



Abdi v Governor ,Kakamega County Government & 2 others (Employment and Labour Relations Petition E004 of 2022) [2023] KEELRC 433 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 433 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

EMPLOYMENT AND LABOUR RELATIONS PETITION E004 OF 2022

JW KELI, J

FEBRUARY 16, 2023

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ARTICLES 1,10,19,20,21,22,25,(3)(A),(B),
(C),27(2),28,41, 47(1),50,165,236(A),(B),258(1) OF THE CONSTITUTION**

AND

**IN THE MATTER OF UNLAWFUL, UNFAIR, UNPROCEDURAL AND UNREASONABLE
SUSPENSION FROM THE OFFICE OF CHIEF EXECUTIVE OFFICER (CEO) FOR
THE KAKAMEGA COUNTY WATER AND SANITATION COMPANY LIMITED**

AND

IN THE MATTER OF THE EMPLOYMENT ACT

BETWEEN

ABDIKADIR MOHAMED ABDI PETITIONER

AND

GOVERNOR ,KAKAMEGA COUNTY GOVERNMENT 1ST RESPONDENT

**BOARD OF DIRECTORS OF KAKAMEGA COUNTY WATER AND
SANITATION COMPANY LIMITED 2ND RESPONDENT**

KAKAMEGA COUNTY PUBLIC SERVICE BOARD 3RD RESPONDENT

JUDGMENT

1. The Petitioner herein filed Petition dated 15th March,2022 seeking for judgment against the Respondents for:-



- a. A conservatory Order do issue restraining the 1st, 2nd and 3rd Respondents, their Board of Directors, Officers, their employees, workers, agents and/or whomsoever from terminating the services of the Petitioner.
- b. A Conservatory Order do issue compelling the Respondents to lift the suspension of the Petitioner made vide the letter dated 7th February, 2022 by the 1st Respondent .
- c. A Conservatory Order do issue restraining the 1st, 2nd and 3rd Respondents whether by themselves, their Board of Directors, Officers, agents and or servants from recruiting and/or employing any person in the position of the chief Executive Officer (CEO) for the Kakamega County Water and Sanitation Company limited, removing and/or replacing the Petitioner with any such person to be recruited.
- d. A conservatory Order do issue restraining the 1st, 2nd and 3rd Respondents whether by themselves, Board of Directors, Officers, agents and or servants from relying, acting on, and/or effecting the purported suspension letter of the 1st Respondent dated 7th February, 2022.
- e. A declaration that the 1st Respondent's action of suspending the Petitioner from the office of Chief Executive Officer (CEO) for the Kakamega County Water and Sanitation Company Limited vide the letter dated 7th February, 2022 is a violation of the Petitioner's rights to fair administrative action, fair labour practices and rights to due process and contrary to the Memorandum of Association and Human Resources Policies and Procedures Manual, December , 2020 of the 2nd Respondent and is null and void.
- f. A declaration that the act of the unlawful suspension of the Petitioner's employment by the 1st Respondent is a gross violation of the constitutional rights to fair labour practices, fair administrative action and infringement of the protection offered by Articles 41 and 47 of the Constitution of Kenya of the Petitioner.
- g. A declaration that the unlawful suspension of the Petitioner's employment without pay is gross violation of the Constitution rights to freedom from torture, cruel inhuman and degrading treatment or punishment offered by Articles 25, 27 and 28 of the Constitution of Kenya.
- h. A declaration that the act of the 1st, 2nd and 3rd Respondents in relieving the Petitioner his duties was in breach of the Petitioner's constitutional rights under Articles 1, 10, 19, 20, 21, 22, 23 (3) (a)(b)(c), 27(2), 28, 41, 47(1), 50, 165, 236(a)(b), 258 (1) of the Constitution of Kenya and that the same is null and void for intent and purposes and in breach of the contract in force between the Petitioner and the Respondents.
- i. A declaration that the act of the Respondents in relieving the Petitioner his duties was breach of the Petitioner's constitutional rights under Articles 27 (1) (2) and (3), 28, 41, 47 and 50, 200 and 236 of the Constitution of Kenya and that the same is null and void for all intent and purposes and in breach of the contract in force between the Petitioner and the Respondents.
- j. Compensation for loss of privileges and other benefits for the remainder of the period in the Petitioner's contract.
- k. Compensation for unfair suspension and General damages for violation of the Petitioner's fundamental rights and for being subjected to degrading and inhuman treatment by the Respondents.
- l. An order that the Petitioner be compensated by the 1st, 2nd, and 3rd Respondents in the sum of Kshs.88,338,000/- - computed as follows:-



- i. Payment of the Petitioner’s salary and benefit from 23rd March, 2022 to the expected retirement age of sixty (60)years.
- ii. Payment of Kenya Shillings Three Hundred and Ninety Five Thousand (Kshs.395,000/-) as stipulated in the terms and conditions of service for the Chief Executive Officer (CEO) for the Kakamega County Water and Sanitation Company Limited.
- m. General damages for unfair and unlawful suspension of employment
- n. Uncomputed terminal benefits and salary for unlawful and unfair suspension of employment.
- o. Costs of this Petition be borne by the Respondents.
- p. Any other relief or order that this court may deem fit in the special circumstances of this matter.

Petitioner’s case in summary

2. The Petitioner in addition filed his supporting affidavit sworn on the 15th March 2022 and list of documents dated 15th March 2022 being:-
 - i. Letter of appointment dated 23rd March 2020
 - ii. Suspension letter dated 7th February 2022
 - iii. Memorandum of association Kakamega County Water and Sanitation Company Limited
 - iv. Human Resources Policies and Procedures Manual December 2020 for Kakamega County Water and Sanitation Company
 - v. Copies of payslips
 - vi. Letter dated 20th January 2022 from the petitioner to the Branch Manager KCB Kakamega
 - vii. Letter dated 4th February 2022 from the petitioner to the respondents
 - viii. Letter dated 23rd February 2022 from the Petitioner’s advocates addressed to the 1st Respondent.
3. That by a letter of Appointment dated 23rd March, 2020, the Petitioner was appointed by the 1st Respondent in terms of the employment contract. The Appointment of the Petitioner as the Chief Executive Officer (CEO) for Kakamega County Water and Sanitation Company Limited followed an open and competitive process in which the Petitioner was interviewed and successfully employed as the Chief Executive Officer (CEO) for the Kakamega County Water and Sanitation Company Limited.
4. By the letter dated 7th February, 2022, the 1st Respondent suspended the Petitioner from the said position of the Chief Executive Officer (CEO) for the Kakamega County Water and Sanitation Company Limited in contravention of the Law and the Constitution of Kenya.
5. That the Human Resources Policies and Procedure Manual of December, 2020 under clause 11 at Page 34 state that:-

“The Board of Directors of the Company employs officers in salary scale 1 and 2 on long contracts of upto 5 years and can be renewed twice for 5 other years. Chief Executive Officer may , under delegation of the Board make appointments on contract of employees from



salary scales 3 who are permanent employees. These employees are eligible for all employee benefits given by the company”

6. The Petitioner’s duties and Responsibilities were numerated under Clauses 3,7,8,9,10,11 and 12 of the Letter of Appointment dated 23rd March, 2020.
7. That the 1st Respondent took unlawful, callous process of suspending the petitioner’s employment contract without any colour of right, excuse or justification and without affording the petitioner opportunity to be heard in defence and is in breach of the 2nd Respondent’s Memorandum and Articles of Association and Human Resources Policies and Procedures Manual of December, 2020.

Particulars of breach of employment contract by the 1st, 2nd and 3rd respondents

- i. Suspending the Petitioner’s services unlawfully and indeed illegally in contravention of the 2nd Respondent’s Memorandum of Association and Human Resources Policies and Procedures Manual, December. 2020.
- ii. Failing to provide the Petitioner with investigation Report of their intentions to suspend the Petitioner.
- iii. Failing to accord the Petitioner a hearing in accordance with the Human Resources Policies and Procedures Manual December, 2020 thereby contradicting the Rule of Natural Justice.
- iv. Failing to heed/strictly follow the provisions of the Employment Act, the 2nd Respondent’s Memorandum of Association and Human Resources Policies and Procedures Manual, December, 2020.
- v. The 1st Respondent’s Suspension letter dated 7th February, 2022 was irregular, illegal, unfair, wrongful, unlawful and untenable in law for failing to accord the petitioner a fair administrative Action that was lawful, reasonable and procedurally fair contrary to Article 47 (1) of the Constitution of Kenya.
- vi. The 1st Respondent in suspending the Petitioner vide the letter dated 7th February, 2022 was and is in breach of the Petitioner’s Constitutional Rights under Articles 10,41,47 (1) ,50 and 236 of the Constitution of Kenya.

Respondents’ Case

8. The Respondents’ case was per replying affidavit sworn by Christabel Ashiono on 22nd November, 2022 (hereinafter referred to as the “Replying Affidavit”) together with the annexure thereto, filled in opposition to the entirety of the Petition. The defence is summarized as follows:-
9. That vide an appointment letter dated 23rd March, 2020 and executed by the Governor, the Petitioner was appointed as the Chief Executive Officer for the Kakamega County Water and Sanitation Company Limited (hereinafter referred to as “KACWASCO”)
10. On 20th January, 2022, the Petitioner without authority from KACWASCO’s Board of Directors authority, wrote to their bankers, KCB Bank Kenya Limited instructing them to change KACWASCO’s bank accounts signatories (annexure CA-4 at page 21 of the Replying affidavit).
11. On receipt of the Petitioner’s letter, KCB Bank Limited responded vide a letter dated 26th January, 2022 advising the Petitioner to seek the approval of the County Executive Committee Member or Chief Officer responsible for Finance, Economic Planning and ICT in the County Government of



- Kakamega before the changes of KACWASCO's bank signatories could be effected (annexure CA-5 at page 22 of the Replying Affidavit).
12. Vide a letter dated 4th February, 2022 the chairperson of KACWASCO's Board of Directors wrote to the Petitioner seeking confirmation whether he forwarded a resolution of the Board of Directors (annexure CA-6 at page 23 of the replying affidavit).
 13. The petitioner indeed responded to the Chairperson's letter on 4th February, 2022 confirming that he indeed wrote to the bank through the letter dated 20th January, 2022 (annexure CA-7 at page 24 of the Replying Affidavit)
 14. On account of the above mentioned occurrences, it was discerned that the Petitioner had misrepresented the decision of KACWASCO's Board of Directors' in his communication to KACWASCO's bankers which explained the reason why the bank needed the approval of the County Executive Committee member or Chief Officer responsible for Finance, Economic Planning and ICT in the County Government of Kakamega.
 15. The above mentioned incident of manifest representation of a decision of the Board of Directors with grave consequences as it involved issues related to Public funds thus informed the decision of the KACWASCO Board of Directors through its Chairperson to write to the County Executive Committee Member responsible for Water, Environment, Natural Resources and Climate Change in the County Government of Kakamega informing her of the Board's resolution to suspend the Petitioner pending investigations on the misconduct outlined hereinabove (annexure CA-9 at pages 35-36 of the Replying affidavit)
 16. From the foregoing, the 1st Respondent being the Petitioner's appointing authority, proceeded to suspend the Petitioner vide a letter dated 7th February, 2022 in accordance to the resolution of the 2nd Respondent pending further investigation and determination of possible misconduct on the Petitioner's part (annexure CA – 9 at page 37 of the replying Affidavit)
 17. The grounds for the suspension is outlined in the letter were as follows:-
 - a. Misrepresenting the resolutions of KACWASCO's Board of Directors *vide* a falsified resolution of a virtual board meeting held on 8th September, 2021,
 - b. That the resolution attached to the Petitioner's letter of 20th January, 2022 did not originate from KACWASCO's Board of Directors and it contradicted the Board's original resolution of 8th September , 2021 regarding signatories whereby the Petitioner varied from the original mandatory three signatories to one mandatory signatory being himself with the other two being alternates and
 - c. That the Petitioner imposed the signature of KACWASCO's Board Secretary without her knowledge and consent.
 18. Subsequently, the Kakamega County Public Service Board invited the Petitioner for a disciplinary hearing scheduled for 3rd March, 2022 and therein clearly outlined the misconduct the Petitioner was accused of and offered him the opportunity to defend himself (annexure CA-9 at pages 38-39 of the Replying Affidavit).
 19. The Petitioner indeed received the invite and through an invite and through an email sent on 2nd March, 2022, he informed the 3rd Respondent of his unavailability for the disciplinary hearing on account of Covid -19 symptoms (annexure CA- 9 at page 40 of the Replying Affidavit).



20. The 3rd Respondent sent another invited for a disciplinary hearing via email on 4th March, 2022 requesting the Petitioner to advise the 3rd Respondent on a suitable date wherein he would be available for purposes of the disciplinary hearing which the Petitioner failed to respond to (annexure CA – 13 at page 41 of the Replying Affidavit.)
21. The 3rd Respondent once again wrote a letter dated 7th April, 2022 to the Petitioner, inviting him for a disciplinary hearing scheduled for 14th April, 2022 which invite the petitioner failed, neglected and/or refused to honour or proffer reasons for his failure to do so (annexure CA-14 at pages 42-43 of the Replying affidavit).
22. While waiting for the Petitioner to present himself for the disciplinary hearing, the Petitioner moved this Honourable court with the present petition. The Respondent have at all times by their actions been in full compliance with the tenets of fair labour practices and fair administration action as immediately after the petitioner was issued with a suspension letter, he was invited for a disciplinary hearing with full disclosure of the items for the discussion at the hearing way before these proceedings had been filed.
23. It is important to note that the Petitioner’s employment at KACWASCO has not been terminated but the Petitioner was still undergoing a disciplinary process before an informed decision could be made on whether the allegations raised against him were merited or not and the proper remedy or sanction available upon such decision being determined.

Submissions

24. The court gave directions that the petition be dispensed by way of written submissions.
25. The Petitioner's submissions drawn by Hassan N. Lakicha & Company advocates were dated 16th December 2022 and received in court on the 21st December 2022.
26. The Respondent’s written submissions drawn by Vivianne MMBaka Komwonyo were dated 24th January 2023 and received in court on the 24th January 2023.
27. The court, upon hearing the parties on the 13th February 2023, expunged the supplementary written submissions by the petitioner dated 8th February 2023 and received in court on 10th February 2023.

Determination

Issues for determination

28. The petitioner addressed the merits of the petition without identifying the specific issues for determination.
29. The Respondent in their identified the following issues for determination :-
 - i. Whether the petition meets the threshold of a constitutional petition.
 - ii. Whether the petitioner is a public officer for the purposes of disciplinary laws applicable to public officers
 - iii. Whether the 1st and 3rd Respondents have authority to undertake disciplinary procedures on the petitioner.
 - iv. Whether the petition is premature



- v. Whether there existed extra ordinary circumstances to interfere with the internal disciplinary mechanisms of the respondents.
 - vi. Whether the remedies sought by the petitioner are available to him.
30. The court upon considering the pleadings by the parties and their written submissions was of the considered opinion that the issues placed by the parties before the court for determination of their dispute as follows:-
- a. Whether the petition meets the threshold of a constitutional petition.
 - b. Whether the 1st and 3rd Respondents have authority to undertake disciplinary procedures on the petitioner.
 - c. Whether the petitioner’s rights were violated
 - d. Whether the petitioner is entitled to reliefs sought

Whether the petition meets the threshold of a constitutional petition.

31. The Petitioner under paragraph 9 of the petitioner pleaded that the 1st Respondent’s suspension letter without hearing contravened the *Employment Act*, the 2nd Respondent’s memorandum of association and human resources policies and procedures manual December 2020 and rules of natural justice. That the suspension letter of 7th February 2020 was irregular, illegal, unfair, and untenable under the law for failing to accord the petitioner fair administrative action contrary to Article 47(1) of the *Constitution* and further in breach of the petitioner’s constitutional rights under articles 10, 41,47(1),50 and 236 of the *Constitution* of Kenya. The petitioner then set out the provisions of the *Constitution*.
32. The Respondents submit that the particulars of the violations of the articles 1,2,3,10(2),19(1),20(1),22,23(1),236 and 258 of the *Constitution* were not disclosed and thus the petition does not meet the threshold as espoused in the case of *Anarita Karimi Njeru v Republic*(1979) eKLR namely, ‘We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.’Which case was upheld by justice *Nzioki wa Makau in David Mathu Kimingi v SMEC International PTY Limited* (2021) eKLR. To buttress their submission the respondents cite extensively decision in *David Gathu Thuo v Attorney General & another* (2021) eKLR where justice F. Muchemi affirmed the findings in *Anarita Karimi Njeru v Republic*(1979) eKLR to wit :- The Court of Appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR provided the standard of proof in Constitutional Petitions.

The Court of Appeal judges stated;-

“...The principle in *Anarita Karimi Njeru (supra)* that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of *Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639 holds true today:

“ The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be



discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”

The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19,20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars.

We wish to reaffirm the principle holding on this question in *Anarita Karimi Njeru (supra)*. In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made reference to. In view of the substantive nature of these shortcomings, it was not enough for the superior court below to lament that the petition before it was not the “epitome of precise, comprehensive, or elegant drafting,” without requiring remedy by the 1st respondent...”

33. Lenaola J. while referring to the Anarita Karimi and Mumo Matemu Cases in Dr. Rev. Timothy Njoya vs The Hon. Attorney General and Kenya Review Authority HC Constitutional and Human Rights Division Petition No. 479 of 2013 stated:-

“The Petitioner cannot come to court to seek facts and information he intends to use to prove the very case that he is arguing before the court. He must also plead his case with some degree of precision and set out the manner in which the Constitution has been violated by whom and even state the Article of the Constitution that has been violated and the manner in which it has been violated.”

34. I find the Dr. Timothy Njoya case (supra) by Lenaola J. persuasive while that of Mumo Matemu (supra) being a Court of Appeal decision is binding on this court.

35. Looking at the Petitioner’s pleadings, the evidence as well as the submissions of the parties, it is my conserved view that the Petitioner has not met the requirements of a Constitution Petition. Although the Petitioner has pleaded provisions of the Constitution, he has not demonstrated to the required standard how his individual rights and fundamental freedoms were violated, infringed or threatened by the respondents. He has not adduced any evidence to demonstrate the alleged violations.

36. Even assuming that this petition was competent, it would not pass the test of the burden of proof. It is trite law that he who alleges must prove his claim. The claim must be propounded on an evidentiary foundation. In saying so, I rely on the case Leonard Otieno Vs. Airtel Kenya Limited [2018] where Mativo J. held that:-

“It is fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the proposition he asserts to prove his claim. Decisions on violation of Constitutional rights should not and must not be made in a factual vacuum. To attempt



to do so would trivialize the Constitution an inevitable result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”

37. The Respondents further emphasized on the importance of pleadings in such a petition to provide the specific articles the petitioner alleges to have been infringed, the particulars thereof together with evidentiary material to back up such allegations.
38. The Respondents further invoked the doctrine of constitutional avoidance and submits that the doctrine frowns against bringing ordinary disputes to the constitutional court. To buttress this submission and that the petition did not meet the constitutional threshold and ought to be struck off relied on the decision of Justice D.O. Ohungo in Kakamega Environment and Land Court Petition No. E003 OF 2021 Kenneth Shitsugane Olembo v County Government of Kakamega wherein the court upheld the doctrine of constitutional avoidance as stated by the Supreme Court in Communication Commission of Kenya & 5 others V Royal Media Services Limited & 5 others (2014)e KLR “[256] The appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Krentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

Decision

39. The court found in the petition the petitioner pleaded under paragraph 9 that the suspension letter of 7th February 2020 was irregular, illegal, unfair, and untenable under the law for failing to accord the petitioner fair administrative action contrary to Article 47(1) of the Constitution and further in breach of the petitioner’s constitutional rights under articles 10, 41, 47(1), 50 and 236 of the Constitution of Kenya. The court finds the articles 20, 21, 22, 23 and 258 are about the access to the constitutional court. The court in the instant case finds on balance of probabilities the petitioner met the threshold under Anarita Karimi case by citing the provisions of the Constitution violated and manner of violation being right to fair administrative rights under article 47 and fair labour practices under Article 41.
40. On the doctrine of constitutional avoidance, the court finds that this was an issue that was raised by the Respondents too late in the day. The petitioner sought for constitutional declarations and for compensation of violation of constitutional rights. The court in the instant case finds it would be great injustice to strike off the petition when specific violations have been cited with evidence and is guided by position taken by the Supreme Court in Communication Commission of Kenya & 5 others V Royal Media Services Limited & 5 others (2014)e KLR where it held :- “[258] From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents’ claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright- infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court.” The Supreme Court nevertheless proceeded to consider the appeal on merit. The court finds it has original jurisdiction to determine any violation of constitutional rights of employees however brought in court. The court finds and determines the petition is valid.



Whether the 1st and 3rd Respondents have authority to undertake disciplinary procedures on the petitioner.

41. By a letter of Appointment dated 23rd March, 2020, the Petitioner was appointed by the 1st Respondent in terms of the contract. The petitioner averred that the appointment as the Chief Executive Officer (CEO) for Kakamega County Water and Sanitation Company Limited followed an open and competitive process in which the Petitioner was interviewed and successfully employed as the Chief Executive Officer (CEO) for the Kakamega County Water and Sanitation Company Limited.
42. By the letter dated 7th February, 2022, the 1st Respondent suspended the Petitioner from the said position of the Chief Executive Officer (CEO) for the Kakamega County Water and Sanitation Company Limited in contravention of the Law and the Constitution of Kenya. The petitioner submits that 1st respondent suspended his services unlawfully and indeed illegally in contravention of the 2nd Respondent's Memorandum of Association and Human Resources Policies and Procedures Manual, December, 2020.

Respondents' Position

43. The Respondents submit that article 235 (1) of the Constitution vests the responsibility of exercising disciplinary control over and removing persons holding or acting in offices to the county government through a framework of uniform norms and standards prescribed under an Act of parliament. That the County Governments Act 2012 established a county government public service board whose function is amongst others functions under section 59(1)(c) exercise disciplinary control on behalf of the county government. That the county government of Kakamega human resources policies and procedures manual 2016 vests such powers in the county public service board. To buttress their submissions the respondent relied on the decision of justice Maureen Onyango in Daniel Namenya Naburi & 9 others v County Assembly Service Board Busia, Busia County & another (2019) eKLR where the court stated:- 'On the disciplinary process against the 1st, 2nd, 3rd and 4th petitioners, the petitioners did into adduce any evidence to support the contention that it was a gimmick to silence the petitioners. In any event, both respondents have statutory authority to discipline their staff and should there be any violation of statutory or constitutional provisions as set out in the Constitution and the various legislation governing the same, they are free to approach the court with specific particulars of the same for redress.

I find no basis on the evidence and material currently before the court to warrant interference with the disciplinary process against the said petitioners.”

44. The Respondent further relied on decision in Kenya National Union of Nurses v Council of Governors and another (2019)eKLR where it was stated that the County Governments Act provides explicitly that the function to hire and discipline and deal with human resources functions of the county Government employees is vested in the county government public service boards under section 59 (1) (C) of the County Government Act.
45. The Respondents further submit that KACWASCO (2nd Respondent) is a company wholly owned by the County Government of Kakamega and established under articles 235 of the Constitution. That county water service providers are county government agencies by virtue of provisions of section 6(5) (a) of the County Governments Act which allows county government to establish a company for efficient delivery of a particular service. That the petitioner was appointed as a public officer under section 22(1) of the Kakamega County Water and Sanitation Services Act by the 1st respondent pursuant to section 13 of the Kakamega County Water Act hence subject to powers of the 3rd respondent under section



6(3) of *Kakamega County Public Service Board Act* hence his employment is fully under county of the Kakamega County Government.

Decision of the court

46. The court under this issue has to establish whether or not the 1st and 3rd Respondents have powers to discipline an employee of the 2nd respondent and specifically the petitioner in the instant case.
47. In the letter of appointment dated 23rd March 2020 by the 1st Respondent in the 1st paragraph is stated:- ‘In line with section 13 of the Kakamega County Water Act 2019 and following your successful interview , I am pleased to appoint you as the Chief Executive Officer for the Kakamega County Urban Water and Sanitation Corporation with effect from 1st may 2020 on contract basis for a period of three(3)years.’ The appointment further stated that the petitioner was to report to the chairman of the 2nd respondent. On performance measures the letter of appointment in clause 1 provides that the petitioner’s performance will be measured inline with the performance contract signed between the petitioner and the chairman of the board of directors (2nd Respondent during the period of appointment).
- Clause 12 of the letter of appointment provided for the code of conduct as follows:- ‘
- i. Observe company rules and regulations
 - ii. Perform your duties diligently and faithfully
 - iii. Perform any other duties given from time to time
 - iv. Employ you time attention and abilities to the services of the company as its employee.’
48. Clause 16 of the employment letter provided that the petitioner’s employment was subject to the provisions of the *Employment Act* and the company(2nd respondent) rules and regulations.
49. Under clause 18 of the appointment letter it was stated that the offer and acceptance by the petitioner constituted a binding employment contract between the petitioner and the company.
50. The court finds that the employment letter dated 23rd March 2020 was explicit that it was a contract of employment between the petitioner and the 2nd respondent. The 1st and 3rd respondents were not mentioned as employers of the petitioner.
51. The 2nd Respondent is a registered private company limited by shares. Under company law it is a legal entity. The argument that it is wholly owned by the 3rd Respondent with 100% shareholding does not give it powers to act outside the board. The court finds that the argument by the 1st and 3rd respondents that they had disciplinary control over petitioner does not hold water in view of the 2nd respondent being a legal entity and the employment letter expressly stating the letter of appointment was an employment contract between the petitioner and the 2nd Respondent company. The court is guided by the decision on corporate entities being *Salomon V Salomon & Co Ltd* which is a landmark case under company law decided in 1897 in the UK jurisdiction. The case established that a Limited Liability Company wears an independent legal identity from its shareholders. Therefore, shareholders cannot be held responsible for the debt and liabilities of the company. ‘Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr. Salomon... If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.’(Lord Halsbury LC at page 22).
52. Applying the landmark UK jurisdiction decision in *Salomon V Salomon & Co Ltd* I find and determine that the petitioner was an employee of the 2nd respondent a corporate entity and thus the 1st and



3 respondents were intruders/strangers into the petitioner's employment in purporting to issue the suspension letter dated 7th February 2022 and summon him for disciplinary hearing *vide* the County Public Service Board. (CA-11). Only the employer has disciplinary control and powers over the employee. the court examined the provisions of section 22(1) of the [Kakamega County Water and Sanitation Services Act](#) and found it concerns appoint of other staff not the chief executive officer. Section 19 of the [Act](#) is the relevant provision providing for the appointment of the chief executive officer by the county water services provides who shall be its managing director. Section 19 (2) provides that the terms of appointment and service of the chief executive officer shall be as set out in the instruments of appointment and shall be in accordance to the provisions of the memorandum and article of association of the company in line with the regulatory Boards corporate governance guidelines. The court finds that section 13 (2) does not in any imagination grant any powers to the county public service board to interfere with the terms of service of the petitioner as provided for under section 19(2) [Kakamega County Water and Sanitation Services Act](#).

53. The employment contract is binding between the petitioner and the 2nd respondent and thus the 1st and 3rd respondent had no role in the control of the employment of the petitioner. The purported disciplinary process initiated *vide* the suspension letter of 7th February 2020 was thus null and void *ab initio*. The court is mindful not to interfere with internal disciplinary processes of the employer as submitted by the respondents. The court will only interfere if the internal processes are marred with irregularities and illegalities thus flawed. The court found in the instant purported disciplinary process initiated *vide* the suspension letter of 7th February 2020 was thus null and void *ab initio* for being initiated by a party who was not the employer of the petitioner outside the law specifically section 19(2) [Kakamega County Water and Sanitation Services Act](#) and the employment contract .
54. The court holds that this judgment does not bar the employer(2nd respondent) from initiating disciplinary process where there is a valid reason to do so provided that the same is done within the law and the stipulations of Petitioner's contract of employment.

Whether the petitioner's rights were violated

55. Having found that the 1st and 3rd respondents act of suspending the petitioner *vide* letter dated 7th February 2022 and the purported disciplinary procedures were void *ab initio* it follows that the rights of the petitioner to fair labour practice and fair administrative under article 41 and 47 respectively were violated by the respondents.

Whether the petitioner is entitled to reliefs sought

56. The court found that the issuance of the suspension letter of 7th February 2020 to the petitioner and the purported disciplinary proceedings by the 1st & 3rd respondents were void *ab initio*. The suspension was without pay which was oppressive. The 2nd respondent's human resources manual is silent on payment during suspension. The court then considers the reliefs sought as follows:-
- a. A declaration that the 1st Respondent's action of suspending the Petitioner from the office of Chief Executive Officer (CEO) for the Kakamega County Water and Sanitation Company limited *vide* the letter dated 7th February, 2022 is a violation of the Petitioner's rights to fair administrative action, fair labour practices and rights to due process and contrary to the Memorandum of Association and Human Resources Policies and Procedures Manual, December , 2020 of the 2nd Respondent and is null and void. The court already found there was violation of fair labour practice and fair administrative action.



- b. A declaration that the act of the unlawful suspension of the Petitioner's employment by the 1st Respondent is a gross violation of the constitutional rights to fair labour practices, fair administrative action and infringement of the protection offered by Articles 41 and 47 of the Constitution of Kenya of the Petitioner. The court already found there was violation of fair labour practice and fair administrative action.
 - c. A declaration that the act of the Respondents in relieving the Petitioner his duties was breach of the Petitioner's constitutional rights under Articles,41 and 47 of the Constitution of Kenya and that the same is null and void for all intent and purposes and in breach of the contract in force between the Petitioner and the 2nd Respondent. The court already found there was violation of fair labour practice and fair administrative action.
 - d. The petitioner made a prayer for order that the Petitioner be compensated by the 1st, 2nd, and 3rd Respondents in the sum of Kshs.88,338,000/- - computed as follows:-Payment of the Petitioner's salary and benefit from 23rd March, 2022 to the expected retirement age of sixty (60)years.-Payment of Kenya Shillings Three Hundred and Ninety Five Thousand (Kshs.395,000/-) as stipulated in the terms and conditions of service for the Chief Executive Officer (CEO) for the Kakamega County Water and Sanitation Company Limited.-General damages for unfair and unlawful suspension of employment-Uncommuted terminal benefits and salary for unlawful and unfair suspension of employment.
57. Under the above prayer the court finds that the petitioner is entitled to full salary and all benefits under contract of employment accruing from month of suspension February 2022 to date of judgment for gross salary as per payslip of January 2022 being KES 395,000/-. The Petitioner's contract was for 3 years hence the 60 years issue is totally misplaced.

Conclusion and disposition

58. I enter judgment for the petitioner against the respondents jointly and severally having found that the suspension issued by the 1st Respondent and disciplinary proceedings initiated by the 1st & 3rd Respondent were void ab initio and further having found that the said actions violated the petitioner's right to fair labour practices and fair administrative action. Consequently, I enter judgment in favour of the Petitioner in the following terms: -
1. A Declaration that suspension of the petitioner done vide the letter dated 7th February 2022 by the 1st Respondent was unlawful and void ab initio. The purported disciplinary proceedings initiated by 1st & 3rd respondents were void *ab initio*
 2. A Declaration that the petitioner's right to fair labour practices and fair administrative action has been violated.
 3. The suspension of the petitioner done vide the 1st Respondent's letter dated 7th February 2022 and the disciplinary proceedings are revoked, lifted and/or set aside.
 4. An order that all the salaries and benefits payable under the petitioners terms of service withheld from the claimant from February 2022 on account of the said unlawful suspension to date of judgment be released to him forthwith.
 5. That the payment of special damages from February 2022 to-date is considered sufficient compensation for the violations committed by the respondents against the petitioner. The unpaid salary is calculated applying the gross salary of January 2022 being KES 395000 X



12 Months (KES 4,740,000/-) plus 16/28 DAYS x 395000 (225,714.20) total award of KES 4,965,714.20 (award amount payable subject to statutory deductions)

6. An order for the petitioner to resume duties as the Chief Executive Officer of the 2nd respondent under terms of his employment and without loss of any of his benefits and report to the place of work within 7 days of this Judgment. The 2nd Respondent to facilitate the resumption of work by the Petitioner under this order within 7 days of this judgment.
7. The petitioner is awarded costs of the Petition and interest on the award amount from date of judgment.

It is so ordered.

DATED, SIGNED, DELIVERED IN OPEN COURT AT BUNGOMA THIS 16TH FEBRUARY 2023.

J.W. KELI,

JUDGE.

In the presence of

Court assistant : Brenda Wesonga

Petitioner: Mr Lakicha

Respondents : Ashitsa holding brief for Mmbaka

Court Order:

Stay of 30 days for payment of the monies only.

It is so ordered.

