



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ang'awa v Kituo Cha Sheria & another (Petition 223 of 2022)  
[2023] KEELRC 698 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 698 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION 223 OF 2022**

**B ONGAYA, J**

**MARCH 24, 2023**

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 41, 47, 50, 159,  
162(2) (A), 165(5) (B), 258 AND 260 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS  
AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 10, 27,  
28, 31, 41, 47, 48, 50 OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF THE ENFORCEMENT OF THE CONSTITUTION OF KENYA, 2010**

**IN THE MATTER OF SECTIONS 4, 6, 7, 8, 9, AND 11 OF  
THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015**

**IN THE MATTER OF RULES 4, 10, 11, 22, 23, AND 24 OF THE  
CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

**VALARIE ANG'AWA ..... PETITIONER**

**AND**

**KITUO CHA SHERIA ..... 1<sup>ST</sup> RESPONDENT**

**ANNETTE MBOGOH ..... 2<sup>ND</sup> RESPONDENT**

*(Before Hon. Justice Byram Ongaya on Friday 24th March, 2023)*

**RULING**

1. The petitioner filed an application by the notice of motion dated December 19, 2022 through Seko Minayo & Company Advocates. The application is pursuant to articles 22(2) (c), 23 and 159 (2) (c), 23 and 159 (2) (d) of the Constitution of Kenya, 2010, rules 23 and 24 of the Constitution of Kenya



(Protection of Fundamental Rights and Freedoms) Practice & Procedure Rules, 2013; the inherent powers of the court and all enabling provisions of law. The applicant prayed for orders as follows:

- a. (spent).
  - b. (spent).
  - c. An order staying the proceedings and resolutions made by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and communication dated November 11, 2022 terminating the employment of the petitioner pending the hearing and determination of the petition.
  - d. An order restraining the 1<sup>st</sup> respondent, its servants, officials, representatives, or agents from appointing any person to act in the office of the program coordinator, Advocacy, Governance and Community Partnerships (AGCP) program of the respondent, pending the hearing and determination of the petition.
  - e. A permanent order prohibiting or restraining the 1<sup>st</sup> respondent, its servants, officials, representatives, or agents from advertising or having so advertised, from acting thereupon, interviewing, recruiting, or otherwise in any other manner replacing the applicant in her position as the program coordinator, Advocacy, Governance and Community Partnerships (AGCP) program of the respondent.
  - f. That costs of the application to abide outcome of the suit.
2. The application is based upon the annexed applicant's affidavit and upon the following grounds:
- a. The respondents terminated the employment of the petitioner *vide* a letter dated November 11, 2022.
  - b. The letter gave a termination notice of 30 days until December 11, 2022.
  - c. The petitioner was forced by the respondents during the notice period.
  - d. Despite the notice period, the petitioner's salary has been withheld.
  - e. The petitioner filed an appeal to the full board of directors on November 14, 2022 challenging the termination decision. The respondents did not acknowledge or respond to the appeal.
  - f. On November 25, 2022 the petitioner through its advocates wrote to the respondents asking for directions on the appeal. The petitioner indicated that the appeal ought to be determined in time before the lapse of the termination notice period by the respondents on December 11, 2022.
  - g. On November 30, 2022 the petitioner received an email from the 2<sup>nd</sup> respondent that the appeal would be heard virtually on December 8, 2022 at 2.30pm and that her salary would be withheld by the 1<sup>st</sup> respondent. The petitioner attended the appeal hearing and the date of appeal decision was not indicated and no communication on releasing of withheld salary. The petitioner feared that the board would render its decision way after December 11, 2022 when the notice period would have lapsed – rendering decision on appeal an academic exercise.
  - h. The termination followed an inquiry without giving the petitioner and opportunity to be heard. The termination was unfair because due process in the 1<sup>st</sup> respondent's human resource manual was not followed.
  - i. The respondents have violated the petitioner's rights to fair labour practices, non-discrimination, fair administrative action and fair hearing as enshrined under articles 41, 27,



47, and 50 of the Constitution. Unless restrained by court order, the infringement will persist. The respondent will not suffer prejudice if the orders prayed for are granted. The orders be granted in the interest of justice.

3. The respondents opposed the application by filing the replying affidavit of Dr Annette Mbogoh, the executive director of Kituo Cha Sheria and the 2<sup>nd</sup> respondent through Muma and Kanjama Advocates and sworn on February 3, 2023. It was urged for the respondents as follows:
  - a. The petitioner was at all material times employed by the 1<sup>st</sup> respondent.
  - b. A complaint was made against the petitioner On April 23, 2022 from the AGCP program team. The petitioner was asked to respond and was subjected to disciplinary process in accordance with section 41 of the Employment Act, 2007. It was concluded that the petitioner was involved in sexual harassment of an employee whom she had supervisory control over by repeatedly using the term “baby boy” and “boy lollipop” when referring to him without his consent and through advances of a sexual nature that were both verbal and physical. It was further returned by the disciplinary committee that the petitioner’s management style was characterised by micro-managing of staff, favouritism and lack of collegiality which resulted in an unhealthy work environment that affected the mental health of staff within the organization among other reasons in the notice of termination. The board of directors adopted the committee’s findings and resolved to terminate the petitioner’s employment and the decision was implemented by the letter dated November 11, 2022.
  - c. The petitioner appealed against the termination decision by the letter dated November 15, 2022 which was virtually heard on December 8, 2022 in presence of the petitioner’s lawyer and decision on appeal was communicated to the petitioner on December 21, 2022
  - d. The reasons for termination were valid and lawful as informed by board committee hearing on July 15, 2022, July 22, 2022 and October 14, 2022 and the petitioner was duly heard but failed to exculpate.
  - e. The administrative appeal did not stay the dismissal decision in any manner.
  - f. The 2<sup>nd</sup> respondent signed the termination letter in her capacity as the representative of the board and signed with due authority of the board.
  - g. The petitioner’s rights had not been violated as alleged.
  - h. The petitioner has to make an account and her salary was withheld pending such accounting by the petitioner.
  - i. As a result of the complaints against the petitioner, two of the complainants have resigned from the 1<sup>st</sup> respondent’s employment.
4. The respondents also filed the notice of motion dated February 3, 2023 brought under sections 1A, 1B, 3 & 3A of the Civil Procedure Act, order 1 rule 10(2) of the Civil Procedure Rules & order 51 of the Civil Procedure Rules 2010 and all other enabling provisions of the law. The respondents prayed for orders:
  - a. ...(spent).
  - b. The honourable court be pleased to strike out the 2<sup>nd</sup> respondent from the suit for misjoinder.
  - c. The honourable court be pleased to grant any other orders as it may deem fit to further ends of justice.



- d. The petitioner to pay costs of the application and the suit.
5. The respondents' application was based upon the following grounds:
- a. By the petitioner's own admission, the subject matter of the instant suit is the contractual employment relationship between the petitioner and the 1<sup>st</sup> respondent.
  - b. The 2<sup>nd</sup> respondent has not in her own capacity employed or acted as an employer of the petitioner.
  - c. The 2<sup>nd</sup> respondent has been unlawfully dragged into the proceedings as a party yet her role was limited to supervision over the petitioner in the course of her duties and to undertake any instructions issued by the board of directors.
  - d. The petition and the application disclose no cause of action against the 2<sup>nd</sup> respondent.
  - e. The 2<sup>nd</sup> respondent is not a necessary party as no reliefs are being sought against her in her personal capacity and should be removed as a party for misjoinder. Any order passed will be enforced without necessity of involving the 2<sup>nd</sup> respondent personally.
  - f. The suit is aimed at prejudicing, embarrassing and harassing the 2<sup>nd</sup> respondent as is without substance and an abuse of court process as against the 2<sup>nd</sup> respondent.
  - g. The application be allowed in the interest of justice.
  - h. The matters as per the supporting affidavit of the 2<sup>nd</sup> respondent sworn on February 3, 2023.
6. The petitioner opposed the respondents' application by filing her replying affidavit sworn on February 19, 2023. The petitioner urged and stated as follows:
- a. The alleged breach of rights and freedoms is made jointly and severally against the respondents including a declaration that the respondents have breached the rights and fundamental freedoms of the petitioner.
  - b. The 2<sup>nd</sup> respondent be retained as a party because reliefs are sought against her in the petition; the 2<sup>nd</sup> respondent engaged in egregious violations of the petitioners' rights and freedoms in her individual capacity as petitioner's supervisor; and it will not be possible to pass an effective decree in the absence of the 2<sup>nd</sup> respondent given her individual violations of the petitioner's rights and freedoms.
  - c. There is a direct and real interest in the reliefs sought against in the reliefs sought against the 2<sup>nd</sup> respondent and she is therefore a necessary party.
  - d. The termination by the 1<sup>st</sup> respondent was coupled by the violation of her fundamental rights and freedoms by the individual acts of the 2<sup>nd</sup> respondent and she has been sued for violating the petitioner's rights and freedoms in her individual capacity and orders jointly sought against her together with the 1<sup>st</sup> respondent. The 2<sup>nd</sup> respondent is therefore properly joined as a party.
  - e. The application be dismissed with costs in the interest of justice.
  - f. Orders are sought against both respondents including
7. The petitioner also filed a supplementary affidavit sworn on February 19, 2023 raising issues of facts to show the procedure was unfair and that the 2<sup>nd</sup> respondent engaged in alleged unlawful actions against the petitioner. Further the orders are against both respondents and not the 2<sup>nd</sup> respondent personally or



specifically. Further, for a party to be joined, there must be a right to some relief such a party in respect of the matter involved in the proceeding in question and it should not be possible to pass an effective decree in the absence of such a party. That at best the 2<sup>nd</sup> respondent is a witness for 2<sup>nd</sup> respondent and there is no evidence that the 2<sup>nd</sup> respondent took actions in her personal capacity but only in her official capacity. The reliefs are sought jointly against the respondents and it should be possible to pass an effectual decree without the 2<sup>nd</sup> respondent being a party. She was the petitioner's supervisor but acted in official capacity.

8. The 2<sup>nd</sup> respondent filed her further affidavit sworn on March 6, 2023 urging that she cannot be personally liable in the case because the alleged violations are as a result of the contract of service between the petitioner and the 1<sup>st</sup> respondent.
9. Submissions were filed for the parties on the two applications which are being determined together. The court has considered all the material in that regard and returns as follows.
10. As submitted for the respondents, in *Sarah Wangui Karanja v Amref Health Africa in Kenya* [2020]eKLR (Radido J) and in *Joab Mehta Oudia v Coffee Development Board of Trustees* [2014]eKLR (Rika J), it was held that the court cannot stay the termination of an employee at an interlocutory stage as it would amount to the court unduly interfering with the a decision already made by the management within its discretion. Further, it was held staying a termination decision amounts to an interim reinstatement which lacks justification because an aggrieved employee would presumably move the court expeditiously on merit and if reinstatement is granted as deserving, there would be an order for reinstatement with back wages. The court considers that indeed, once a termination is pronounced by the employer, there is nothing to be arrested by way of a stay order as such stay order would not amount to setting aside the termination decision. Further, damages by way of back payment consequential to a reinstatement order after full hearing of the suit would appear to show that the applicant would not suffer irreparable injury as such payment would return the employee to full position as though termination had not been imposed.
11. The prayer on withheld wages appear pegged upon the need for the petitioner to render an account. The court considers that in such contested positions, it is not obvious that the claim for release of the wages withheld is an obviously successful claim. Thus the court returns that in such circumstances, the prayer to pay the wages being in the nature of a mandatory and final injunction is not available at the interim stage.
12. The prayers to preserve the vacancy flowing from the termination is opposed on account that the temporary injunction as prayed for is capable of being remedied with damages. The court agrees as already stated that damages are available in the circumstances of the case.
13. The court returns that the petitioner has not shown the basis for the submission that the pending administrative appeal should operate as a stay of the termination decision appealed against. The lamentation was that decision on appeal had not been communicated but the respondents have shown that the decision has since been communicated. In any event there was no prayer that the decision be communicated.
14. The court returns that the application by the petitioner will therefore not succeed as is declined.
15. The court has considered the petition, the petitioner's affidavits and the nature of allegations levelled and leading to the termination. There are specific allegations and then prayers sought against the 1<sup>st</sup> and 2<sup>nd</sup> respondent. Considering the prayers and the allegations, the petitioner has established that the 2<sup>nd</sup> respondent is indeed a necessary party for the effectual, effective, and complete determination of the issues in dispute. While the 2<sup>nd</sup> respondent acted in official capacity, the petitioner makes specific



allegations against her and which can only be resolved one way or the other after the full hearing of the application. It is submitted that due to the doctrine of privity of contract, the 2<sup>nd</sup> respondent was not a party to the contract of service and is therefore not a proper defendant or party. However, in the instant case the petitioner has by pleadings mixed issues of contract of service and alleged breach of rights and fundamental freedoms, obviously going beyond the cited doctrine.

16. The application on joinder will therefore also fail.
17. In conclusion the application for the petitioner dated December 19, 2022 and the one for the respondents dated February 3, 2023 are hereby dismissed with orders:
  - a. Each party to bear own costs of the applications.
  - b. Parties to fix the matter for mention for further steps for the expeditious hearing and determination of the main petition.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS  
FRIDAY 24<sup>TH</sup> MARCH, 2023**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

