



**Mwamati (P Eng Tech) v Tanathi Water Works Development Agency & another
(Petition E187 of 2024) [2024] KEELRC 13470 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELRC 13470 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E187 OF 2024
B ONGAYA, J
DECEMBER 19, 2024**

**BETWEEN
FREDRICK TITO MWAMATI (P ENG TECH) APPLICANT
AND
TANATHI WATER WORKS DEVELOPMENT AGENCY 1ST RESPONDENT
HON REGINAH MUIA NDAMBUKI 2ND RESPONDENT**

RULING

1. The petitioner filed the notice of motion application dated 19.11.2024 through Tonge Yoya & Associates Advocates. He seeks the following orders:
 - i. Spent.
 - ii. That pending hearing and determination of the application and petition, the Honourable Court do make an order suspending or staying the interdiction by the 2nd respondent contained in the letter dated 14.11.2024 and order for immediate resumption of duties by the petitioner.
 - iii. That pending hearing and determination of this application and petition, this Honourable Court do make an order suspending or staying the unlawful disciplinary process commenced vide 2nd respondent show cause letter dated 14.11.2024 and further orders for evidence in all the allegation be filed in court to establish a prima facie case to subject the petitioner for another round of endless disciplinary process by protecting the sanctity and integrity of disciplinary process from gross abuse.
 - iv. That pending hearing and determination of this application and petition, this Honourable Court do issue temporary injunction restraining the respondents either by themselves, employees, servants or agents from harassing, intimidating or terminating the employment of the applicant/petitioner for the remainder of his term in relation to similar allegations.



- v. That the costs of this application be borne by the respondents.
2. The application was founded on the grounds set out therein and supported by the affidavit of the petitioner, who averred as follows:
- a. The 1st respondent engaged him as Chief Executive Officer (CEO) on three years contractual basis with the duty to oversee policies and programs on water and sewerage projects among others.
 - b. The 2nd respondent suspended him on 23.11.2023 pursuant to orders and/or directions of the Cabinet Secretary, Ministry of Water, Sanitation and Irrigations communicated via his letter dated 17.11.2023. However, the said suspension was declared unconstitutional, unlawful hence null and void ab initio in the Judgement delivered by this Honourable Court on 09.05.2024 in ELRC Nairobi Petition No. E229 of 2023, Fredrick T. Mwamati vs. Tanathi Water Works Development Agency & 2 Others.
 - c. Officers of the Ethics and Anti-Corruption Commission (EACC) then apprehended him and he was arraigned and charged in court with allegations of an economic crime offence in Kitui Criminal Case No. MCAC No. E003 of 2024, Republic vs. Fredrick T. Mwamati & 11 Others. Consequently, the 2nd respondent convened 1st respondent's board meeting and suspended the petitioner vide a letter dated 03.07.2024.
 - d. Despite a ruling being delivered on 02.10.2024 in MCAC No. E003 of 2024 discharging him and other co-accused, the respondents denied him an opportunity to resume duties. Thereafter, the 2nd respondent handed him three letters on 14.11.2024 as follows:
 - i. A letter dated 12.11.2024 purportedly lifting his suspension in line with the court ruling of 02.10.2024, which letter was made one (1) month and 10 days after the discharge by court and was received by him on 14.11.2024 at 12:20pm;
 - ii. A letter dated 14.11.2024 purportedly interdicting him, which letter he received at around 12:23pm; and
 - iii. A show cause letter alleging gross misconduct of action and/or inaction that allegedly took place between January 2023 and September 2024, which letter he received at around 12:25pm.
 - e. The respondents then proceeded to hurriedly convene a board meeting to ensure he remains out of office for the remainder of his contractual term that terminates on 31.06.2026.
 - f. In effect, the respondents subjected him to two rounds of suspension, with the first attempt having been stopped on 09.05.2024 in ELRC Nairobi Petition No. E229 of 2023. He has been on suspension from November 2023 to May 2024 and from July 2024 to 12.11.2024, which period cumulatively adds to 11 months. However, the law and the 1st respondent's Human Resource Management Policies and Procedures Manual, 2021 (hereinafter "HR Manual") do not provide a scenario where any purported interdiction could be issued concurrently with the show cause letter. The period in which he was on suspension was sufficient for the respondents to conduct investigations on the allegations and not block him from discharging his duties for the remainder of the contract.
 - g. Unless this Court intervenes, he stands to be greatly prejudiced considering his contract term shall lapse while he is out of office.



3. The respondents filed their grounds of opposition dated 27.11.2024 through Nyaencha Waichari & Company Advocates. They opposed the petitioner's application on the following grounds:
 1. That paragraph 10.9 of the 1st respondent's HR Manual gives the 1st respondent's Board powers to interdict any employee for purposes of carrying out investigations that may lead to a dismissal. That the interdiction in issue herein is intended to inter alia safeguard the integrity of the investigation. Given the gravity of charges pressed against the applicant, lifting his interdiction in the interim will not only compromise the investigation but it will also jeopardize the outcome of the same.
 2. Further that in so far as paragraph 10.9 of the 1st respondent's HR Manual has not been declared unconstitutional by any competent court of law or authority, the same is still in force and applicable to all and any employee of the 1st respondent, including the applicant. Its constitutionality is not in issue herein.
 3. That to the extent that the petitioner's notice of motion and supporting affidavit make reference to proceedings in Nairobi ELRC Petition No. E229 of 2023 and Kitui Criminal Case No. MCAC No. E003 of 2024, the same are not in any way related to the disciplinary proceedings commenced by the respondents herein - partly the subject to this application, through the interdiction letter of 13.11.2024 and the notice to show cause of 13.11.2024; and that in those proceedings, the respondents herein were not the claimants and/or complainants. The 2nd respondent agreed with both the decisions and implemented them faithfully.
 4. That this Court lacks the requisite jurisdiction to entertain the motion herein on account that the same is non-justiciable, premature and is under the primary jurisdiction of the 1st respondent's Board. Further, the application violates the doctrines of exhaustion, constitutional avoidance and/or deference. Entertaining it will be tantamount to usurping the role of the Board of the 1st respondent and shelving the 1st respondent's human resource instruments. The show cause and interdiction are ongoing administrative decisions and the petitioner cannot allude that a process that is ongoing and on which no determination has been made has already prejudiced him.
 5. That prayer 4 of the motion is in the nature of a final order of a permanent injunction. The same cannot be granted at the interim stage but can only issue upon hearing of the parties and on merit.
 6. That to the extent that the applicant herein has neither responded to the notice to show cause dated 13.11.2024 nor made any request for information under Articles 35, 47 and 50 of *the Constitution*, as read with the *Access to Information Act*, 2016 and *Fair Administrative Action Act*, 2015 - regarding the commencement of the disciplinary process he seeks to impeach, his claim under prayer 3 and paragraph 23 of the supporting affidavit to the application are unfounded.
 7. That a determination of whether the respondents have a prima facie case against the applicant can only be made on a merit hearing before the Board of the 1st respondent and only upon the applicant responding to the notice to show cause. To the extent that the application and supporting affidavit are a veiled prosecution of the notice to show cause before this Court, the same violate the doctrines of exhaustion, constitutional avoidance and/or deference; and this Court has no jurisdiction to entertain the same. These depositions and averments cannot form the basis of granting interim orders.



8. Further that the issues raised by the applicant/petitioner in both the application and petition filed herein are ordinary employment matters and are internally provided mechanisms for addressing such grievances which the respondents are following in this case.
 9. That if the allegations are baseless as contended by the petitioner, then there is no harm why he should not deal them by responding to them and bring this matter to an end by giving a satisfactory response.
 10. That it is the employer's prerogative to discipline its employee on account of a contract between the two. The applicant herein has not demonstrated reasons why the court should intervene.
 11. 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 respondents.
4. The 1st and 2nd respondents also filed the replying affidavit of Oyagi sworn on 02.12.2024. It was urged that other than the proceedings in Kitui MCAC No. E003 of 2024, the applicant's suspension from duty on 03.07.2024 was not challenged and the said criminal proceedings were not disciplinary proceedings contemplated under the 1st respondent's HR Manual. Following discharge of the applicant in the criminal proceedings, the 1st respondent's Board held a special full board meeting on 12.11.2024 wherein it reinstated him. He was also fully paid his salary and benefits upon reinstatement.
 5. The 1st and 2nd respondent further averred that on 13.11.2024, the 1st respondent's Board interdicted the applicant on account of various charges of gross misconduct. Accordingly, the Board issued him with a letter of interdiction together with a notice to show cause why his contract should not be terminated. The decision to interdict the applicant and requiring him to show cause did not concern the issues prosecuted in Nairobi ELRC Petition No. E229 of 2023 and issuance of both letters was justifiable.
 6. The 1st and 2nd respondents pleaded that a grant of the interim orders sought will jeopardize the disciplinary process already commenced, given that the applicant is an ex-officio member of the 1st respondent's Board, a disciplining organ of the 1st respondent. If the interim orders are granted, the applicant will sit as a member of the Board and be part of its collegial decisions; he will be his own accuser, complainant, prosecutor, witness, custodian of all the relevant evidentiary materials, and judge. Considering that board meetings of statutory corporations were capped at six (6) annually by dint of a circular by the Executive, this explains the extended number of days it took the Board to sit post the decision in Kitui MCAC No. E003 of 2024. A delay by 25 working days, not 40 as alluded, was not inordinate and the applicant has not demonstrated any acts or omissions of violation of the process on the part of the respondents. In addition, the application herein is an abuse of this court's processes and based on the unfounded apprehension that the disciplinary process will proceed beyond the applicant responding to the notice to show cause.
 7. The parties filed their respective submissions.
 8. The Court has considered the material on record and returns as follows:
 - a. The applicant has failed to show that he has requested the respondents and the respondents have refused to provide the information or documents subject of the instant application and as prayed.



- b. As urged for the respondents, the respondents appears to have invoked clause 10.9 of the Manual on interdiction . The applicant has not cited a provision of the manual or law that precluded the respondent from issuing the interdiction letter and the letter to show cause on the same date.
- c. The cited previous petition and criminal cases appear to be separate from the instant cause of action.
- d. As urged for the respondent the applicant urges for stay of the interdiction and administrative disciplinary case against the applicant and when granted would amount to a final order in the nature of a reinstatement. Even if it would be in the nature of a temporary mandatory injunction, the test for grant of such an order has not been satisfied - as there is no shown undisputable case that it is near obvious that the applicant will succeed.
- e. In view of the foregoing findings, the Court returns that the applicant has failed to pass the threshold to justify the exercise of the Court’s rare jurisdiction to interfere with the exercise of the employer’s prerogative of disciplinary control. It appears to the Court that the applicant should cooperate with the respondent towards a fair disciplinary process consistent with the prevailing statutory, policy and contractual provisions.

In conclusion, the application is dismissed with costs in the cause and parties to take directions for the expeditious hearing and determination of the petition or, to consider compromise as may be just and in view of the findings in this ruling.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 19TH DECEMBER 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

