



Kulundu v Chief Executive Officer, Independent Electoral and Boundaries Commission & 9 others (Petition E170 of 2022) [2023] KEELRC 114 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELRC 114 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E170 OF 2022
L NDOLO, J
JANUARY 26, 2023

BETWEEN

RUTH KHATIEVI KULUNDU PETITIONER

AND

CHIEF EXECUTIVE OFFICER, INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

WAFULA CHEBUKATI 4TH RESPONDENT

BOYA MOLU 5TH RESPONDENT

ABDI YAKUB GULIYE 6TH RESPONDENT

JULIANA CHERERA 7TH RESPONDENT

FRANCIS WANDERI 8TH RESPONDENT

JUSTUS NYANG'AYA 9TH RESPONDENT

IRENE MASIT 10TH RESPONDENT

RULING

Introduction

1. On August 9, 2022, Kenyans went to the polls to choose their President and other elected leaders. This dispute revolves around activities leading to the tallying and announcement of the presidential election results, in which the parties herein were directly involved.



2. The Petitioner, Ruth Khatievi Kulundu is an employee of the 2nd Respondent, the Independent Electoral and Boundaries Commission (IEBC), currently holding the position of Deputy Commission Secretary-Operations.
3. Soon after the elections, the Petitioner was interdicted on allegations of misconduct. She came to court by filing a Petition accompanied by a Notice of Motion under Certificate of Urgency. The Motion is the subject of this ruling.
4. The matter was placed before my brother, Dr Gakeri, J, who granted interim orders staying the disciplinary process initiated against the Petitioner.
5. The 1st and 2nd Respondents filed a subsequent Notice of Motion dated October 21, 2022 seeking orders to set aside the ex parte orders granted by my brother Judge. When the parties appeared before me on October 24, 2022, Counsel for the 1st and 2nd Respondents opted to abandon the latter Motion and to subsume the issues raised therein in a replying affidavit opposing the Petitioner's plea.

The Petitioner's Notice of Motion

6. By her Notice of Motion dated September 29, 2022, the Petitioner seeks the following orders pending the hearing and determination of the Petition:
 - a. A conservatory order suspending the decision of the 1st Respondent contained in the letter dated September 19, 2022, purporting to interdict the Petitioner from the exercise of her duties as the Deputy Commission Secretary-Operations;
 - b. A temporary injunction staying any or further and/or intended disciplinary proceedings commenced by the Respondents.
7. The Motion is supported by the Petitioner's own affidavit and is premised on the following grounds:
 - a. The Petitioner was appointed as Deputy Commission Secretary-Operations vide appointment letter dated March 11, 2022 for a term of five (5) years. Since then, she had devoted the whole of her time, attention and abilities, to her duties ahead of the General Elections that were scheduled for and took place on August 9, 2022;
 - b. Prior to this appointment, the Petitioner had been employed by the 2nd Respondent in November 2009 as Regional Election Coordinator in charge of the Nairobi Region, which then comprised of Nairobi and Kajiado Counties. During that period, she created seventeen (17) Constituency Offices in Nairobi, five (5) in Kajiado and a Regional Office at Nyayo House in Nairobi;
 - c. Further, the Petitioner carried out many successful by-elections in Kamukunji, Starehe and Makadara, among others, which arose from the 2007 Elections by the then Electoral Commission of Kenya. She also conducted a successful referendum in the said Region, in 2010;
 - d. In 2012, the Petitioner was transferred to the Lower Eastern Region, consisting of Machakos, Makueni and Kitui Counties, where she successfully conducted the 2013 General Elections and by-elections in Makueni County, Matungulu and Kibwezi West Constituencies. She also managed to obtain land for the construction of a Regional Warehouse in Machakos and offices in Kitui, Machakos and Makueni Counties;
 - e. The Petitioner returned to Nairobi Region in 2015 and thereafter was transferred to Siaya County in May 2017, in the position of County Elections Coordinator;



- f. The Petitioner's woes escalated when the Ag. Director, Voter Registration and Electoral Operations, Moses Sunkuli, unreasonably and persistently breached the Commission's protocol by reporting directly to the 1st and 4th Respondents, an act that was condoned by the Respondents;
- g. During the 2nd week of August 2022, while the Petitioner was conducting duties at the National Tallying Centre, the 4th Respondent re-assigned her to the peripheral role of Protocol and Dignitaries;
- h. Nonetheless, the Petitioner went about executing her duties and while escalating concerns on the sanitary conditions for Returning Officers as observed at the Tallying Centre, she requested Moses Sunkuli and the Manager of Corporate Events, Tabitha Mutemi to find a solution to those concerns. The Petitioner suggested that the lady Returning Officers be allowed to freshen up at any hospitality facility close to Bomas of Kenya but Sunkuli suggested a closer and more convenient facility within Bomas of Kenya;
- i. Unknown to the Petitioner, Sunkuli informed the 4th Respondent that the Petitioner was intending to whisk away Returning Officers from the Tallying Centre, an allegation the Petitioner terms as malicious and erroneous. The Petitioner sought to clarify the position with the 4th Respondent but she was snubbed;
- j. On August 25, 2022, the Petitioner received an invitation to attend a special plenary meeting of the 2nd Respondent, which meeting was called by four Commissioners, including the Vice-Chairperson, Juliana Cherera. According to the Petitioner, the invitation was also sent to all the Commissioners and the Commission Chief Executive Officer, Marjan Hussein Marjan;
- k. The meeting took place on August 26, 2022 as scheduled, with the Petitioner, the 7th, 8th, 9th and 10th Respondents in attendance. The 1st Respondent and three Commissioners were absent;
- l. According to the Petitioner, her job description as Deputy Commission Secretary allows her to represent the 1st Respondent at various meetings that he is unable to attend and to assist him in taking plenary minutes. The Petitioner therefore took the minutes of the 279th plenary meeting but did not sign them as she was awaiting approval by the 1st Respondent;
- m. Following the meeting of August 26, 2022, the Petitioner received a notice to show cause why disciplinary action should not be taken against her. The notice accused the Petitioner of misconduct, with allegations that she had arranged for a Commission plenary meeting without authority or delegation by the 1st Respondent. The Petitioner was further accused of threatening and intimidating staff members;
- n. The Petitioner responded to the show cause notice on September 9, 2022, denying all the allegations levelled against her. In her response, the Petitioner stated that the meeting, which she was accused of arranging, was in fact called by the 7th, 8th, 9th and 10th Respondents;
- o. On September 14, 2022, the Petitioner was issued with another show cause notice on allegations of breach of confidentiality, particulars being that she had circulated the contents of the letter dated 29th August 2022 on social media;
- p. The Petitioner was required to respond to the second show cause notice within seven (7) days, contrary to Section 12.11.1 of the Human Resource and Administration Policies and Procedures Manual, 2020 which provides for a period of fourteen (14) days;



- q. This notwithstanding, the Petitioner responded to this show cause notice on September 20, 2022, within the period afforded to her;
- r. Despite responding to both notices, the Petitioner's responses were not taken into account as she was issued with an interdiction letter dated September 19, 2022 pursuant to Section 12 of the IEBC Human Resource and Administration Policies and Procedures Manual, 2020;
- s. Due process of the law and internal regulations of the IEBC were not followed in the disciplinary proceedings against the Petitioner in that:
 - i. The Commission Secretary/CEO, in excess of his mandate and without any evidence, issued an interdiction letter to the Petitioner, which power was vested in the Commission, to be exercised through its Disciplinary Committee as per Section 12.3.1 of the Human Resource and Administration Policies and Procedures Manual, 2020;
 - ii. The Commission Secretary/CEO, in excess of his mandate and without the approval of the majority of the IEBC Commissioners, issued an interdiction letter to the Petitioner;
 - iii. The Commission Secretary/CEO went against the Second Schedule to the *IEBC Act*, which provides for the conduct of the business and affairs of the Commission. The principle under this Schedule is that the Commissioners discharge the affairs of the Commission collectively provided there is a quorum, being at least half of the existing members of the Commission;
 - iv. The Petitioner was not afforded the stipulated and appropriate period to respond to the show cause notice as per Section 12.11.1(1) of the Human Resource and Administration Policies and Procedures Manual, 2020;
 - v. Upon receipt of the Petitioner's responses, the 1st Respondent did not refer the matter to the relevant Disciplinary Committee as per Section 12.11.1(4) of the Human Resource and Administration Policies and Procedures Manual, 2020. Instead, the 1st Respondent purported to interdict the Petitioner in his own capacity;
 - vi. The letter of interdiction was issued before the lapse of the time given to the Petitioner to respond to the show cause notice.
- t. The Petitioner has suffered and continues to suffer intimidation, harassment, discrimination and victimisation;
- u. The Petitioner is at the verge of being illegally terminated by the 1st and 2nd Respondents on account of political vendetta and a desperate attempt by the Commission to find a scapegoat in light of the split that was witnessed during the just concluded elections. The Petitioner is being subjected to unfair procedures contrary to her fundamental rights and the provisions of the *Employment Act, 2007*;
- v. The 1st Respondent has and continues to use his powers as the Commission Secretary to intimidate, dress down and make unlawful decisions, asserting that the Petitioner has acted in outright misconduct and is culpable of issuing threats and intimidating staff;
- w. The 1st Respondent has acted in excess of his powers by purporting to interdict the Petitioner, without the approval of a majority of the Commissioners, which actions are in excess of his legal mandate. Further, the 1st Respondent continues to act in a manner that completely flouts



the provisions of the law on the rights of the Petitioner and continues to breach the Petitioner's right to fair labour practices;

- x. The Petitioner has been put through untold suffering, victimisation, witch-hunt and violation of her right to fair administrative action through a process that not only demonstrates lack of professionalism and bias on the part of the leadership of the Commission, but is also a breach of the constitutional provisions on leadership and integrity as well as violation of the *Public Officer Ethics Act* and the *Leadership and Integrity Act*;
 - y. The disciplinary process initiated by the 1st Respondent against the Petitioner is marred with irregularities and is clearly stage-managed towards dismissal. This is evidenced by the 1st Respondent's disregard of the Petitioner's responses followed by the hurried interdiction;
 - z. An injustice has been perpetuated upon the Petitioner and the Court should remedy the said injustice by staying the impugned interdiction;
 - aa. The Petitioner is apprehensive that if the disciplinary process continues, it will not be fair and just for reasons that the complainant against her is also the person spearheading the disciplinary process;
 - ab. The Commission's policy is that a matter is referred to the Disciplinary Committee if the Commission Secretary is not satisfied;
 - ac. The impugned decision to interdict the Petitioner was utterly discriminative for the reason that the subject plenary meeting was called and attended by the 7th, 8th, 9th and 10th Respondents; none of these Commissioners has been condemned and none of them has denied instructing the Petitioner to attend the said meeting;
 - ad. The Petitioner wrote to the 1st and 2nd Respondents on September 26, 2022, requesting for minutes of the meeting that led to her interdiction, the record of the alleged threats and intimidation and any evidence in support of the allegations. The 1st and 2nd Respondents have ignored and/or refused to supply the information in violation of the Petitioner's right to access information;
 - ae. Pursuant to the allegation that the Petitioner had violated the confidentiality clause by sharing information regarding her interdiction with the media, specifically the Standard Group, the Petitioner wrote to the said Media House requesting for disclosure as to whether the Petitioner had shared the information with the Media House;
 - af. The Standard Group responded by letter dated September 29, 2022 stating that they had obtained the subject show cause letter from its sources who had pleaded confidentiality owing to the high stakes in the matter.
8. The Petitioner asserts that she has met the threshold for grant of the orders sought and urges that she stands to suffer irreparable damage if the orders are not granted.

Response by the 1st and 2nd Respondents

9. For the 1st and 2nd Respondents, a replying affidavit was sworn by Lorna A. Onyango, on October 21, 2022. Onyango, who describes herself as the Director of Human Resource and Administration at the Independent Electoral and Boundaries Commission, confirms that the Petitioner was employed by the 2nd Respondent in the capacity of Deputy Commission Secretary-Operations.



10. Onyango terms the Petitioner's application as an abuse of the court process. She states that the Petitioner was interdicted pursuant to Section 12.11.1 of the IEBC Human Resource and Administration Manual, 2020 based on internal investigations for impersonation of the Chief Executive Officer and complaints of threats and intimidation of staff and allegations of attacking, insulting and threatening a Commission staff, Mr. Sunkuli.
11. Onyango maintains that there was sufficient reason and justification for the Petitioner's interdiction since the allegations made against her were quite serious and constituted gross misconduct as stipulated under Section 12.10.1 of the IEBC Human Resource and Administration Manual, 2020.
12. She adds that the disciplinary process set in the IEBC Human Resource and Administration Manual was duly followed, prior to the decision to interdict the Petitioner; the Petitioner was served with two separate and distinct letters to show cause why disciplinary action should not be taken against her.
13. Regarding the allegations of issuing threats and intimidation of staff, the Commission is said to have received complaints from the Ag. Director- Voter Registration and Electoral Operations, Moses Sunkuli vide letter dated August 12, 2022.
14. With respect to the allegation of disregarding the authority of the 1st Respondent, the Petitioner was accused of arranging for the Commission Plenary Meeting No 279, without authority or delegation by the 1st Respondent, who is the Commission Secretary.
15. Onyango further accuses the Petitioner of circulating the contents of the letter dated 29th August 2022 in mainstream and social media, contrary to the principle of confidentiality stipulated under Section 12.10.1(ix) of the Human Resource and Administration Policies and Procedures Manual, 2020. This prompted the subsequent show cause notice dated September 14, 2022.
16. Following the Petitioner's response to the show cause notices, the 1st Respondent wrote a brief to the 4th Respondent, through a memo dated September 15, 2022, informing him that the Petitioner's response was not satisfactory and that further investigation was warranted.
17. The 4th Respondent is said to have communicated by an internal memo dated September 16, 2022, that he would constitute a committee to commence disciplinary proceedings against the Petitioner. The 4th Respondent is further reported to have instructed the 1st Respondent to interdict the Petitioner, pending investigation and determination of the matter.
18. Onyango asserts that the Petition and Notice of Motion are premature as the Petitioner is inviting the Court to interfere with due process. She asks the Court to set aside the interim orders to pave way for conclusion of the internal investigation and disciplinary proceedings.

Response by the 7th, 8th, 9th and 10th Respondents

19. The response by the 7th, 8th, 9th and 10th Respondents is contained in a replying affidavit was sworn by the 7th Respondent, Juliana Cherera, who at the material time, was the Vice-Chairperson of the Independent Electoral and Boundaries Commission.
20. Cherera depones that she is ware that during the General Elections held on 9th August 2022, the Chairperson of the Commission unilaterally assigned the Petitioner to protocol duties after assigning the Petitioner's role as the in-charge of election operations to one of the Petitioner's juniors.
21. Cherera further depones that following the filing of the Presidential Election Petition No E005 of 2022 at the Supreme Court of Kenya, in which she and the 8th, 9th and 10th Respondents were named as co-respondents, they wrote a memo dated 23rd August 2022 requesting the Chairperson of the



- Commission to avail a list of the Commission pre-qualified Advocates/ Law Firms to facilitate issuance of instructions but there was no response from the Chairperson.
22. Subsequently, the 7th, 8th, 9th and 10th Respondents asked for the convening of a special meeting of the Commission, through an internal memo dated August 24, 2022, pursuant to paragraph 3 of the Second Schedule of the *Independent Electoral and Boundaries Commission Act*, to deliberate on the Commission's position on the Presidential Election Petitions filed at the Supreme Court of Kenya.
 23. According to Cherera, the silence from the Chairperson necessitated her together with the 8th, 9th and 10th Respondents to issue a notice on August 25, 2022 to the Chairperson, as well as to the 5th and 6th Respondents, convening a special meeting of the Commission on August 26, 2022 at 9.00 am, as the last day for filing of responses to the Presidential Election Petition was August 27, 2022.
 24. The memo convening the meeting was also sent to the Petitioner and Marjan Hussein Marjan, the 1st Respondent herein.
 25. Cherera states that the Petitioner as the Deputy Commission Secretary, ordinarily took minutes of plenary meetings of the Commission.
 26. The meeting of August 26, 2022, took place as scheduled but the 1st, 4th, 5th and 6th Respondents were absent. The Petitioner was asked to take the minutes of the meeting.
 27. Cherera asserts that at the meeting of August 26, 2022, the Petitioner performed her duties in accordance with her job description and as required of her position in the absence of the Commission Secretary, Marjan Hussein Marjan, whose absence amounted to insubordination and dereliction of duty.
 28. On August 25, 2022 at 2300 hours, Cherera received a notice from Marjan Hussein Marjan indicating that a special meeting of the Commission would be held on August 31, 2022. Agenda 7 of the said meeting was listed as the 'Commission's position on the Presidential Election Petition filed at the Supreme Court on August 22, 2022'. Cherera raises concern that this meeting was being convened after the deadline for filing of pleadings at the Supreme Court of Kenya.
 29. Cherera depones that none of the allegations levelled against the Petitioner had ever been tabled before the Human Resource Committee or before a plenary meeting of the Commission.

Further Response by the 1st and 2nd Respondents

30. Another affidavit was sworn by Hassan Abdalla specifically in response to the replying affidavit by the 7th, 8th, 9th and 10th Respondents and in further response to the Petitioner's application.
31. Abdalla, who describes himself as the Administration Manager at the Independent Electoral and Boundaries Commission, states that the Petitioner impersonated and usurped the responsibilities of the 1st Respondent, by purporting to perform his duties at the meeting held on August 26, 2022, without authority or delegation.
32. Abdalla avers that as a result of the foregoing, the Petitioner was charged vide a show cause letter dated August 29, 2022, for disregarding the authority of the 1st Respondent, usurping his responsibilities coupled with another charge of intimidation and threatening of the Ag. Director, Voter Registration and Electoral Operations, Moses Sunkuli. Abdalla points out that both charges amount to major offences under Section 12.10 of the IEBC Human Resource and Administration Policies and Procedures Manual.



33. Abdalla adds that as per the letter dated August 29, 2022, the Petitioner attacked Mr. Ledama in his office, insulted and threatened him without provocation contrary to Section 11.7.1 of the Human Resource Policies and Procedures Manual, which requires all employees of the Commission to carry out their duties in a manner that treats the public and fellow employees with courtesy and respect.
34. According to Abdalla, the Petitioner was given ample time to respond to the show cause letter dated August 29, 2022. He states that the 1st Respondent interdicted the Petitioner upon instructions by the Chairman of the Commission.
35. He points out that the interdiction was on account of the allegations of intimidation of staff, insubordination and usurping of the role of the Chief Executive Officer and not on the issue of breach of confidentiality.
36. Abdalla reiterates that the suit herein has been brought before the Court prematurely as the disciplinary process against the Petitioner has not been concluded.

Determination

37. According to the pleadings and supporting documents on record, the charges levelled against the Petitioner relate to her participation in a plenary meeting of the Commission held on August 26, 2022. In addition, there are allegations that she had threatened and intimidated Commission staff.
38. In this regard, the Petitioner was issued with two show cause notices. The first one is dated August 29, 2022 and states thus:

“Dear Ms. Ruth,

RE: Notice to show Cause

This is to convey the Commission’s displeasure over your incorrigible demeanour and outright misconduct in the past weeks.

The Commission has learnt that on August 26, 2022, you arranged for a Commission Plenary Meeting No 279 without authority or delegation by the Commission Secretary/ CEO who by appointment shall be the “secretary at all meetings of the Commission” as stipulated by IEBC Act 2011, Second Schedule 9(1). Therefore, you impersonated the CEO and usurped his responsibilities as you purported to perform his duties without his authority or delegation. Moreover, Plenary Meeting No 279 had already been held thus voiding the “other” meeting of August 26, 2022 where you were secretary, thus rendering it illegal.

Impersonation of the CEO and participating in illegal activities without the sanction of your Supervisor and Controlling Officer who is the Commission Secretary as indicated in your appointment letter clause 3 is insubordination and a serious breach of your employment contract.

The Commission has also received complaints against you for issuing threats and intimidation to staff in contravention of the Commission Regulations and Rules of Conduct. It is on record that on August 12, 2022, you allegedly attacked, insulted and threatened a Commission staff, Mr. Moses Sunkuli, without provocation thereby arousing in him a sense of fear and insecurity on his life.

It is a gross misconduct to use threats and intimidation or behave in a manner likely to cause a breach of peace as stipulated under the Commission Human Resource and Administration Policies and Procedures Manual, 2020, Section 12.20.1(xxiii). The Commission require[s]



that all its employees “Carry out their duties in a manner that treats the public and the fellow employees with courtesy and respect,” section 11.7.1 of the manual.

The above allegations are very serious and constitute gross misconduct as stipulated under the EIBC HRA Manual, 2020, Section 12.10.1 and warrants very severe disciplinary action including dismissal from the service of the Commission if found culpable in accordance with section 12.13 of the manual.

The Commission is therefore contemplating taking appropriate disciplinary action against you. However, before this is done, you are accorded an opportunity to show cause why disciplinary action should not be taken against you.

Your response should be received by the undersigned within Fourteen (14) days from the date of this letter.

(Signed)

Marjan Hussein Marjan

Commission Secretary/CEO”

39. The second show cause notice is dated September 14, 2022 and states as follows:

“Notice to show Cause-breach of Confidentiality

The show cause letter Ref. No 2009000042 dated August 29, 2022 addressed to you refers.

It is noted that the contents of the letter which was confidential and delivered to you personally have been circulating in social media as per the attached excerpts against the principle of confidentiality as stipulated under the Human Resource and Administration Policies and Procedures Manual, 2020 Section 12.10.1(xi) and states that unauthorized use of or disclosure of confidential information by an employee amounts to gross misconduct. Commission employees are required to “exercise confidentiality in dealing with the affairs of the Commission and ensure that no information is released to any person where the interest of the Commission could be prejudiced or harmed.”

The above provision is further reinforced by the *Public Officer Ethics Act, 2003* which stipulates that a Public Officer should maintain confidentiality of the office, otherwise “A person who, without lawful excuse, divulges information acquired in the course of acting under this Act is guilty of an offence” Section 41. The letter under reference was addressed to you to respond accordingly and not to the media.

You are therefore required to explain within 7 days from the date of this letter circumstances under which contents of the confidential letter addressed personally to you were leaked to the social media.

(Signed)

Marjan Hussein Marjan

Commission Secretary/CEO”

40. It would appear that the charge of breach of confidentiality was abandoned along the way. I say so because in the interdiction letter dated September 19, 2022, there is no mention of this charge. This position was also confirmed in the replying affidavits sworn on behalf of the 1st and 2nd Respondents.



41. The interdiction letter of September 19, 2022 reads as follows:

“RE: Interdiction

Reference is made to the Notice to Show Cause dated August 29, 2022 for disregard of the authority of the Commission Secretary, insubordination, and issuing threats and intimidation, incongruent with the Commission’s Code of Conduct.

Your written response vide letter dated September 9, 2022 has been considered but was not satisfactory. Subsequently, owing to the gravity of the allegations levelled against you, you are, hereby, interdicted from exercise of duties of your office with immediate effect, pursuant to Section 12.11.1 of the IEBC Human Resource and Administration Policies and Procedures Manual, 2020.

During this period of interdiction, you shall be entitled to half basic salary, full house allowance and medical insurance, and shall report to the Commission Secretary/CEO every last Friday of the month.

You are also required to adequately hand over Commission property in your possession to the undersigned.

(Signed)

Marjan Hussein Marjan

Commission Secretary/CEO”

42. From the foregoing, it is safe to conclude that the surviving charges against the Petitioner were alleged disregard of the authority of the Commission Secretary, insubordination, and threats and intimidation of Commission staff.

43. The orders sought by the Petitioner fall within the province of interlocutory injunctions and the conditions under which such orders may be granted were set in *Giella v Cassman Brown* Co. Ltd [1973] EA 358 as follows:

- a. That the applicant has established a *prima facie* case with a probability of success;
- b. That if the orders sought are not granted, the applicant stands to suffer irreparable harm, which cannot be compensated by an award of damages; and
- c. If the court is in doubt, it will determine the application on the balance of convenience.

44. A *prima facie* case was defined by the Court of Appeal in *Mrao v First American Bank Kenya Limited & 2 others* [2003] KLR, 123 in the following terms:

A *prima facie* case in a civil application includes but is not confined to a genuine and arguable case. It is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

45. I am fully aware of the general principle that courts ought not to interfere with internal disciplinary proceedings at the workplace, save in exceptional cases where there is imminent injustice through an irregular process that is stage-managed to achieve an unlawful disciplinary action.



46. In the written submissions filed on behalf of the 1st and 2nd Respondents, reference was made to the decision in *Ann Wambui Kamuiru v Kenya Airways Limited* [2016] eKLR where it was held that:
- “...courts on their part will not interfere with proper internal disciplinary processes unless the court is satisfied that the process is marred with irregularities or it is stage managed towards dismissal.”
47. The 1st and 2nd Respondents further relied on the decision in *Fredrick Saundu Amolo v Principal Namanga Secondary School & 2 others* [2014] eKLR where it was held that courts ought to allow internal disciplinary processes to run their full course, except in cases where grave injustice might result.
48. On her part, the Petitioner relied on the decision in *Mulwa Msanifu v Kenya Airways* [2013] eKLR where it was held that a court will intervene in an administrative disciplinary process if it is established that the procedure adopted offends due process or is in breach of the employer’s internal policy.
49. The Petitioner challenges the action taken against her on two fronts; first, that the allegations against her were no more than a witch-hunt and personal vendetta and second, that the 1st Respondent had no authority to take action against her, without the sanction of the Commissioners of the Independent Electoral and Boundaries Commission.
50. In the replying affidavit sworn on behalf of the 7th, 8th, 9th and 10th Respondents, Juliana Cherera gives a blow by blow account of the events leading to the meeting of August 26, 2022, which the Petitioner is alleged to have irregularly convened.
51. Cherera states that following the filing of the Presidential Election Petition No E005 of 2022 at the Supreme Court of Kenya, in which she and the 8th, 9th and 10th Respondents were named as co-respondents, they wrote a memo dated August 23, 2022 requesting the Chairperson of the Commission to avail a list of the Commission pre-qualified Advocates/ Law Firms to facilitate issuance of instructions but there was no response from the Chairperson.
52. It was not lost on the Court that neither the 1st Respondent, Marjan Hussein Marjan nor the 4th Respondent, Wafula Chebukati who were at the centre of the events leading to this matter, swore any affidavit regarding the matters in dispute. Instead, two similar affidavits were sworn by employees of the IEBC, who evidently did not have first-hand knowledge of the matters they sought to depone to.
53. Even so, none of the two deponents disagreed with Cherera’s account of the events leading to the matter now before me. Cherera’s word was therefore unchallenged and the Court found no reason to disbelieve her. According to Cherera, she together with the 8th, 9th and 10th Respondent’s called the meeting of August 26, 2022 and asked the Petitioner to attend and further instructed her to take the minutes.
54. Having received clear instructions from some of the Commissioners, to attend and take the minutes of the meeting of August 26, 2022, the Petitioner had no option but to obey. Article 236 of the *Constitution* protects public officers, such as the Petitioner, from being disciplined for performing the functions of their office in accordance with the *Constitution* and the law.
55. On the allegations of intimidation and threats to Commission staff, the Court notes that none of the staff alleged to have been intimidated or threatened by the Petitioner, swore any affidavit to verify these allegations. The said allegations therefore remained unsubstantiated and unsupported by any evidence.
56. Regarding the procedure adopted in the impugned disciplinary process, the Petitioner accuses the 1st Respondent of usurping the power of the Commission. In her written submissions, she cites Section



- 12.3.1 of the IEBC Human Resource and Administration Policies and Procedures Manual, 2020 which provides:
- 12.3.1 The power to exercise disciplinary control and removal of employees [are] is vested in the Commission. The Commission shall exercise disciplinary powers thorough its disciplinary committee.
57. The Petitioner further relies on paragraph 5 of the 2nd Schedule to the *Independent Electoral and Boundaries Commission Act* which provides that:
5. The quorum for the conduct of business at a meeting of the Commission shall be at least half of the existing members of the Commission, provided that the quorum shall not be less than three members.
58. From the evidence on record, no disciplinary committee was constituted to deal with the Petitioner’s case and the matter appears not to have been discussed by the Commission. This was confirmed by Cherera in her replying affidavit and there was no evidence to the contrary.
59. Additionally, the Petitioner’s request for further information regarding the allegations made against her were ignored.
60. In its decision in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR this Court rendered itself as follows:
- “...in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.”
61. There is one more thing to say on this dispute and it is this; it is a matter of public notoriety of which the Court takes judicial notice, that in the follow-up to the General Elections of August 9, 2022, there was a major split among the Commissioners of the Independent Electoral and Boundaries Commission with two factions dubbed ‘the Chebukati 3’ and ‘the Cherera 4’ emerging.
62. This Court observes that the split among the Commissioners created a toxic work environment for employees of the Commission, including the Petitioner, at a very critical time in the Country. It would have therefore been expected that Marjan Hussein Marjan, as the Chief Executive Officer and Secretariat Team Leader would have injected some alkaline by rallying all employees to deliver on their mandate.
63. Instead, Marjan Hussein Marjan appears to have been sucked into the split among the Commissioners and I have no hesitation in reaching the conclusion that the move against the Petitioner was a manifestation of this split.
64. What is more, by proceeding to interdict the Petitioner, without recourse to the Commission or a duly constituted disciplinary committee, Marjan Hussein Marjan was clearly in violation of the IEBC Human Resource and Administration Policies and Procedures Manual, 2020.
65. Further, by taking over the disciplinary process, while being the complainant against the Petitioner, Marjan Hussein Marjan placed himself in the position of prosecutor and executioner. The Petitioner therefore had reason to fear that she was being herded towards dismissal from employment.



66. Consequently, I find and hold that a *prima facie* case for grant of interlocutory injunctive relief has been made.
67. On the question of irreparable harm, I have this to say; having determined that the disciplinary proceedings as initiated were unlawful, any disciplinary action, which might well include termination of employment, would be unlawful. The loss of employment in such circumstances, cannot in my view, be remedied by an award of damages. Moreover, the interdiction slapped on the Petitioner being on half salary, had all the stamps of a disciplinary action that would evidently cause the Petitioner irreparable harm.
68. Regarding the issue of balance of convenience, the Petitioner referred the Court to the decision in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR where it was stated:
- “The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiff, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendant if an injunction is granted but the suit is ultimately dismissed.”
69. I have carefully considered the balance of convenience in this matter and my finding is this; that in light of the verdict that the disciplinary process initiated against the Petitioner was unlawful and that she would suffer irreparable harm if it is allowed to continue the balance of convenience tilts in the Petitioner’s favour. In arriving at this decision, I have formed the opinion that none of the Respondents will suffer any prejudice if the orders sought in the Notice of Motion are granted.
70. On the whole, I find and hold that the Petitioner has made out a proper case for grant of interlocutory relief and therefore make the following orders:
- a. The Petitioner’s interdiction as communicated by the 1st Respondent’s letter dated September 19, 2022 is suspended pending determination of the Petition;
 - b. The disciplinary process commenced against the Petitioner on account of the matters contained in the letter of interdiction dated September 19, 2022 is stayed pending determination of the Petition;
 - c. The costs of the Motion will be in the Petition.
71. These are the orders of the Court.

DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JANUARY, 2023.

LINNET NDOLO

JUDGE

Appearance:

Mr. Manwa for the Petitioner

Mr. Nura for the 1st and 2nd Respondents

Mr. Mboya for the 7th, 8th, 9th and 10th Respondents

No appearance for the 3rd, 4th, 5th and 6th Respondents

