



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njuki v Independent Electoral and Boundaries Commission (Petition  
E021 of 2023) [2023] KEELRC 577 (KLR) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 577 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION E021 OF 2023**

**B ONGAYA, J**

**MARCH 10, 2023**

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

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE RIGHTS AND  
FUNDAMENTAL FREEDOMS IN ARTICLES 20, 21, 27, 28, 33(3), 35, 28, 41, 43 & 47, 88(5),  
232(1) (E), (I), & (2), 236, 249 (1) (C) & 250 (1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF SECTIONS 41, 43, 44(2), 45(4) (B) & (5) OF THE EMPLOYMENT  
ACT, 2007 AND SECTIONS 4, 7, 10(1), 11 AND 12 OF THE FAIR ADMINISTRATIVE  
ACTION ACT, 2015 AND SECTIONS 11A & PARAGRAPH 8 OF THE FOURTH SCHEDULE  
OF THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ACT, 2011**

**BETWEEN**

**HANSON MUGO NJUKI ..... PETITIONER**

**AND**

**INDEPENDENT ELECTORAL AND BOUNDARIES  
COMMISSION ..... RESPONDENT**

**RULING**

1. The petitioner as applicant filed an application dated 03.02.2023 by way of a notice of motion drawn and filed by Muma & Kanjama Advocates. Senior Counsel Charles Kanjama Advocate appeared in that behalf. The motion was under 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*, the inherent jurisdiction of the Court and all enabling provisions of law. The applicant prayed for orders:

- a. .... (spent).



- b. .... (spent).
  - c. .... (spent).
  - d. Pending the hearing and determination of the petition, the Honourable Court be pleased to stay the dismissal letter dated 19.01.2023 terminating the petitioner or applicant as the Senior Election Officer and to further restrain the respondent by itself, its agents and servants from otherwise or whatsoever suspending, dismissing, purporting to send on compulsory leave or doing anything prejudicial to the applicant after the aforesaid stay by the court.
  - e. Pending hearing and determination of the petition, the Honourable Court be pleased to grant interim orders reinstating the petitioner or applicant herein to the position that he previously held as Senior Election Officer.
  - f. The respondent be hereby ordered to disclose and give access to the petitioner or applicant all the information necessary for the enforcement of the petitioner's fundamental rights including the following documents: (1) All documents in the petitioner's employment file including all appraisal reports and minutes of the disciplinary meeting and the report given by the disciplinary panel before which the petitioner appeared.
2. The application was based upon the applicant's supporting affidavit and the following grounds:
- a. The petitioner's constitutional and legal rights have been grossly violated.
  - b. The respondent failed or declined to accord the petitioner a fair capability 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 violated its own human resource 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 violated its human resource policy requiring that all disciplinary cases be concluded in 6 months within which investigations should be concluded and disciplinary action determined whereas the petitioner's disciplinary process took 16 months after the issuance of the notice to show cause.
  - e. The Court has the power under section 11 of the *Fair Administrative Action Act* to 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, or, to grant temporary relief.
  - f. That the conduct and intention of the respondent to terminate the 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.
  - g. The applicant has stated in his supporting affidavit as follows. The respondent purported to terminate his employment on 16.01.2023 after he attended a disciplinary hearing before the respondent's disciplinary committee on 03.01.2023 to which he was invited to 18 months after he was issued with a notice to show cause on 06.08.2021. The disciplinary proceedings came as a surprise to the applicant because the appraisal reports scored him as a high performer and



he had a clean record of service with no reported complaints by his supervisor. Further that on 19.01.2023 he received the dismissal letter citing tax non-compliance as one of the reasons for the dismissal being a reason not communicated to him well in advance to the disciplinary meeting and which was not in the show cause letter of 06.08.2021. The disciplinary letter quoted a plenary meeting of the respondent held on 06.01.2023 that resolved to dismiss the applicant from employment yet on that date Commissioner Professor Abdi Guliye was in Elgoyo Marakwet County conducting the Senatorial by-election – the consequence being that the plenary meeting could not have been properly constituted. The applicant’s case is that the dismissal was therefore in violation of due process and subject to review under section 7 of the *Fair Administrative Action Act* on account that the dismissal decision was taken with an ulterior motive or purpose calculated to prejudice his rights, was made in bad faith, was unreasonable and violated his legitimate expectation as was unfair. He urged that the application be allowed to maintain his livelihood until hearing and determination of the petition.

3. The respondent opposed the application by filing the replying affidavit of its Director of Legal and Public Affairs Chrispine Owiye. The affidavit was to the following effect. The applicant has not established grounds that justify the grant of the orders as prayed for. The petitioner has violated the doctrine of exhaustion of internal dispute resolution mechanism because he had not exhausted the procedures in section 12.14 and 12.15 of the respondent’s Human Resource Manual providing for against a dismissal decision within 6 weeks from the date of the letter conveying the decision, and, applying for review within 6 months of the respondent’s decision. The disciplinary committee was well constituted per section 12.5.3 of the Manual comprising of members of the Commission and the secretary being the Director, Human Resource and Administration. There is one member of the Commission in office and the applicant should appeal as prescribed. The petition and application are therefore premature until after the appeal or review. The dismissal was lawful and not illegal or in breach of constitutional provisions and orders sought should not be granted.
4. The applicant filed a further supporting affidavit dated 20.02.2023. He stated that for the grade he held, the disciplinary case was under the respondent’s disciplinary committee established under the Human Resource Manual. The committee was comprised of Commissioners and the Director, Human Resource and Administration. Further, under rule 5 of the 2<sup>nd</sup> Schedule to the *Independent Electoral and Boundaries Commission Act* 2011, the quorum for the conduct of the respondent’s meetings is at least half of the existing members of the Commission – and there was no evidence to show that the disciplinary committee was well constituted and there was no evidence that the plenary meeting of 06.01.2023 actually took place and the conflict of interest as a ground for the dismissal had not been established at all. His reply to the show cause letter and dated 18.08.2021 was sufficient to exculpate him from the levelled accusations. Further the termination letter dated 19.01.2023 had been communicated to him 2 days after expiry of the Commissioner’s tenure. The conclusion of the disciplinary process had been calculated to deny him the appeal process. He denied being accorded a fair hearing. He urged that he was praying for provision of relevant documents as per Article 35 so that he can pursue his rights in the instant petition.
5. Submissions were filed for parties. The court has considered the material facts surrounding the dispute and the submissions and returns as follows.
6. The 1<sup>st</sup> issue is whether the petition and application are premature for want of exhaustion of the appeal and review procedure prescribed in the respondent’s Human Resource Manual and as urged for the respondent. The Manual at paragraph 12.14 provides as follows:



- i. An employee who is not satisfied with the decision made on a disciplinary case shall have the right of appeal to the Commission.
  - ii. Any such appeal shall be made in writing within six (6) weeks from the date of the letter conveying the disciplinary action.
  - iii. The commission shall consider only one appeal in each case.
  - iv. Upon the consideration by the relevant Committee, the Commission may uphold or vary earlier decision.
7. The manual at section 12.15 provides for review as follows:
- i. An employee may apply for a review of his case within six (6) weeks after the decision of the Commission.
  - ii. Upon the consideration by the Committee, the Commission may uphold or vary earlier decision.
8. In the instant case, the dismissal letter dated 19.01.2023 conveyed that the Commission in its 284<sup>th</sup> plenary meeting held on 06.01.2023 deliberated and resolved to dismiss the applicant. The applicant then moved the Court in the instant proceedings. The respondent has cited Court of Appeal decisions in *Geoffrey Muthinja & another –versus- Samuel Muguna Henry & 1756 others* [2015]eKLR, and, *Republic –Versus- National Environment Management Authority Ex-parte Sound Equipment Ltd.* [2011]eKLR for the holding that where an alternative remedy exists, a litigant must exhaust alternative remedy as prescribed in a statute or other manner prior to moving the Court. For the applicant it is urged that the Commissioners having left office, there was no quorum. The Court has carefully considered the issues surrounding the ripeness of the petition. Whether there was quorum, whether the disciplinary committee was well constituted or whether the plenary meeting referred to in the letter of summary dismissal are matters of fact which in the Court’s view are best resolved after the full hearing of the matter and taking into account relevant parties’ evidence. Nevertheless, the Court has considered the Manual’s provisions on appeal and review. It is not clear whether one has to appeal and thereafter apply for review or of appeal and review, which one takes priority over the other. It is also clear that the respondent had already taken a decision to dismiss the applicant at its own plenary meeting as per the dismissal letter. It therefore appears to the court as a misconceived prescription in the manual that an employee dissatisfied with the respondent’s decision would of mandatory provision appeal to the same respondent and expect a different outcome (upon the same facts and other considerations of the case as prevailing at the initial instance leading to the decision appealed against). Accordingly, in the opinion of the Court, in view of the ambiguity in priority of appeal and review as prescribed in the Manual and then in view of the misnomer of mandatory appeal to the respondent as against the respondent’s own decision, the applicant would validly be exempted from the application of the doctrine of exhaustion of alternative prescribed procedure and remedy. Such ambiguous prescription and being inconsistent with known meaning of appeal as manifested with clear conflict and bias if the applicant were to appeal to the same decision maker would not, in the court’s view, amount to a fair and genuine alternative procedure and remedy. The court returns that in the circumstances, the petition and the application are not premature or barred for want of exhausting the purported alternative procedure or remedy.
9. The 2<sup>nd</sup> issue is whether the applicant is entitled to the remedies as prayed for. Both parties invoked *Giella –Versus- Cassman Brown* (1973) that for the court to grant a temporary or interim injunction the applicant must show a prima facie case with a probability of success and show that he shall suffer irreparable injury which cannot be compensated by damages, and, if the court is in doubt, then it can decide the case on a balance of convenience. Upon that standard, it appears to the Court that if the



applicant indeed primarily applied for an interim injunction, then as submitted for the respondent damages by way of compensation for unfair termination would be available under section 49 and 50 of the *Employment Act*, 2007. Further, if an order of reinstatement is, after the hearing, successfully urged, pay back from the date of dismissal would be available. The case for temporary injunction would therefore collapse.

10. The court has carefully examined the prayer in the application and it is for stay of the letter of dismissal and then for a temporary injunction. Essentially a temporary injunction would require the respondent to be restrained or compelled in one way or the other pending the hearing and determination of the petition. With respect to the stay order, the court is focused on preservation of dispute so that depending with the likely final outcome, the suit is not rendered nugatory. Thus, a stay order arrests or suspends a process or a flow of the thing in issue. The court considers that the dismissal having issued as per the letter of dismissal, the act of the dismissal effectively concluded as is incapable of being arrested or suspended because the termination of the contract of service thereby crystallized, with nothing left to arrest or suspend in terms of the prayers made in the application. Thus turning to the restraining order that consequential or conjunctive to the stay order as prayed for, the respondent not to suspend, dismiss or emplace the applicant on compulsory leave, it appears to the court as misconceived because the parties have already separated and unless the dismissal is set aside or declared unfair, unlawful, null and void, the restraining order would not be available or would be superfluous at this stage of the proceedings. It therefore appears to the court that similarly, an interim reinstatement order would not be available unless and until the termination decision as conveyed in the letter of dismissal is condemned or set aside one way or the other – so that a prima facie case at this stage cannot be said to prevail in absence of the justification of stay order upon which a restraining order was predicated and as urged for. Further, the court finds that in the circumstances, it cannot be said that the petition would be rendered nugatory if the stay order is disallowed as it has not been shown how the reliefs in the petition would become defeated. The co-joined prayer for interim stay and then restraining order will collapse.
11. The court therefore returns that interim reinstatement would not be available as prayed for and which essentially is a final remedy after hearing the parties on the petition. The court considers that even if an order staying the dismissal were to be granted, such an order would not amount to revival or resurrection of the contract of service and at this stage, reinstatement would amount to a drastic remedy that is final in nature.
12. The court has considered the prayer for provision of documents. The prayer is in the nature of discovery. The court considers that the applicant be at liberty to serve the relevant notice to produce particularised documents as is just or required for purposes of the current proceedings and the respondent to answer by filing and serving the documents.

In conclusion the application is hereby determined with orders:

1. The applicant to serve a notice to produce particularised documents within 7 days and the respondent to answer thereafter by filing and serving the list and copies of the documents within 7 days after the service.
2. Parties to take a mention date for further directions and orders towards the expeditious hearing and determination of the main petition.
3. Costs of the application in the cause.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 10TH MARCH, 2023**



**BYRAM ONGAYA**  
**PRINCIPAL JUDGE**

