



**Mugo HSC v Mugo & 2 others (Petition E006 of 2022)
[2024] KEELRC 2445 (KLR) (9 October 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
PETITION E006 OF 2022
ON MAKAU, J
OCTOBER 9, 2024**

BETWEEN

JANE WANJIRU MUGO HSC PETITIONER

AND

FRANCIS MURIITHI MUGO 1ST RESPONDENT

BOARD OF DIRECTORS BINGWA SACCO LIMITED 2ND RESPONDENT

BINGWA SACCO SOCIETY LIMITED 3RD RESPONDENT

JUDGMENT

1. The petitioner is the CEO of the 3rd respondent and has worked for the Sacco for 30 years. On 3rd March 2022 she took all her 76 pending leave days and she was to report back on 4th June 2022. On 3rd June 2022, she was served with a suspension letter for 90 days to pave way for investigation into some anomalies related to her work that were discovered during her 76 days leave. She was aggrieved by the turn of events and brought this suit challenging the disciplinary proceedings commenced vide the said suspension letter. The petition dated 20th July 2022 seeks the following reliefs: -
 - a. A declaration be and is hereby issued that the action of the 1st and 2nd Respondent to suspend the Petitioner were in excess of their powers and a violation of human rights and fundamental freedoms of the Petitioners and an abuse of the fair labor practices.
 - b. An order of certiorari be and is hereby issued removing into this court and quashing the decision of the 1st Respondent dated 3rd June, 2022 placing the petitioner on suspension without justifiable reasons contrary to the fair labor practices.
 - c. An order of mandamus be and is hereby issued compelling the respondents to stop any investigation, harassment and/or intimidation to the Petitioner.



- d. An order of mandamus be and is hereby issued directing the respondents to unconditionally recall the Petitioner back to work.
 - e. A declaration be and is hereby issued that the fundamental rights and freedoms of the Petitioners under Articles 27,28, 31, 41 and 47 of the Constitution have been violated by the Respondents.
2. Simultaneously with the petition, the petitioner filed a notice of motion dated even date seeking conservatory order namely to halt the impugned disciplinary proceedings and allow the petitioner to resume her duties as the CEO of the Sacco. On 26th July 2022, the parties recorded a consent to the effect that:
 - a. The impugned disciplinary proceedings against the petitioner were halted.
 - b. The respondents were restrained from terminating or interfering with the petitioner's employment pending hearing and determination of the suit.
 - c. The petitioner was to remain in suspension but enjoy full basic salary.
 3. Subsequently, the respondents filed Response to the petition and cross petition against the petitioner. They contended that the disciplinary proceedings against the petitioner were substantively and procedurally above board and therefore the petition ought to be dismissed with costs.
 4. As regards the cross-petition, the respondents averred that they investigated the conduct and performance of the petitioner from 2022 and discovered serious acts of misconduct, fraud, incompetence and misappropriation of the Sacco funds. As a result, the 2nd respondent resolved to suspend the petitioner and subsequently invited her for disciplinary hearing on 29th July 2022. However, due to this suit the disciplinary hearing never took place and the respondents accused the petitioner of filing the petition to frustrate the disciplinary process.
 5. By the cross petition dated 19th August 2022 the respondents prayed for the following reliefs: -
 - a. The petitioner is unfit to continue holding the office of the Chief Executive Officer of the 3rd cross-petitioner, by reason of gross misconduct, misappropriation of funds, outright negligence, and gross incompetence.
 - b. The Cross-Respondent to be terminated and dismissed from her office as the Chief Executive Officer of the 3rd Cross-Petitioner.
 - c. The Cross-Respondent be ordered to reimburse to the Cross-Petitioner all the misappropriated, and lost funds as a result of the gross misconduct, negligence, misuse of office, fraud and deceit, totaling to a sum of Kshs.26,623,521/- together with any other monies that will be found lost and/or misappropriated.
 - d. The cost of the petition and cross-petition.
 - e. Any other relief that this Honourable Court may deem fit to grant.

Petitioner's Evidence

6. The petitioner testified as PW1 and adopted as evidence her Affidavit sworn on 20th July 2022 in support of the Petition and her further affidavit sworn on 7th September 2022 in response to the cross petition. In brief, the petitioner's case is that she is the CEO of the 3rd respondent and she has worked there since 1993; that she has never had any disciplinary issue or warning from the employer; and that



she has grown the Sacco from one branch to 19 branches from Kshs.50,000,000 to Kshs.7,000,000,000 and from 3 members of staff to 300.

7. It is further the petitioner's case that on 2nd March 2022, the 1st respondent went to her office and told her to fill leave for all her 76 pending annual leave days. These instructions were given shortly after the 1st respondent was elected to office as the Board chairman. She had no option but to comply with the directions and the 1st respondent supervised her exit to begin the 76 days leave. She was to resume work on 6th June 2022 but on 4th June 2022 she received a letter dated 3rd June 2022 suspending her for three months on half basic pay.
8. She contended that the procedure adopted was not proper because she was neither served with a show cause letter nor were any investigation done before the suspension as required under clause 9.5 and 9.8 of the Sacco HR Manual. Further, there was not full Board resolution subjecting her to the disciplinary process since the disciplining of the CEO lies with the Board by dint of Clause 9.10 of the HR Manual. She contended that the suspension was done by the Chairman on Saturday 3rd June 2022 and it never cited any Board resolution. As regards the disciplinary hearing, she contended that the letter inviting her for the hearing was served after obtaining a court order.
9. She denied all the allegation levelled against her by the respondents including authorizing illegal payment of Kshs.6.2 million and Kshs.3.8 million to Soni Enterprises via Accounts 410700740840 and 4170078222. She also denied having seen the material cheques or being guarantor in the said payments. She also contended that the investigation report does not attach the material cheques or any evidence to prove that the said money was illegally transferred to her.
10. She further testified that Loan application is a process that starts with the Branch Loan Officers and checked by the Branch Manager and ends with the Credit Manager unless there is a big issue which requires the intervention of the CEO and sometimes the Board. She wondered why she has been subjected to disciplinary process yet the loan processing does not start and end with the CEO. She pointed out that loan cheques are signed by at least three signatories including the chairman who is a mandatory signatory.
11. She further testified that an external auditor, audits the Sacco annually and the reports have all been approved by the Sacco members and the SASRA and no query was ever raised. She testified that the allegation against her stretches back to 2011 yet all the Boards in office then never raised any issue with her. instead she has been commended for good performance even by the President. She wondered why the respondents have not filed in court the Audit Reports. She contended that she has filed an internal Audit Report (JWM2) in her further affidavit which has not implicated her but Branch Managers.
12. She stated that the disciplinary process against her was without any basis because the Board's Audit Committee had not come up with any audit report implicating her. she denied ever authorizing any reimbursement of loan money and contended that such authorization cannot be done orally. She further denied authorizing any money to be credited to her account nor did she receive any money except loans which she applied for, like any other member of the Sacco.
13. She testified that the reason why she filed the suit before the disciplinary process was completed is because the respondents treated her unfairly causing her to lose faith in the process. She testified that she tried to engage the chairman but no attention was given to her. she wondered why the new Board turned against her yet she had grown the Sacco from the scratches, sometimes late in the night. She testified that her retirement will be in August 2024 and she hoped to exit the Sacco honorably as opposed to being thrown out without a fair hearing. Consequently, she prayed to be allowed back to work until her retirement date.



14. On cross examination, she admitted that when she joined the Sacco she supplied the employer with copy of her National Identity Card indicating her date of birth as 1st January 1964. She further admitted that the HR Policy provides for retirement at the age of 60 years. further the HR Policy allows her to go for annual leave of 38 days.
15. She admitted that she never took her leave in 2020/2021 and 2021/2022 just like the Deputy CEO and the Finance Manager. The reason for the failure to take leave was pressure of work. She contended that she had instructed the Management team to draw a leave schedule for the years with pending leave but the same was not the one marked FMM1 in the affidavit sworn by the 1st respondent prepared by the HR Manager. She admitted that according to the 'FMM1' she was supposed to go for leave from 17th September 2020 to 17th January 2021 and she did so after the chairman approved it on 16th September 2020. Thereafter, her Deputy went for leave from 14th April 2021 to 21st May 2021, and the Finance Manager from 5th July 2021 to 7th August 2021.
16. She further admitted that, according to 'FMM1' her next leave was scheduled for 3rd March 2022 to 4th June 2022 and she applied for the same because the Chairman went to her office and compelled her to do so despite her plea to work from one more week. However, she admitted that she never complained to the chairman or the Board or anybody else that she was forced to apply for the leave.
17. As regards the suspension letter dated 3rd June 2022, she admitted that the chairman had the authority to sign the letter after resolution by the Board. She further admitted that Clause 9.8 of the HR Policy provides for service of a show cause letter to an employee whose offence requires response within three days but in her case, she was not required to give a written response within three days. She further admitted that Clause 9.9 of the HR Policy provides for suspension where evidence is incomplete and further investigation is required.
18. She further admitted that clause 9.5 of the HR Policy gives the Board power to handle her case and for other senior managers. She disputed the authenticity of the minutes of the Board meeting held on 2nd June 2022 contending that they were not cited in the suspension letter dated 3rd June 2022. However, she confirmed that the minutes indicated that all the seven Board members attended the meeting together with the Deputy CEO and the Sub-county Cooperatives officer.
19. She further confirmed that the Board met on 20th July 2022 and resolved that she be invited to a disciplinary hearing but coincidentally, she moved to court the same day. She contended that the 1st respondent was elected into office in November 2019 after the death of the former chairman in June 2019. All the other members were serving in the Board except two who were elected after the death of the former chairman.
20. She reiterated that the allegations made against her in the investigation report enclosed in the letter dated 20th July 2022 were all false and she could have shed light if there was a fair opportunity to do so before the suspension. However, the letter was only served on her on 25th July 2022 after she had filed this suit and obtained orders.
21. She contended that all the loans for Mutho & Co.Ltd and Soni Enterprises totaling to more than Kshs.20 million were applied and were fully secured. She denied that the loan money was authorized by her and surrendered to her. she maintained that all loan cheques are signed by three signatories and not the CEO alone. She also denied that Sacco was used to pay rent for her daughter and Women Groups and contended that the same was drawn from her account. She denied any wrong doing in authorizing transactions vide SMS texts and said that it was a normal procedure. She admitted that Audit Report



- she produced indicates that there was a problem in approval of loans via SMS but she contended that she never authorized any unsecured loan.
22. She admitted that she took STL loan on 7/6/2019 which is simply a loan given to a member who is expecting payment from a known source. She filled the necessary forms and it was approved received and fully settled. She contended that the form she filled for the loan application are the genuine one and termed the ones filed by the respondent as fraudulent forms because the Serial Number is different, the security stated is title and it does not bear her signature. Her correct form bears her signature and states security as collateral.
 23. She further clarified that Kshs.35,000.00 alleged to have been given to the MD Cooperative Bank was actually used to entertain visitors from the said bank. She further contended that she authorized payment of Kshs.70,000 for entertainment of members during training at Gatire, Kagumo and Ngurubani in 2019. She also authorized payment of Kshs.32,050 to Board members who attended the burial of the deceased former chairman. She maintained that she would have explained all those issues and shown documents had she been given a chance before the suspension. Finally, she admitted that she has been paid her half salary as per the consent order aforesaid.
 24. In the re-examination, she clarified that the copy of National Identity Card she supplied upon employment only indicated the year of birth and no date and month. She reiterated that the 76 leave days she took was compulsory leave and clarified that the practice in the Sacco was one month leave which can be extended. She contended that she never planned for the leave of 76 days and maintained that she was forced to apply for the same by the chairman. Thereafter, she was suspended by the Board before being given any chance to explain herself. she maintained that the investigation report was served on her after she served the respondents with court papers.
 25. She clarified that she does not give any loans but only authorizes applications when the forms are submitted to the Branch office. She further clarified that the loans she authorized had application forms duly filled and she returned them to the Branches where the loans were sought.
 26. She contended that as the CEO she has Kshs.100,000.00 petty cash for entertainment, burials among others and it is managed by the Chief Cashier and signed by the Finance Manager. The chairman is not required to sign the same because it is a daily expenditure. She reiterated that the senior staff who authorized the said payments were not subjected to disciplinary process like her. Further that all the payments she authorized for personal use were drawn from her account through computer and clarified that all payments are done through computer and not the physical vouchers filed by the respondents.
 27. Finally, she contended that all the cheques paid to Soni Enterprises and Mutho & Co Ltd indicated in paragraph 8 of cross petition were by cheques signed by three signatories and the chairman was mandatory signatory. She denied ever drawing the said cheques. Further that the loan for Kshs.2.5 million was authorized by the Deputy CEO and the Credit Manager and it was not only secured by a title deed but she fully repaid it.

Respondents case

28. Eliud Mwangi Muriu testified as RW1. He is the respondent's Nairobi Branch Manager. He adopted his affidavit sworn on 12th October 2022 as his evidence. He also filed certificate of Electronic evidence in relation to SMS correspondences with the petitioner.
29. In brief, he stated that the Audit department never held any meeting on 10th September 2022 and the report filed by the petitioner attributed to the said meeting is an outright fabrication by the petitioner which lacks date and signature. He accused the petitioner of irregularly and unprocedurally issuing



- him with instructions either verbally or via text messages to authorize him to make transactions which exposed the employer to loss.
30. He further accused the petitioner of irregularly dealing with her loan application for purchase of her sister's (Grace Njeri Karimi) business. That petitioner visited the business premises personally and valued the assets while her nephew in Nairobi Branch office approved the loan. (see EMM.2). He stated that he raised the alarm that the petitioner made loan approval which exposed the Sacco to loss including the loans issued to Samuel Waiyaki Ngari, Soni Enterprises and Mutho Limited.
 31. On cross examination, he stated that he has worked for the respondent for 20 years while the petitioner was the CEO. He contended that the CEO was giving him instructions which were irregular and unprocedural since 2018. He contended that he complied with illegal instructions because they came from the CEO. He admitted that he can deposit Kshs.10 million into the CEO's account illegally if instructed by the CEO. However, he admitted that his contract of employment barred him from making illegal transactions.
 32. He admitted also that he did not produce any bank statements to confirm that the petitioner authorized illegal payments but insisted that the petitioner authorized payment of cash and loans. He confirmed that loans are assessed by loan clerks, the Branch Manager and Security Manager except on occasions when the CEO's approval was required. He admitted that production of the loan applications was important towards proving his case but he did not have loan application forms.
 33. He admitted that the loans were sought in his Branch but he was not subjected to disciplinary process for authorizing the loans. He also admitted that he never reported to the police but to the Board as the illegal and irregular authorization of loans were not criminal. He contended that authorizing loan by SMS was irregular as the correct procedure was to write on the assessment form. He contended that the petitioner was authorizing by SMS and sign the forms later since 2018.
 34. However, he admitted that the CEO could not authorize the application before the credit manager had signed. He clarified that after the Branch Manager signs the form, he sends to the Credit Manager in the Head Office for approval and in turn forward to the CEO for final authorization. He admitted that the illegal forms were signed by the clerk and himself but no signature by Credit Manager yet a customer took the loan. He admitted that he had no evidence that the petitioner received any proceeds from the illegal loan. He also admitted that the petitioner has no personal account in the Nairobi Branch.
 35. He contended that the petitioner was based in Kirinyaga and he was in Nairobi Branch and petitioner was authorizing him via SMS to pay cash and endorse the loan forms later. He showed SMS dated 21st August 2020 in which the petitioner authorized payment of Kshs.30,000 to Eugene and Kshs.400,000 to Wanjau. However, he admitted that he did not produce in court any documents to prove payment of the said money.
 36. In re-examination, he stated that the petitioner had a joint account with Wonder Girls School from where rent was paid. He contended that the payments in page 44-55 were made from Nairobi with the authority of the petitioner. He, however, changed to say that the petitioner had no account in Nairobi Branch and therefore he paid from Sacco money and the same was never refunded.
 37. He reiterated that the instructions given were irregular and unprocedural. He explained the procedure for loan application from submission of the loan application form to the dispatch of the loan money. He contended that page 20-40 of the cross petition are SMS texts where the petitioner authorized payment through the same. He admitted that he sought instructions via SMS texts and got approval via SMS texts.



38. He admitted that material loans were paid to the account of Mutho & Company Limited and Soni Enterprises in Nairobi Branch. He admitted that the proceeds of the irregular process did not benefit any other customer. He then explained the matter to the Board and the investigators.
39. RW2 was Mr. Nicholas Njue Kiura who is a Senior Cashier of the respondent's Sacco. He adopted as his evidence his Affidavit sworn on 12th October 2022. In brief, his case was that his duties as the chief cashier was to reimburse all expenses incurred upon production of receipts in support of a claim for reimbursement, and an explanation of the said expenses.
40. When the petitioner brought a receipt to him and a signed explanation of the expense, he was obliged to reimburse without investigation or any question on the expenses. He just prepared a payment voucher for the petitioner to sign upon receiving the amount claimed and post the payment in the relevant ledger. Thereafter he handed over the documents to the Financial Manager.
41. He further stated that the petitioner also used to authorize him to make payments to various persons, or deposit money into some persons account, which he did and she signed for the same including the account for Soni Enterprises and Mutho & Company Limited. He listed down seven (7) cheques dated between 30th April 2016 to 31st August 2019 which the petitioner authorized him to give to Soni Enterprises instead of using the money to repay outstanding loans that were outstanding at the time. Similarly, she authorized him to issue two cheques dated 31st December 2018 to Mutho & Company Limited who at the time had a loan balance of Kshs.7,706,483.95 and Kshs.11,054,156 respectively.
42. He blamed the petitioner for improper conduct of instructing him (her junior) to do things which exposed the Sacco to great loss because of the said unpaid and unsecured loans. He contended that, if at all the improper conduct was attributable to him the petitioner would have taken disciplinary action against him.
43. On cross examination, he reiterated that his duties included payment after getting authority from the petitioner. The authority was both in writing or verbal via phone call. He has done the job for 25 years. He admitted that he does not deal with loans and therefore he could not produce documents to prove the loans he has referred in his Affidavit. He also does not sign cheques but merely draws them after authority to pay comes from the CEO (Petitioner).
44. He further admitted that he did not have the cheques referred to in paragraph 7 of his affidavit but he confirmed that for a cheque to clear they must have the signature of the CEO, chairman and another director. He admitted that the CEO cannot sign a cheque and contended that the chairman must have signed the 7 cheques since they were all cleared. He confirmed that the cheques were properly drawn and signed correctly and therefore they were not illegal.
45. He further confirmed that he had no proof that the cheques were cashed through wrong accounts. He also had no proof that the proceeds of the 7 cheques were banked into the petitioner's personal accounts. Finally, he confirmed that the cheques were issued to a particular payee.
46. In re-examination, he reiterated that there was nothing wrong with the cheques he released to Mutho & Soni through Samuel Wanjai but clarified that the problem was that the cheques were never cleared through the customer's loan account in the Sacco but other banks. Consequently, the loans were never recovered.
47. RW3, Mr. Peter Karimi Waiganjo respondents' Finance Manager also adopted his Affidavit dated 12th October 2022 as his evidence in chief. In brief, he stated that his duties did not include or involve incurring, approving or authorizing of expenses. His role was only to receive from the chief cashier, the payment voucher together with the relevant supporting documents for his confirmation and/



- or verification that the payment had been posted to the right ledger. The said documents were only brought to him after the payment/reimbursement had been made and therefore he absolutely had no control over the same.
48. On cross-examination, he stated that he was not a signatory to the Sacco account. He is also not involved in audit process and he was not aware whether the respondent had filed any Audit Report in court. He further admitted that he had not accused the petitioner of any irregularities in his affidavit. However, he denied that he authorized any of the payments the petitioner has accused him of in paragraph 17-21 of her Affidavit.
 49. RW4, Samuel Wanjau Ngari is a businessman and director of Mutho & Company Limited, and also the Manager of Soni Enterprises which belongs to his daughter. He adopted his Affidavit dated 12th October 2022 as his evidence in chief. In brief, he stated that the two entities had done money transactions with the Sacco as evident in bank statement annexed to the affidavit.
 50. He stated that he joined the Sacco in 2009-2010 and opened personal and business accounts and all was well between him and the petitioner and the late chairman until 2013 when Mr.Nguru who was inciting other Sacco directors against the chairman and the petitioner filed suit against the Sacco. The petitioner then approached him to help get money out of the Sacco to use in facilitating the suit. The plan was to have him apply for a loan and then they will find a way of sorting out the loan. He agreed to the plan and took loans of approximately Kshs.9.5 million all of which he handed to the petitioner in cash either personally or through agents.
 51. He was never asked for any security, and all his loan applications were granted instantly regardless of any outstanding loan balance or how recently he had taken another loan. The petitioner used to call Nairobi branch Manager to authorize payment pending signed approval at a later date.
 52. He contended that the same issue was repeated recently when the Sacco vice chairman, Mr.John Njora Kega sued the Sacco, and the petitioner asked him to take loans for the same purpose and he signed loans approximately Kshs.16,000,000 which he handed over to the petitioner in person or sent any of his employees to deliver to her in an agreed place in Nairobi or to her in Kerugoya office or home.
 53. In the meanwhile, he was being given tenders to supply stationery to the Sacco and part of his payment was deducted to repay the loans and the rest he withdrew. In 2016, the petitioner told him that the Sacco had issues with KRA and asked him to apply for a loan of Kshs.4,000,000 to enable her sort out the KRA matter. The chief cashier, Mr.Kiura was present during the said explanation held at the Sacco office at Kerugoya. He applied for the Kshs.4,000,000 out of which he took Kshs.1,000,000 to her at the Sacco's Advocate office, Hon.Munene Wambugu where he found her with the chairman.
 54. He stated that, in order to clear the loan given to his company, he was given tenders to either build or renovate the Sacco offices in Nairobi, Kagio, Gatwe, Kitengela, Githurai, Mwea, Kangundo among others at exaggerated Bill of Quantities by the Architect. However, the Architect refused the suggestion.
 55. Since he did not have money for the works tendered, he applied for more loans to finance the same but again the petitioner kept demanding a share of the loan and he obliged. In 2019, new directors were appointed and started investigating his accounts and found large outstanding and unsecured loans being Kshs.17,395,247 for Mutho & Company Limited, Kshs.20,069,064 for Soni Enterprises and Kshs.1,965,501 for himself.
 56. He has since learned that all the money he gave to the petitioner, she used to develop houses in Kitengela and Umoja and for purchase of land. He is now left to pay the loans he took from the Sacco and gave the money to the petitioner.



57. On cross examination, he stated that he is 64 years old and he is no longer a director of Mutho & Company Limited. He contended that he had not been paid supplies of Kshs.4,000,000 and when he went to claim he was told to wait for the Sacco to sort out their problem with KRA.
58. He clarified paragraph 22 of his Affidavit by stating that he never withdrew the Kshs.4,000,000 and took to the claimant but rather he signed papers (withdrawal vouchers) for the account of Soni Enterprises. That he was requested to sign by the CEO and leave the vouchers in the bank. The Kshs.4,000,000 had been paid to the account for supplies to the Sacco which he was requested to let it be used to sort out the KRA issues.
59. He contended that he gave the petitioner approximately Kshs.26,000,000 in instalments from 2014. He took loans and withdrew the money from his account to give to the petitioner which she said would go to the Sacco. He denied that she stole the money from the Sacco and contended that she was her friend for many years.
60. He admitted that he did not know the owner of the houses he took the photos which he filed in court.
61. In re-examination, he clarified that the petitioner was his friend for over 20 years. He further clarified that, the petitioner was asking for money as the CEO from him as a supplier to the Sacco. He used to fill a loan form and withdraw voucher and send his employees to withdraw cash and then take it to the petitioner as directed. Sometimes he withdrew the money himself and gave the petitioner.
62. He testified that the loan application would be processed within one hour. He learned in 2022 that the money never went to the Sacco. He clarified that the Kshs.26,000,000 he gave the petitioner is inclusive of interest on the loans. He was very close with the petitioner and the late chairman Cyrus Kabira who occasionally was with her.
63. He gave the money also to protect his work as a Supplier to the Sacco. He changed his story to say that the houses he photographed belonged to the petitioner contending that she had taken him there severally including the opening ceremony. He defended the petitioner's juniors and blamed her for the irregular transactions he did with her from 2014.

Submissions

64. It was submitted for the petitioner that the disciplinary process against her were flawed and the same ought to be stopped for violation of her Constitutional rights. The said submission stands on three legs namely quorum of the Board, reason for the disciplinary proceedings and the procedure followed.
65. As regards the quorum, it was submitted that Clause 9.4 of the Sacco HR Policy and Procedure Manual (HR Manual) provides that disciplinary measure against the CEO shall be handled by the Finance and Administration Committee and the Board of Directors. Further Part 8 of the Sacco By-Laws provides under 53(a) that the Board of Directors shall be elected from Class A members and shall comprise 7 members and 3 members of gender representation. By law 53(h) then provides that the quorum shall be 4 members.
66. It was submitted that the 1st Respondent sent the petitioner on compulsory leave of 76 days and subsequently suspended her in his own capacity without any resolution of the Board in contravention of the said By Laws. It was argued that the disciplinary process against the petitioner ought to have been originated by the Board and not the chairman of the Board acting individually. It was submitted that the respondent did not tender any evidence to prove that the Board held a quorate meeting, discussed and decided to suspend the petitioner as no such resolution was supplied to the court.



67. For emphasis, reliance was placed on Republic v University of Nairobi Exparte Bargorret Victor Kiprop (2017) eKLR where the court held that disciplinary proceedings conducted by a committee without quorum were null and void. Further reliance was placed in the case of Republic v Kirinyaga University College & 2 others Exparte Isaya Kamau Kagwima (2015) eKLR where the court also held that proceeding by a committee without quorum was a nullity. Accordingly, it was urged that the disciplinary proceedings herein were nullity ab initio for failure to meet the strict requirement of a resolution by a quoted Board.
68. As regard the reason for the suspension, it was submitted that the offences levelled against the petitioner are unknown to her and they are not provided for in the Sacco HR Manual. As such, the charges are bad in law, irregular and fatally defective. It was submitted that the charges were pressed against her by the chairman after she declined to heed to certain illegal requests which if granted could have contravened the Sacco HR Manual.
69. It was further submitted that the disciplinary process was not for any valid reason but a vendetta for refusing to heed to the said illegality. It was argued that the petitioner will not get justice in the disciplinary process because even before being accorded an opportunity to present her case, the respondents have filed a cross petition seeking declaration that she is not fit to hold office.
70. Reliance was placed on the case of Republic v Cabinet Secretary for Education & another; Jeremy Budi & 3 others (Interested Parties); Exparte Kenya University Staff Union (2019) eKLR where the court held that exercise of power should be lawful and not arbitrarily or irrational or for improper motive.
71. As regards the procedural impropriety, it was submitted that clause 9 of the Sacco HR Manual was not complied with. It was argued that the said clause requires that disciplinary process be handled with fairness and credibility and as regards allegations of misconduct, the Board should ensure that the case is thoroughly and fairly investigated before a fair and consistent disciplinary action is taken against an employee.
72. It was urged that clause 9.8 of the HR Manual requires that an employee shall be issued with a show cause to respond before any interdiction or suspension, but in this case, the petitioner was not issued with any show cause letter before her suspension. Instead, she was forced to a compulsory leave of 76 days and thereafter she was suspended.
73. It was argued that commencing disciplinary proceedings against the petitioner before carrying out investigations breached clause 9.5 and 9.8 of the Sacco HR Manual and violated her rights to fair labour practices and right to fair administrative action under Article 41 and 47 of *the Constitution* respectively. For emphasis, reliance was placed on MTM v KIE Limited & another (2020) eKLR where the court held that an employer must ensure due process, fair hearing and due regard to natural justice.
74. Like in the foregoing case, this court was urged to interfere with the petitioner's disciplinary process to avert a grave injustice as the complainant is the same person spearheading the disciplinary process.
75. In view of the aforesaid procedure impropriety, the disciplinary process violated petitioner's constitutional right under Article 41 and 47 of *the Constitution*. For emphasis, reliance was placed on Fredrick Sandu Amolo v Principal Namenga Mixed Day Secondary & 2 others (2014) eKLR and Narok County Government & another v Richard Bwogo Biriri & another (2015) eKLR where the court faulted decision made in breach of rules of natural justice.
76. As regards the response to the petition and the cross petition, it was submitted that the same is fatally defective for want of a Replying Affidavit as required by Rule 15 of the Mutunga Rules, 2013. Accordingly, it was submitted that the facts of the petition are uncontested and unchallenged. It



was submitted that the respondents attempted to introduce new evidence through its bundles of documents without filing a Replying Affidavit.

77. For emphasis, reliance was placed on Daniel Kibet Mutai & 9 others v Attorney General (2019) eKLR, Philip Tirop Kitur v Attorney General (2018) eKLR and Peter O.Nyakundi & 68 others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another (2016) eKLR where the court found that the respondents did not controvert the facts in the petition and therefore were deemed to have admitted the same. In the instant case, it was submitted that the respondents failed to file a replying affidavit to challenge the petitioner's averments and therefore failed to call Francis Muriithi Mugo during the hearing to give evidence.
78. It was further submitted that foregoing failure to adduce evidence, rendered the respondents cross petition lack legs to stand on. For emphasis, reliance was placed on the case of Kenneth Nyaga Mwige v Austin Kiguta & 2 others (2015) eKLR where it was held that failure to call a witness to produce a document MFI is fatal.
79. In view of the matters submitted above, the court was urged to grant the reliefs sought by the petitioner plus costs. Reliance was placed on MWK & another v Attorney General & 3 others (2017) eKLR, where the court explained circumstances that warrant granting aggravated damages including conduct that subjects the plaintiff to humiliation, distress, embarrassment, pain, anguish, wounded pride among others.

Respondent's submission

80. It was submitted for the respondents that the petitioner was not forced to take leave as alleged. On the contrary, it was submitted that the leave was given in accordance with the leave schedule dated 3rd November 2020 which was prepared by the HR Manager with instructions from the petitioner. The leave was to be taken in two instalments starting 17th December 2021 to 23rd January 2022, and then from 3rd March 2022 to 4th June 2022.
81. It was further submitted that the leave schedule was for all the Senior Managers and they all took their respective leaves when they fell due. The petitioner did not complain about the first instalment of her leave and therefore it was submitted that the alleged compulsory leave was not true since the leave schedule was made almost one and half years before and the petitioner duly applied for the same. She also approved the leave for the other managers based on the same schedule. Consequently, it was submitted that the alleged forced leave is untrue and uncalled for. It was further submitted that the suspension of the petitioner was justified and the procedure followed was proper.
82. It was argued that the respondents acted within their mandate under Clause 9 of the HR Manual which permits interdiction or suspension where there is incomplete evidence to support an offence by an employee to necessitate further investigations and especially where the employee is likely to tamper with the evidence. The employer is not bound to disclose the reasons for suspension/interdiction to the employee. The suspension should not exceed 180 days within which the matter should be concluded. The employee is entitled to half salary during the suspension and the rest be paid depending on the outcome of the investigations. No salary is payable if the employee is interdicted for desertion, misappropriation of funds, fraud or absenteeism.
83. It was submitted that, while the petitioner was on leave, the directors discovered many anomalies that had been occasioned by the petitioner as the CEO of the Sacco. The anomalies required further investigations hence the suspension letter dated 3rd June 2022. It was submitted further that the list of gross misconduct offences in clause 9.2(3) of the HR Manual is not exhaustive. Further that the suspension was under clause 9.4 of the HR Manual and therefore by dint of clause 9.9 the petitioner



was not entitled to 50% of her salary due to her offence of misappropriation of funds. Nevertheless, she was paid the same during the suspension.

84. It was further submitted that under clause 10.0 of the HR Manual, the Board had the full mandate to discuss and approve termination cases involving the CEO. Besides clause 9.17 of the HR Manual provided that, the board is the final authority on the day to day operations of the Sacco, in relation to appointment, termination of appointments, interdictions and suspension and retirement of employees. The Board met on 2nd June 2022 and authorized the suspension of the petitioner and the chairman wrote the suspension letter.
85. It was argued that the petition was filed prematurely before the conclusion of the internal disciplinary procedure set out under clause 9 of the HR Manual. The investigations were concluded and tabled before the board on 20th July 2023 and the petitioner was invited to a disciplinary hearing on 29th July 2022. However, the petitioner frustrated the process by moving to court on 20th July 2022 after “getting wind” of the board’s intention of subjecting her to disciplinary hearing.
86. It was argued that by seeking to stop investigations into her conduct and then recalling her to work unconditionally it meant to restrain the respondents from carrying out their lawful mandate under the law. Allowing the said prayers would be prejudicial to the law, legal process and the HR Manual which binds all the parties herein. Consequently, the court was urged to decline the reliefs sought because they are premature and pre-emptive and instead allow the disciplinary process to be concluded.
87. For emphasis, reliance was placed on *MTM v KIE Limited & another* (2020) eKLR, and *Rosemary Waitherero Mburu v Kenya Airways Ltd* (2020) eKLR where the court held that courts should only interfere with internal disciplinary process only when the process is flawed. Further reliance was placed on *Abraham Gumba v Kenya Medical Supplies Authority* (2017) eKLR and *Geoffrey Muthinja Kabiru & 2 others v Samuel Munga Henry & 1756 others* (2015) eKLR.
88. It was further submitted that the petition does not meet the competence threshold established in *Anarita Karimi Njeru v Republic* (1979) eKLR since the petitioner has not given particulars of the disciplinary hearing, which has a statutory underpinning, has violated her constitutional rights. For emphasis, reliance was placed on *James Makura M’Abwa v Director of Public Prosecution* (2020) eKLR where the court held that there was no constitutional question involved as the matter was purely on employment dispute which ought not to be elevated to a Constitutional case.
89. Finally, it was submitted that the respondents have made out a good case which should be allowed with costs. It was urged that the court has jurisdiction to entertain the cross petition and award the reliefs sought under Article 162 (2)(a) and 165 (5) of *the Constitution* of Kenya, 2010. It was argued that the court cannot shield herself from the internal disciplinary process and again object to the court’s jurisdiction to hear and grant the reliefs sought in the cross-petition.

Issues for determination

90. Having considered the pleadings, evidence and submissions, there is no dispute that the petitioner was at all material times employee of the 3rd respondent Sacco. There is also no dispute that the respondents commenced disciplinary process against the petitioner by a suspension letter dated 3rd June 2022 raising several issues of misconduct against her.
91. The issues for determination therefore are;
 - a. Whether the court should intervene in the disciplinary process and quash the suspension.



- b. Whether the respondents have violated the petitioner's rights.
- c. Whether the petitioner is entitled to the reliefs sought in the petition.
- d. Whether the respondents are entitled to the reliefs sought in the cross-petition.

Intervention in the internal disciplinary process

92. The petitioner has invited the court to quash the decision to suspend her and then shield her from further disciplinary process. She contended that the decision was not made by the Board and no investigations were conducted before the decision was made. Further that, there is no valid reason warranting the disciplinary process.
93. However, the respondent maintained that the petitioner has committed gross misconduct and is not fit to continue serving as the CEO of the Sacco. Further that the decision to suspend her was made by the Sacco Board and not by the Chairman alone. They further averred that the suit was filed prematurely and the court should allow the disciplinary process to go its full course.
94. I have considered the arguments by both sides and I must say that it is not the first time that the court is being invited to intervene in internal disciplinary process. In the case of *MTM v KIE Limited & another* (2020) eKLR, Wasilwa J held that: -
- “Courts will interfere with internal disciplinary action only when the process is flawed. The interference will thus be to put back on track the disciplinary process but not to do away with it all together...”
95. The foregoing holding was repeated in *Rosemary Waitherero Mburu v Kenya Airways Ltd* (2020) eKLR thus: -
- “Courts are reluctant to interfere with an employer's internal disciplinary process unless it is evidently flawed and in breach of the law, and such interference will only be limited to putting the process to the right course.”
96. The foregoing decisions echo a legion of decisions out there. The main reason for why the court will intervene in internal disciplinary process is breach of the procedure provided in the contract of employment, employer's HR Policy and Procedures Manual, the Law and the rules of natural justice. The burden of proof lies with the employee to prove on a balance of probability that the disciplinary process is tainted with procedural impropriety and it is calculating to achieve a pre-meditated result.
97. The validity of the charges may not be a good reason for the court to intervene in internal process unless it can be demonstrated that there is no connection between the alleged charges and the employee's role under his or her contract of service. In such a case, the employee would be complaining that the employer is acting unreasonably.
98. In the instant case, the claimant was suspended vide a letter written by the chairman of the Sacco after a Board resolution. The petitioner has not filed evidence to prove that the board has denied that it made a resolution to suspend her. Consequently, I find and hold that the petitioner has not proved that the Sacco chairman suspended her without resolution from the Sacco Board.
99. There is also evidence that while the petitioner was on leave, preliminary investigations were done which implicated her prompting the decision to suspend her to facilitate further investigations. She was then issued with a suspension letter dated 3rd June indicating the offences under investigation. The



suspension was for three months. I see nothing wrong with the suspension letter as it complied with clause 9.9 and 9.10 of the HR Manual. Nothing in the HR Manual suggests that one must be served with a show cause letter before suspension.

100. As regards the connection between the allegation and the petitioner's role in the company, I am satisfied that there is indeed a direct connection. The petitioner was also not condemned unheard only that she rushed to court before the disciplinary hearing was held.
101. Having considered all the above matters, I am satisfied that the disciplinary proceedings initiated against the petitioner were not in breach of her contract or the Sacco HR Manual, the law or the rules of natural justice. As clause 9.9 of the HR Manual states, suspension of an employee did not mean that the employee is dismissed. It is only a temporary measure of sending the employee away from work to enable the employer to investigate an alleged misconduct.
102. In this case, the petitioner was given a suspension of three months to enable the employer complete investigations and call her back. Consequently, I must find and hold that the petitioner has not met the threshold for the court to intervene in her disciplinary proceedings. Even if there was a reason for the court to intervene, the court would only do so to correct the procedural anomalies but not to muzzle the employer from exercising disciplinary control over the petitioner as prayed.

Violation of petitioner's rights

103. The petitioner alleged that her rights to equality before the law, right to be treated with dignity and right to fair administrative action under Article 27, 28 and 47 of the Constitution were violated by the respondent by being forced to go on leave, being placed under surveillance and improper investigations; being turned away from her office; the office being turned into a boardroom; being singled out unjustly and victimized; and by being exposed to disciplinary process initiated without jurisdiction and contrary to Sacco By-laws and HR Policy and Procedure Manual.
104. I have already made a finding of fact that the disciplinary proceeding against the petitioner were proper and in consonance with the said HR Manual, the law and the rules of natural justice. The proceeding had not gone through their full course and therefore it is premature for the petitioner to allege that her constitutional rights were violated by employer through the proceedings.

Reliefs

105. In view of the finding that the disciplinary process was proper, I find and hold that the petitioner is not entitled to the reliefs sought.

Cross-petition

106. The respondents urged the court to allow the disciplinary proceedings to go their full course; that I declare the petitioner unfit to hold the office of CEO of the Sacco; and finally, to condemn her to pay to the Sacco Kshs.26,623,521 which was lost through petitioner's negligence, abuse of office and fraud.
107. The court did not stop the disciplinary proceedings. It is the parties who agreed to stop the proceeding pending the hearing and determination of the suit. I have already made a finding that the petitioner has not showed sufficient cause to warrant intervention of the court in the proceedings. It is also not within the mandate of the court to go about stopping internal processes but only to correct the flaws if any.
108. As regards the declaration that the petitioner is not fit to hold the office of CEO of the Sacco and for payment of the lost or misappropriated funds, I would rather leave that matter to the employer



to determine during the internal disciplinary process. It is premature to do that on the basis of the material before me. In the upshot, I decline to grant the reliefs sought in the cross petition.

Conclusion

109. I have found that the petitioner has not met the legal threshold for the court to intervene in the internal disciplinary process initiated against her by her employer. I have further found that the reliefs sought by the petition, and the cross-petition are premature and declined to issue the same. Consequently, I dismiss both the petition and the cross-petition subject to the directions made above. Each party to bear own costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF OCTOBER, 2024.

ONESMUS N MAKAU

JUDGE

ORDER

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

