiciable ripe, it was submitted that pending the completion of the internal disciplinary process, the petition is not justiciable and the petitioner is only inviting the court to issues which are not ready for determination and to premature adjudication in



total disregard of the doctrine of ripeness. In support of this, the Respondent relied on the case of *Wanjiru Gikonyo & 2 others v National Assembly of Kenya & 4 others* [2016] eKLR where the court expressed itself as follows:

“Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through a factual matrix, for determination.”

60. He also relied on the case of *Coalition for Reform and Democracy(CORD) & 2 Others Vs Republic of Kenya & Another HCCP 628 of 2014* [2015] eKLR, and the case of *Jesse Kamau & 25 Others Vs Attorney General Mis. Petition No. 890 of 2004* the court dedicated a great part of the judgment to the doctrine of justiciability and rendered itself as follows:

“On Ripeness pp 80 - 81 Tribe says: “In some cases the constitutional ripeness of the issues presented depends more upon a specific contingency needed to establish a concrete controversy than upon the general development or underlying facts. For example, litigants alleging that a government action has effected an unconstitutional “taking” without just compensation” are normally obliged to exhaust all avenues for obtaining compensation before the issue is deemed ripe” Still even in situations where an allegedly injurious event is certain to occur, (a court) may delay resolution of constitutional question until a time closer to the actual occurrence of the disputed event when a better factual record might be available” The court considered several authorities and discussed the question whether there was a justiciable dispute in the case. It was said that even in a case where a rule gave the court a wide discretion, it cannot still make justiciable disputes which are not justiciable.”

61. It was submitted that the dispute between the Petitioner and the 1st respondent are strictly contractual, that should be handled without hiding behind a constitutional petition to evade a valid process for dealing with the matters in issue. It was argued that the issues raised in this petition should be adequately dealt with administratively as already initiated by the 1st respondent. In support of this, the Respondent relied on the case of *Albert Churembo Mumba & 7 others sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme v Maurice Munyao & 148 others suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme* [2019] eKLR, where the court held that:

“Of precise relevance to this case is *Bethwell Allan Omondi Okal v Telkom K Ltd Founder & 9 others* [2017] eKLR. In that case, the appellants who were former employees of Telkom (K) Ltd felt aggrieved and discriminated against following the implementation of what was referred to as “Trivial Pension Payout”, by the Authority which they accused of fraud, corruption and mismanagement and for paying some categories of retirees less increments in their pension payments than others. The trial court made a finding that since the complaints were against the Authority, that there were other statutory inbuilt administrative dispute resolution mechanisms under the RBA Act that ought to have been followed before recourse to the High Court. He opined that any dispute should have been referred to arbitration in the first instance pursuant to Rule 36 of the Consolidated Deed of Trust and Rules, made under the RBA Act and that the appellant was dissatisfied with the decision of the arbitrator, then he could appeal to the Retirement Benefits Appeals Tribunal



established under the RBA Act. On Appeal, the Court of Appeal dismissed the appeal stating that, the Appellant might want to argue that he has a constitutional right of access to justice and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High court by way of constitutional petitions. We hold that if indeed the appellant had any dispute with the RBA, he ought to have followed the route prescribed by the RBA, before proceeding to the High Court. We hold like the court below, and for the reasons we have given, that the appellant's petition lacked merit and was for dismissal.”

62. Based on the cited authorities, it was submitted that the Petitioner undermines the role of its Board whose role is to hear and determine disputes.
63. On whether the Board has jurisdiction to handle disciplinary matters, it was submitted that the Board has jurisdiction to conduct investigations on any allegations or complains against an employee and conduct disciplinary proceedings as stipulated in the Human Resource Policy and Procedures Manual, 2021. Further that the investigations by the E.A..C.C were on its own volition pursuant to *Ethics and Anti-corruption Commission Act* and not pegged on any invitation by the Board. Moreover, that the assertions that the Board lacked jurisdiction since it had referred the matter to the E.A.C.C lacks merit and is an actual acknowledgement that the Board had jurisdiction and further mandate to refer matters to other relevant bodies in case of need for further investigations. In any event that it is inconceivable that it could employ the petitioner to be its chairperson but lack the jurisdiction to exercise disciplinary control.
64. Regarding the issue whether it was within the 1st Respondent's prerogative to suspend and initiate disciplinary proceedings against the petitioner, it was argued that there are reasonable grounds to initiate a disciplinary process against the Petitioner for which he should answer. Further, that it was within its prerogative to undertake the suspension, interdiction and the intended disciplinary process which are all in compliance with the applicable employment laws, rules of procedure as well as its own internal regulations. In support of this, the Respondent relied on the case of Chrispus Ileli Kunuva Vs County Government of Kitui & another [2020] eKLR and the case of Galgalo Jarso Jillo Vs Agricultural Finance Corporation [2021] eKLR.
65. On whether the Petitioner's rights have been violated. The Respondent cited the case of Khaemba Vs The Supreme Court of Kenya & another Petition 100 of 2019 [2019] KEELRC 917 KLR where the court held that suspension is indefinite in the absence of the required safeguards, however that in this case, the Petitioner was placed on suspension for a definite time as such, the suspension cannot be said to be unfair
66. As to whether this Honourable Court should intervene in a matter involving internal disciplinary processes, it was submitted that internal disciplinary process initiated against the Petitioner are based on credible allegations of misconduct and the Petitioner has been afforded an opportunity to answer to the allegations through a very credible process, therefore that there is nothing that requires the Court's intervention. In support of this, the Respondent relied on the case of Jackson Buti a versus Eastern Produce Kenya Limited Industrial Court Case No.335 of 2011 and the case of Miguna Miguna Vs The PS Office of the Prime Minister & AG JR Case No.188 of 2011, where the court held that;

“the court will only intervene in an employer's administrative action if it established that the procedure relied upon offends fairness and due process; such should be in exceptional cases;



a suspension will be lifted where there are compelling reasons; but the employer retains the prerogative to take disciplinary action against an employee.”

67. As to whether the Petitioner’s Right to fair hearing has been violated, it was submitted that the right to fair hearing only crystallizes where investigations reveal that the employer has reasons to believe that an employee has committed gross misconduct. On that basis, It was stated that compulsory leave was not a disciplinary action but the beginning of investigations to the allegations and the notice to show cause was only issued after the Board concluded its own independent investigations to accord the petitioner an opportunity to be heard as is the requirement in the *Employment Act*. As such the suspension was not in violation of the right to fair hearing. In support of this, they relied on the case of Humphrey Makokha Nyongesa & another versus Communications Authority of Kenya & another JR No.4 of 2018 and the case of Anthony Mkala Chitavi v Malindi Water and Sewerage Company limited [2013] eKLR.
68. As to whether the Petitioner’s Right to information was violated , it was submitted that its Board conducted its own investigation which formed the basis of the decision to interdict the petitioner. He clarified that the absence of an investigative report is not in any way prejudicial to the Petitioner and the fairness of the process is determined based on the consistency of the allegations throughout the process. In any case that it is not a requirement under the employment laws or any other laws that such a report must first be availed to the person affected before action can be taken on the report. In support of this, the respondent cited the case of Wilson Mutabari Mworira Vs Barclays Bank of Kenya Limited [2021] eKLR, where the court held that the absence of the investigative report was not in any way prejudicial to the employee.
69. It was submitted in addition that no request was made for the report and the same denied for his right to information to crystallize under Article 35 of the *Constitution*.
70. On whether illegally obtained evidence should be expunged, the Respondent argued that most of the information used in support of the Petition and the Notice of Motion were privileged and confidential information which the petitioner obtained illegally and the same should be expunged from the record by this Honourable Court. To support this view, the Respondent cited the supreme Court decision in Njonjo Mue & Another vs. Chairperson of Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR.
71. On costs, the Respondent submitted that the basic rule on attribution of costs is that costs follow the event. Therefore, that since the petitioner has not established any violation of the Petitioner’s right, the entire Petition is lacking in merit and urged this court to dismiss it with costs.

2nd Respondent’s Submissions.

72. The Respondent herein submitted from the onset that the Petitioner seeks to stop the disciplinary process on account that he is being hounded out of office on account of his ethnicity, political affiliation and external influences. That the Petitioner cites the person and office of the Chief of Staff and Head of Public Service (HOPs) and investigations by the Ethics and Anti-Corruption Commission (EACC) and produced a letter dated 22nd September 2023, a Press Release from the State House Spokesman and a newspaper cutting, in support of his case. It was argued that the letter addressed to one Mr. Samuel M. Nderitu, the Chairman of the 1st Respondent’s Board, was not copied to the Petitioner, hence the letter is inadmissible in law because the Petitioner has not explained its source. In this, they relied on the case of Okiya Omtatah Okoiti & 2 Others v Attorney General & Others [2020] eKLR where the Court held that, illegally acquired public documents cannot be produced as evidence in a court of law, because they violate Article 31, 35 and 50(4) of the *Constitution* because their production



without the necessary certification is contrary to Section 79(1)(a)(iii) and 80 of the Evidence Act and it violates Articles 35 and 50(4) of the Constitution. Therefore, it should be expunged from the record.

73. Similarly that Exhibits ‘SKO-14’, ‘SKQ-15’, ‘SKO-22’ and ‘SKO-23’ should be expunged from record for having been procured through unorthodox means.
74. On the newspaper cutting, the Respondent submitted that they are inadmissible in evidence, as they contain opinions of the individual authors who are unseeded as was held in *Randu Nzai Ruwa and 2 Others vs. Internal Security Minister* and another *Mombasa HC Misc. No. -68 0 2010 [2012] eKLR* where the court found that newspaper cuttings are hearsay and inadmissible.
75. Accordingly, that exhibits ‘SKQ-12’, ‘SKO-13’ and ‘SKO-18’ are of no probative value and the same cannot therefore be a basis for granting the orders sought in the interim or ultimately. Further that to the extent that the Petition and Petition herein are based on the above cited exhibits, then the same becomes unsupported by their inadmissibility and consequently the Petition and Petition are bereft of evidence and therefore unproven and should be declined.
76. It was argued that the petition is not supported by a supporting Affidavit contrary to under Rule 11(1) and (2) of the Mutunga Rules, hence it is fatally defective. In this, they relied on the case of *Maureen Nyambura Nyisi Warui v Board of Directors Kenya Power & Lighting Compny Limited & 2 others [2020] eKLR*. Where the Court held that:-
- ‘Rule 11(1) & (2) of the Mutunga Rules do not require that a petition must be supported by an affidavit....it is conceivable that a petition which challenges for example constitutionality of a particular legislative text may not require an affidavit. Where however, a petition relies on matters of evidential fact, this must be proved by affidavit. So where, as here, it is sought to rely on matters of fact a suitable affidavit with documentary annexures ought to be filed in discharging the burden of proof of a plaintiff in terms of section 107, 108 and 109 of the Evidence Act...’
77. The Respondent also cited the case of *Patrick Ochieng Obachi and 6 others Vs Kenya Anti-Corruption Commission [2010] eKLR* and the case of *Charles Okello Mwanda Vs EACC and Others*, where the Court has been consistent that petitions filed without supporting affidavits or with fatally defective affidavits are incomplete and incompetent and are therefore liable for dismissal at the first instance.
78. On whether the orders sought are merited, it was submitted the Petition is based on mere apprehensions and therefore the orders and declarations sought should not be issued at this stage and ultimately.
79. On whether the court can interfere with internal disciplinary processes, it was argued that it is now settled that 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 Petitioner 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. In support of this, they relied on the case of *Thomson Kerongo & 2 others V James Qmariba Nyaoga & 3 others [2017] eklr* where the Court held that: -

“Due process is an internal disciplinary process to be exercised by an employer. The Court is not expected to enter into the boardrooms of the employers to micro manage their affairs...



The court will only interfere where there is breach of the process and even so, only with a view to setting the process right.”

80. Accordingly, that granting the orders will hamstring the human resource function of the 1st Respondent and it will be tantamount to this Court supplanting its processes on the Respondents and descending into their Boardrooms.
81. The Respondent herein urged this Court to dismiss the Petition herein with costs.
82. I have examined all evidence and submissions of the parties herein. The Petitioner herein has averred that he is being subjected to an unfair disciplinary process as the EACC is also seized of the investigations and this contravenes the Respondent’s Human Resource Manual at clause 10.39.
83. In determining this petition and to avoid a duplication of efforts, I made a ruling on 4th June, 2024 allowing the disciplinary process to proceed and having indicated that internal disciplinary processes are independent of the criminal process and therefore there is no bar to a disciplinary process continuing when police investigations are ongoing.
84. The Petitioner sought similar orders in the main petition asking this court to stay the disciplinary process that has already been initiated.
85. Having pronounced myself on the same issue, I will not revisit it in this judgment.
86. The Petitioner had also sought orders quashing the Respondent’s letter to him dated 26th September 2023 and 19th February 2024. The letter of 26th September 2023 is one that sent the Petitioner on leave with immediate effect pending investigations on the matters of Bomet-Mulot-Longisa water supply project.
87. The letter of 19th February 2024 was a show cause letter which set out accusations against the Petitioner and for which he was expected to show cause why disciplinary action should not be taken against him. He was expected to respond within 14 days which was by about 5th March 2024.
88. The Petitioner chose not to respond to the show cause letter but filed this petition on 26th February 2024. The Petitioner averred that the interdiction and Notice to Show Cause was issued contrary to the 1st Respondent’s HR Policy and Procedure Manual.
89. It is however unfortunate that the petition was filed without any supporting affidavit and the Human Resource Manual which the Petitioner seeks to rely on as being flawed was not annexed to the petition. The Petitioner has not indicated what the 1st Respondent did or omitted to do against the HR Manual.
90. It is indeed the responsibility of the Petitioner who has alleged breach of the HR Manual to point out the provisions in the HR Manual which have been breached and this the Petitioner failed to do.
91. The Petitioner indeed rushed to this court just after being sent on compulsory leave and being asked to show cause why disciplinary action should not be taken against him.
92. As held in Humphrey Makwicha Nyongesa case, this process was indeed a start of an investigation process and in the circumstances of the case issues of being heard before a NTSC is issued would not have arisen. The averments that there was breach of Article 47, has not been demonstrated.
93. The process was just at the beginning and the Petitioner declined to give it a chance to submit to it. His averment that his constitutional rights were breached is found without merit and I dismiss it accordingly. There will be no order of costs.

JUDGEMENT DELIVERED VIRTUALLY THIS 30TH DAY OF JULY, 2024.



**HON. LADY JUSTICE HELLEN WASILWA
JUDGE**

In the presence of: -

N/A for parties

Court Assistant - Fred

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