



Ndinda v Ethics and Anti-Corruption Commission (Constitutional Petition E209 of 2021) [2023] KEELRC 792 (KLR) (27 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 792 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CONSTITUTIONAL PETITION E209 OF 2021**

M MBARÚ, J

MARCH 27, 2023

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS IN ARTICLE 20, 21, 27,
28, 33, 35, 41, 43 & 47 OF THE CONSTITUTION OF
KENYA, 2010**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE CONSTITUTION
IN ARTICLES 2, 3 & 10 OF THE CONSTITUTION OF
KENYA, 2010**

AND

**IN THE MATTER OF: THE EMPLOYMENT ACT, 2007, SECTIONS 4,
7,
10(1), 11 AND 12 OF THE FAIR ADMINISTRATION
ACTION ACT NO. 4 OF
2015**

BETWEEN

DAMARIS NDINDA PETITIONER

AND

ETHICS AND ANTI-CORRUPTION COMMISSION RESPONDENT



RULING

1. The petitioner filed application dated February 16, 2023 under the provisions of articles 22, 23(3), 35, 47, 50 and 258 of the Constitution of Kenya, Order 51, Rule 1 of the Civil Procedure Rules 2010, sections 4 (1)(2)(3)(4)(5), 6, 7, 10 (1), 11 & 12 of the Fair Administrative Action Act and seeking for orders that;
 1. Spent.
 2. The honourable court exabundanti cautela (in the abundance of caution), hereby waive the discretionary requirement to pursue internal appeal proceedings and further grant leave to the petitioner/applicant to seek judicial review orders in the Petition herein.
 3. Pending the hearing and determination of this Application, the honourable court be pleased to stay the consequences and effects of the dismissal letter dated February 10, 2023 summarily dismissing the Petitioner/Applicant and to further restrain the Respondent by itself, its agents and servants from otherwise or whatsoever acting upon the said letter and/or suspending, dismissing, purporting to send on compulsory leave or retaliating against the applicant.
 4. Pending hearing and determination of the Petition, the honourable court be pleased to stay the dismissal letter dated February 10, 2023 terminating the petitioner/applicant and to further restrain the respondent by itself, its agents and servants from otherwise or whatsoever acting upon the said letter and/or suspending, dismissing, purporting to send on compulsory leave or retaliating against the Applicant.
 5. Pending hearing and determination of the Petition, the honourable court be pleased to grant interim orders reinstating the petitioner/applicant herein to the position that she previously held as Legal Officer II.
 6. The respondent be hereby ordered to disclose and give access to the petitioner/applicant all the information necessary for the enforcement of the Petitioner's fundamental rights, including the following documents:
 - i. All documents relating to the Petitioner's grievance and/or disciplinary process including the minutes of the disciplinary hearing and the report issued by the disciplinary panel before which the Petitioner/Applicant appeared.
 - ii. Any correspondence to or from the HR Department and/or the CEO of the Respondent relating to the Petitioner's grievance and/or disciplinary process and outcome.
2. The application is supported by the supporting affidavit of the petitioner and on the grounds that;
 - a. the constitutional and legal rights of the Petitioner have been gravely violated.
 - b. the respondent failed and/or declined to accord the petitioner a fair disciplinary process and violated the provisions of the Fair Administrative Action Act which provides that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 - c. the respondent's action was in violation of its own Human Resources Policy that requires that all disciplinary cases shall be dealt with reasonably, efficiently, effectively, lawfully and



in a procedurally fair manner whereas the Petitioner was denied a fair hearing and a fair administrative action.

- d. the respondent's action was in violation of its own human resource policy that requires that matters relating to gross misconduct should be dealt with approximately within a month, within which investigations should be concluded and disciplinary action determined whereas the Petitioner's disciplinary process took more than a year after the Petitioner was issued with a Notice to Show Cause.
 - e. the petitioner intends to raise fundamental issues of both law and fact which relate to the practicability of the order of quashing her termination letter.
 - f. it is in the interest of justice that the dismissal be stayed pending the hearing and determination of the Petition.
 - g. the application has been made within reasonable time in the circumstances and in good faith.
 - h. the court has the power under section 11 of the Fair Administrative Action Act to:
 - i. Grant an order that is just and equitable, including an order setting aside the administrative action or decision and remitting the matter for consideration by the administrative body with or without directions;
 - ii. To grant temporary relief.
 - i. the conduct and intention of the respondent to terminate the petitioner/applicant was contrary to article 10 of the Constitution of Kenya, 2010 particularly the principles of good governance, integrity, transparency and accountability and should be declared a nullity.
3. In her supporting affidavit, the petitioner avers that she was employed by the respondent as Legal Officer II on November 16, 2016 and on January 28, 2021 she was issued with letter from the human resource office indicating that they had received confidential information from her supervisor touching on various disciplinary issues and the petitioner wrote seeking clarifications on the matter. At the time, the petitioner had lodged a complaint with regard to her performance appraisal which was pending.
 4. On September 28, 2021 the petitioner was invited to attend before the investigations committee scheduled for October 4, 2021 and where she was given a report dated September 3, 2020. On October 25, 2021 the petitioner was issued with a notice to show cause as to why she had negligently performed her duties and she gave her responses on October 25, 2021.
 5. The petitioner was then invited to attend disciplinary hearing on 29th and December 30, 2021 to address allegations made against her and being apprehensive that the proceedings would be undertaken and an adverse action taken against her because of challenging the respondent's decision not to promote her, she moved court herein seeking interim orders. On April 4, 2022 the court delivered a ruling directing the respondent to conclude the grievances made by the petitioner first before commencing the disciplinary process but contrary to the court orders, by letter dated June 17, 2022 the respondent indicated that it had concluded the grievance process. In a letter dated November 17, 2022 the petitioner was invited to a hearing before the disciplinary committee on 29th and December 30, 2022.
 6. The petitioner avers that she attended disciplinary hearing on December 30, 2022 where she was denied the opportunity to give her representations and on February 16, 2023 she was issued with letter of summary dismissal on the grounds of gross misconduct without any indication of the disciplinary committee recommendations to the CEO and therefore unfair taking into account that the CEO



was granted authority to make the final decision even though he was not party to the disciplinary committee. The grounds of gross misconduct are without merit and based on a Charge Sheet issued on December 14, 2021.

7. The petitioner avers that in the disciplinary process the respondent has failed to follow due process to her prejudice, her reputation has been damaged by the allegations made against her and the orders sought herein should issue as prayed to secure her employment and payment of her due salaries.
8. In reply, the respondent filed Grounds of Opposition that;
 1. The petitioner is inviting the court to usurp lawful powers/responsibilities of an employer. The court is being asked to substitute its orders with the disciplinary prerogative of the respondent. The court should not accept this invitation. See the cases of *Nazareno Kariuki v Feed the Children Kenya* [2013] eKLR and *Lawrence Nyamichaba Ondari v National Hospital Insurance Fund* [2018] eKLR.
 2. There is nothing capable of being stayed. The Respondent's decision issued on February 10, 2023 has already taken effect and asking for stay is tantamount to asking for reinstatement in a roundabout way.
 3. Rule 17(10) of the *Employment & Labour Relations Court Rules* (2016), provide that reinstatement to employment is not a remedy available at an ex- parte or interlocutory stage. It is a remedy considered by the court substantively after hearing parties on merit.
 4. The basis and the grounds upon which the application is made are matters which cannot be determined by the court at an interlocutory stage. The application essentially alleges that the termination of employment was not substantially justified and that fair procedure was allegedly not followed. These are not matters for determination at an interlocutory stage. Parties must be substantively heard on merits.
 5. Regarding prayer 6(i), the petitioner has made a request for the report and her request is being considered by the Respondent. The Request has not been denied for the Petitioner to move the court. The Petitioner has prematurely moved the court and this amounts to an abuse of the court process.
 6. Prayer 6 (ii) is framed in wide terms and not capable of being responded to. It is a fishing expedition.
 7. The application and the amended petition upon which the application is based are attempts to re-litigate issues that were already decided by the ruling of April 4, 2022 which was not challenged on appeal.
 8. The application is based on frivolous grounds. For instance, the Petitioner states at ground (d) on the face of the application that the disciplinary process has taken long, yet the Petitioner is aware and the court record can confirm that she moved the court in December 2021 and was granted an interim stay of the process which lasted until April 4, 2022 when the court held that the disciplinary process could not go on until the grievance process was complete. The disciplinary process was completed on February 10, 2023. The petitioner came back to court with yet another application seeking to stop the process yet again. The court declined to grant an interim order to stop the process. She is now back in court again trying to suspend a decision that has already taken effect.
 9. The court has previously given directions on the hearing of the main petition by way of viva voce evidence. The application is unnecessary. All the matters raised in the application are



for determination in the main petition. The application is otherwise frivolous, vexatious and amounts to a blatant abuse of the court process. It should be dismissed with costs.

10. The petitioner herein has not demonstrated lawful and sufficient cause or grounds upon which the Court can or should grant the orders sought.
9. The respondent also filed the replying affidavit of Douglas O. Olang the Senior Human Resource Management Officer and who avers that he was a member of the disciplinary hearing committee wherein the petitioner was heard. The respondent conducted a fair and transparent disciplinary process which culminated in the dismissal of the petitioner from employment through letter dated February 10, 2023. The petitioner was given ample time to make her representations and while the respondent does not ordinarily allow external lawyers to attend at the disciplinary hearing, the petitioner's request to be accompanied by her advocates was allowed and who attended and cross-examined witnesses.
10. At the end of the disciplinary process some charges were dropped but the petitioner was found not to have satisfactorily explained two grounds which formed the basis of the dismissal.
11. During the disciplinary process, some members were found conflicted since they had participated in the investigations or would be called as witnesses and hence would not sit in the disciplinary panel and the respondent appointed a sub-committee in this regard and the petitioner did not object to the same. The allegations that the petitioner was denied time to respond to the allegations made cannot be true since she was allowed and further given her request to attend with her advocates. The petitioner attended hearing and was allowed the opportunity to examine all witnesses called and following which a decision was taken to dismiss her from employment which is lawful and justified as the same is based on the Constitution, the law and the policy of the respondent.
12. The delay in conclusion of the disciplinary process was not inordinate because hearing was in December, 2022 and the policy requires the same to be completed within 14 days based on the given circumstances. The reasons given for summary dismissal are valid and based on the facts that on June 17, 2019 the petitioner carelessly and improperly performed her duties by recording a consent without authority of the respondent and without informing the regional manager and also, the petitioner being seized of the matters as the respondent's Counsel on record, she willfully failed to file Response to the Amended Defence and Counterclaims dated April 25, 2019 in suits for recovery of land parcel number Machakos Municipality Block 1/609 and Machakos Municipality Block 1/712 thereby exposing the respondent to liability for judgment in default.
13. The petitioner was only presented with one charge sheet and no other charge sheet was issued or backdated contrary to her allegations. The charges were read to the petitioner during the disciplinary hearing and no issue was raised and cannot challenge the charges made after the fact and the orders sought for quashing of the letter dated February 10, 2023 would in effect reinstate the petitioner back to her employment which has been lawfully terminated and the application should be dismissed with costs.
14. Both parties attended and made written and oral submissions together with list of authorities relied upon.
15. The petitioner submitted that following the court ruling herein delivered on April 4, 2022 the respondent initiated the disciplinary process without addressing the grievances the petitioner had made and as directed by the court. The petitioner had complained about her promotion and breaches of her rights which matters were not addressed and the grievance process has been left incomplete and seek that the employment be preserved to allow her petition be heard.



16. The petitioner was forced to file her complaint with the Commission on Administration of Justice to address the unfair procedures applied against her by the respondent and which matter is pending.
17. The respondent has failed to administratively address the grievances made by the petitioner but instead used fresh charges with material differences from the original charges made and leading to her dismissal from employment. The petitioner is seeking for judicial review orders under the provisions of article 22 and 23(3) of *the Constitution* which allow the court to give conservatory orders as held in the case of *Republic v National Assembly & another ex parte Coalition for Reforms and Democracy (CORD)* [2016] eKLR and in the case of *Fredrick Odhiambo Walukwe v Cabinet Secretary Ministry of Interior and Co-ordination of National Government & 2 others* [2020] eKLR that in judicial review proceedings a decision-maker's proceedings and its decision can be stayed together with its effects. An order of *certiorari* can be applied to reverse a historical injustice and the court has power to stay the decision to dismiss the petitioner from her employment and allow her to earn her salary until the determination of the petition herein as amended.
18. In the case of *Law Society of Kenya v The Attorney General & others* Petition No. E203 of 2020 the court outlined the principles upon which interim orders issued that the court is not at this moment being called to undertake a detailed analysis of the matter but address the injury to be visited upon the applicant if the interim orders sought are not issued especially where the violation of fundamental rights and freedoms are in issue and should be protected.
19. The petitioner also submitted that she has not been issued with all the documents and records with regard to her disciplinary process to allow her to apply and address her petition which order should be allowed and the interim orders sought issued with costs.
20. The respondent submitted that the orders sought by the petitioner in their nature is seeking an order of reinstatement disguised as a stay of the letter terminating employment. That is seeking the court to substitute the employer's decision with that of the court whereas termination of employment has already taken effect as of February 10, 2023 after the petitioner was taken through the disciplinary process and she was allowed to attend in the company of her advocate and was able to make representations but could not give satisfactory responses as to why she neglected her duties and proceeded to enter into a consent without approval of the respondent and also failing to reply to a counter-claim in a matter she was attending for and on behalf of the respondent in Machakos Prison land and hence exposed the respondent to liability.
21. Despite being issued with disciplinary hearing proceedings; the petitioner is still demanding for more documents without giving particulars hence cannot blame the respondent for seeking generalized records without details or specifics. The respondent allowed the petitioner to attend disciplinary hearing in the company of her external advocates and who had the chance to cross-examine all witnesses and access the entire record. The judicial review orders sought have no justification and the orders of stay of the decision to terminate employment issued on February 10, 2023 having taken effect, there is nothing to stay and the orders sought should be dismissed with costs.

Determination

22. The petitioner is seeking for orders that she be allowed to waive her right of internal appeal proceedings and that she be allowed to seek judicial review orders herein seeking to stay the decision of the respondent issued on February 10, 2023 dismissing her from her employment.
23. The petitioner is also seeking for an order of reinstatement back to her position with the respondent as held prior to being issued letter of dismissal dated February 10, 2023.



24. The petitioner is also seeking to be issued with documents particularly all records relating to her grievance and disciplinary process being the minutes of the disciplinary process and the report of the panel before which the petitioner appeared and also any correspondence to or from the Human Resource department and or the CEO of the respondent relating to the petitioner's grievance and disciplinary process and outcome.
25. Whereas a petition before this court addressing violation of fundamental rights and freedoms under the Constitution with regard to employment and labour relations is allowed as held in the case of [{>/akn/ke/judgment/keelrc/2015/538 Daniel N. Mugendi v the filing of such petition should abide the principles addressed by the Court of Appeal in the case of Sumaiyya Athnami Hassan v Paul Masinde Simidi \[2019\] eKLR. A petitioner is allowed under article 22\(1\) as read with article 22\(3\) and the Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, to petition for the protection and enforcement of rights and freedoms by filing a petition and pursuant to the provisions of article 23\(3\), the court may grant appropriate relief including a declaration that there is violation of any law and the Bill of Rights but where a remedy is secured under the law particularly the remedy of reinstatement, unless there are exceptional circumstances and matters as outlined under the provisions of section 46 of the Employment Act, 2007 \(the Act\) the court is required to hold on to such a remedy which requires specific performance, until the petition has gone through the full motions of hearing and the court has addressed the requirements of section 49\(4\) of the Act. A full and final determination of the petitioner would then address the remedy of reinstatement.](#)
26. Whether one has filed a petition or a claim seeking for the remedy of reinstatement would still require the court to go back to the provisions of provisions of section 49(4) of the Act. Being an order requiring specific performance, a full hearing is imperative unless there are exceptional circumstances demonstrated by an applicant.
27. To therefore stay the decision of the respondent communicated through letter dated February 10, 2023 dismissing the petitioner from her employment would in essence reinstate her back to the position held before such letter issued. Such would deny the court a chance to hear the petition on the merits and then consider such a relief after hearing both parties on the merits.
28. In Alfred Nyungu Kimungii v Bomas of Kenya [2013] eKLR the court in addressing an interlocutory application where the employee was seeking an order of reinstatement pending hearing of the main suit held that;
- "Ordinarily, reinstatement of an employee is a substantive remedy, not a temporary relief. The law does not contemplate that reinstatement issues (**sic**) as a provisional measure. It is a remedy that should normally be granted upon the full hearing of the employer, and the employee"
29. And the Court of Appeal in Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union [2018] eKLR while addressing a similar matter held that interlocutory reinstatement should only issue for a good cause or exceptional circumstances and if the same is practicable. However, in the instant case, I find that the petitioner, save to challenge the process applied in the grievance handling process/procedures and for which there is a matter pending before the Commission on the Administration of Justice, the substantive reasons given and leading to the dismissal are not directly addressed and which, as of necessity, should be part of the Amended Petition which should be allowed to proceed on the merits.



- 30. For these reasons, the judicial review orders sought and seeking stay of the decision of the respondent through letter dated February 10, 2023 the essence of which would be to return the petitioner back to the position held with the respondent before such letter issued will not issue in the interim.
- 31. The petitioner has had a series of back and forth matters with the respondent culminating to these proceedings. In the ruling delivered on April 4, 2022 the respondent was directed to hear the petitioner on her grievances. Whether that was addressed within the framework of the court directions should be a matter of hearing and assessment by the court save, taking this into account, to subject the petitioner to the appeal process available before the respondent after the subject ruling would not resolve the issues in dispute. The petitioner is therefore justified to seek and waive the appeal procedures of the respondent.
- 32. With regard to the issuance of documents held by the respondent, for the petitioner to be able to urge her petition effectively, the request for documents and correspondences by the respondent being general, the petitioner shall state the exact documents and correspondences she seeks to be issued and such shall reasonably be assessed by the respondent and supplied accordingly.
- 33. Accordingly, application dated 16th February, 2023 is found without merit save the petitioner is allowed to waive the right not to appeal through the respondent internal procedures and shall particularize the documents and correspondences required from the respondent before these can issue. Costs shall abide the outcome of the main petition.

DELIVERED IN OPEN COURT AT MOMBASA THIS 27TH DAY OF MARCH, 2023.

In the presence of:

Court Assistant: Japhet Muthaine

M. MBARŪ JUDGE

..... and

