



**Abdi v Governor, Kakamega County Government & 2 others; Maloba  
(Interested Party) (Employment and Labour Relations Petition  
3 of 2023) [2023] KEELRC 1971 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1971 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS PETITION 3 OF 2023**

**JW KELI, J**

**JULY 27, 2023**

**(FORMERLY BUNGOMA ERLC NO. E007 OF2023 )**

**BEFORE HON. LADY JUSTICE JEMIMAH KELI**

**IN THE MATTER OF : THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ARTICLES 1, 10, 19,20,21,22, 23(3)(A)(B) (C),27(2),28,  
41,47(1),165, 236(A) (B), 258(1) OF THE CONSTITUTION OF KENYA**

**AND**

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

**LIMITED**

**IN THE MATTER OF: THE EMPLOYMENT ACT 2017**

**BETWEEN**

**ABDIKADIR MOHAMED ABDI ..... PETITIONER**

**AND**

**GOVERNOR, KAKAMEGA COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**BOARD OF DIRECTORS OF KAKAMEGA, COUNTY WATER AND  
SANITATION COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**KAKAMEGA COUNTY PUBLIC SERVICE BOARD ..... 3<sup>RD</sup> RESPONDENT**



AND

JOSECK JOAB MALOBA ..... INTERESTED PARTY

JUDGMENT

1. The Petitioner was a former Chief Executive Officer(CEO for the Kakamega County Water and Sanitation Company(KACWASCO) with effect from 1<sup>st</sup> May 2020. The Petitioner was sent on terminal leave effective 1<sup>st</sup> April 2023 through a letter Reference Number KAC/BODCHAIR/VOL.1/003 dated 30<sup>th</sup> March 2023 which indicated that his contract of employment was to end on 30<sup>th</sup> April 2023. The Petitioner aggrieved by the decision of the 2<sup>nd</sup> Respondent to send him on terminal leave filed a Notice of Motion Application dated 14<sup>th</sup> April 2023 and contemporaneously a Petition of even date seeking the following reliefs: -
  1. A Conservatory Order do issue restraining the 1<sup>st</sup>, 2<sup>nd</sup> , 3<sup>rd</sup> Respondents, their Board of Directors, officers , their employees, workers, agents and /or whomsoever from terminating the contract/services of the Petitioner and/or from relying on the minutes /sitting of 22<sup>nd</sup> March, 2023.
  2. A Conservatory order do issue directing the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents whether by themselves or their agents , Board of directors, officers and/or servants to consider the Petitioner’s contract as per the new 2<sup>nd</sup> Respondent’s Memorandum and Articles of Association and Approved Human resources Policies and Procedures Manual December , 2020.
  3. A Conservatory Order do issue directing the 1<sup>st</sup> , 2<sup>nd</sup> & 3<sup>rd</sup> Respondents whether by themselves or their agents , Board of Directors , officers and/or servants to pay the petitioner’s full salary and benefits from 30<sup>th</sup> March , 2023 to the expiry of the contract on 30<sup>th</sup> April 2025 renewable.
  4. A Declaration that the Petitioner’s Contract shall expire on 30<sup>th</sup> April 2025 renewable for a further term not less than Five(5) years as per the new 2<sup>nd</sup> Respondent’s Memorandum and Articles of Association and Approved Human Resources Policies and Procedures Manual December , 2020 with all back salaries, benefits and allowances or as shall be directed by this Honourable Court.
  5. A Conservatory order do issue compelling the 1<sup>st</sup> , 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to lift the suspension of the Petitioner made vide the letter dated 30<sup>th</sup> March 2023 by the Respondents.
  6. A Conservatory Order do issue restraining the 1<sup>st</sup> , 2<sup>nd</sup> & 3<sup>rd</sup> Respondents whether by themselves , their agents , their Board of Directors , Chairman officers and/or servants from engaging the interested party herein , Joseck Joab Maloba as Acting Chief Executive Officer(CEO) for the Kakamega County Water and Sanitation Company Limited or replacing the Petitioner with any such or other person to be recruited.
  7. A Conservatory order do issue staying and suspending the appointment of the interested Party herein Joseck Joab Malobaas Acting Chief Executive Officer(CEO) for the Kakamega County Water and Sanitation Company Limited.
  8. A Cconservatory Order do issue restraining the 1<sup>st</sup> , 2<sup>nd</sup> & 3<sup>rd</sup> respondents, their Board of Directors, Officers, their employees, workers, agents and/or whomsoever jointly and severally from interfering, terminating the contract employment /services of the petitioner.



9. A Conservatory order do issue restraining the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents whether by themselves or their Agents, Board of Directors ,officers and /or servants from effecting , relying , or acting on the 2<sup>nd</sup> Respondent's Notice and letter dated 30<sup>th</sup> March 2023.
10. A Conservatory Order do issue directing the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondent to renew the petitioner's contract upon expiry on 30<sup>th</sup> April 2025 for a further term not less than five (5) year as per the new 2<sup>nd</sup> respondent's memorandum and Articles of Association and Approved Human Resources Policies and procedures Manual December, 2020 with all back salaries, benefits and allowances or as shall be directed by this Honourable Court.
11. A Conservatory order do issue restraining the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents whether by themselves , their Board of Directors, officers , agents and or servants from recruting 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.
12. A Conservatory order do issue restraining the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> 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 Respondent dated 30<sup>th</sup> March 2023.
13. A declaration that the 1<sup>st</sup> Respondent's action of suspending the Petitioner from the office of the Chief Executive Officer (CEO) for the Kakamega County Water and Sanitation Company Limited is a violation of the Petitioner's right to fair administrative action, fair labor practices and rights to due process and contrary to the memorandum of Association and Approved Human Resources policies and procedures Manual, December 2020.
14. A Declaration that the act of the unlawful suspension of the Petitioner's employment is a gross violation of the constitutional rights to fair labor practices, fair administrative action and infringement of the protection offered by Articles 41 and 47 of the Constitution of Kenya of the Petitioner.
15. A Declaration that the unlawful suspension of the Petitioner's employment without pay is gross violation of the constitutional rights to freedom from torture, cruel inhumane and degrading treatment or punishment offered by Article 25, 27 and 28 of the Constitution of Kenya.
16. A Declaration that the Act of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents in relieving the petitioner of his duties was in breach of the Petitioner's constitutional rights under Article 1, 10, 19,20,21,22,23(3)(a)(b)(c), 27(2), 28, 41, 47(10), 50, 165,236(a)(b), 258(1) 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.
17. A Declaration that the act of the respondents in relieving the Petitioner his duties was a 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 the same is null and void for all intents and purposes and in breach of the contract in force between the Petitioner and the Respondents.
18. Compensation for loss of privileges and other benefits for the remainder of the period in the petitioner's contract.



19. Compensation for unfair suspension and general damages for violation of the Petitioner's Fundamental rights and for being subjected to degrading and inhumane treatment by the Respondents.
  20. An order that the Petitioner be paid his full salary and benefits for 4<sup>th</sup> and 5<sup>th</sup> Year by the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Respondents in the sum of Kshs. 14,211, 000/- as per the Approved Remuneration structure for scale 1 & 2 computed as follows:-
    - i. Payment of the Petitioner's salary for the 4<sup>th</sup> year and benefits totaling to Kshs. 6,987,600/-
    - ii. Payment of the Petitioner's salary for the 5<sup>th</sup> Year and benefits totaling to Kshs. 7,223,400/-
  21. General Damages for unfair and unlawful suspension of employment.
  22. Uncommuted terminal benefits and salary for unlawful and unfair suspension of employment.
  23. Costs of this petition be borne by the Respondents.
  24. Any other relief or order that this court may deem fit in the special circumstances.
2. The Petitioner filed an Affidavit in support of the Notice of motion sworn on the 14<sup>th</sup> November 2023 and the supplementary affidavit dated 24<sup>th</sup> May 2023 together with annexures.
  3. The petition was opposed. The Respondents and the Interested Party jointly filed a replying affidavit sworn by Boaz Odemu Bulimu dated 3<sup>rd</sup> May, 2023 and received in court on the 4<sup>th</sup> May, 2023.

#### **Written submissions**

4. The court directed that the Notice of Motion and the Petition be canvassed by way of written submissions. The petitioner's written submissions drawn by Hassan N. Lakicha & Company Advocates were dated 24<sup>th</sup> May 2023 and received in court on the 26<sup>th</sup> May 2023. The Petitioner filed authorities relied on together with the submissions. The Respondents' and Interested Party's written submissions drawn by Vivianne Mmbaka Komwonyo, the County Attorney- Kakamega County were dated 19<sup>th</sup> June 2023 and received in court on 20<sup>th</sup> June 2023 , together with the authorities relied on.

#### **Petitioner's case in summary**

(The case as per Affidavit in Support of Notice of Motion of the Petitioner dated 14<sup>th</sup> April 2023 and the supplementary affidavit dated 24<sup>th</sup> May 2023.)

5. The Petitioner was vide a letter of appointment dated 23<sup>rd</sup> March 2020(AMA-1) by the 1<sup>st</sup> Respondent appointed as the Chief Executive Officer (CEO) of KACWASCO on 23<sup>rd</sup> March 2020 for three (3) years, renewable based on performance.
6. That on the 16<sup>th</sup> November 2020, the 2<sup>nd</sup> Respondent approved the reviewed Human Resources Policies and Procedure Manual, December, 2020(herein "The Human Resource Manual") (AMA-5), to wit, the Terms of contract for management staff were reviewed, in that, the Chief Executive officer would serve for a term of Five(5) years subject to renewal, not exceeding two terms once, upon satisfactory performance as evaluated by the Board of Directors.



7. Additionally, a New Memorandum and Articles of Association of KACWASCO (AMA-4) (herein” Amended Article of Association”) was lodged with the Company Registration office effecting the said changes at Page 36, Clause w.
8. That the Petitioner filed Petition No. E004 of 2022 at Bungoma and the Court’s Judgment was delivered on 16<sup>th</sup> February, 2023(AMA-2). The Court directed that the petitioner’s suspension be lifted and the Petitioner resumes his duties as a CEO of KACWASCO and his withheld salaries from February 2022 amounting to Kshs. 4,96,714.20, less the statutory deductions, be paid to the Petitioner. The Petitioner argued that the respondents had failed to comply with the said judgement denying the Petitioner the fruit of the lawful judgement to his detriment.
9. That by a letter dated 22<sup>nd</sup> March 2023(AMA-3) addressed to the 1<sup>st</sup> Respondent, the Petitioner sought guidance on the review of the terms of contract of employment for management staff pursuant to Clause B.4.3(9-1-0) on Pages 32 and 33 of the Human Resources Manual(AMA-5) and Clause w on page 36 of the amended Articles of Association (AMA-4). The Petitioner stated that the said letter was never responded to.
10. The Petitioner alleged that to his surprise on 30<sup>th</sup> March 2023, the Chairman of the 2<sup>nd</sup> Respondent issued a Notice to all Staff(AMA-6) stating that, following a Board of Directors’ meeting held on 22<sup>nd</sup> March 2023, the Board had resolved to engage the interested party herein as the acting Chief Executive officer in place of the Petitioner, whose term was ending on 30<sup>th</sup> April 2023 and the Petitioner would be proceeding on his terminal leave.
11. The Petitioner was sent on compulsory terminal leave on vide letter of 30<sup>th</sup> March, 2023 effective 1<sup>st</sup> April 2023(AMA-7).
12. The Petitioner maintained that his employment contract is to expire on 30<sup>th</sup> April 2025 and the decision to send him on terminal leave was in breach of the Human Resource Manual; as it was a leave he had not applied for; the minutes arriving at the decision had not been supplied to him, and the decision had been made before the Respondents complied with the decree in Petition No. E004 of 2022.
13. The Petitioner argued that the Interested Party holds no position in KACWASCO nor is he part of the Company and thus cannot be appointed in an acting capacity as a Chief Executive Officer of KACWASCO and his appointment is against *the Constitution* and the standards governing the recruitment of public Officers on fair competition and merit.
14. The Petitioner alleged that the 1<sup>st</sup> Respondent’s decision to ignore and or fail to respond to his letter of 22<sup>nd</sup> March 2023 was unlawful as issues raised therein having not been addressed were to the Petitioner’s detriment.
15. The Petitioner argued that under the Approved Human Resource Manual and the Amended Articles of Association his employment contract’s term was extended from three(3) years to the Approved Five (5) Years for scale 1 and 2 renewable on performance; and it is in the interests of justice that the decision in the letter dated 30<sup>th</sup> March 2023, suspending him be stayed and suspended as the same is null and void and the Respondents be restrained from relying on the minutes/sitting of 22<sup>nd</sup> March 2023.
16. The Petitioner indicated that his suspension amounted to unlawful administrative action pursuant to the *Fair Administrative Action Act*, No. 4 of 2015 and Article 47 of *the Constitution*, with the Respondents having failed to respond to his letter of 22<sup>nd</sup> March 2023(AMA-3).



17. That Article 236 (b) of *the Constitution* protects Public officers from being suspended /removed from office subject to any disciplinary process without due process, which due process the respondents argues, he was not subjected to before his suspension, which contravened *the Constitution*.
18. The Petitioner pointed out that his suspension was null and void by contravening Articles 1, 10, 19,20,21,22,23(3)(a)(b)(c), 27(2) , 28, 41, 47(10 , 50, 165,236(a)(b), 258(1) of *the Constitution* of Kenya, and the advertisement by the Respondents of the position of the CEO of KACWASCO on 14<sup>th</sup> April 2023(AMA-1’ – Copy of the Advert in daily Nation) while the Petitioner was still in employment was unlawful and the petitioner is entitled to compensation for loss of privileges and other benefits for the remainder of the period in his contract.
19. The Petitioner argued that the Respondents having renewed the Contract terms of other employees/ heads of Departments with whom they had commenced their contracts at the same time, the Petitioner was discriminated against by the Respondents in violation of Section 5(3) of the *Employment Act*, which frowns upon discrimination of workers at work place. The Petitioner singled out one Christabell Ashiono, the Principal Legal Officer and Company Secretary, whose contract was renewed vide the Letter dated 21<sup>st</sup> May 2023(AMA-2’).
20. The Petitioner maintained that the Respondents’ actions were procedurally irregular and unfair having failed to respond to his letter requesting clarification, to which he has suffered violation, loss and damages and seeks protection from this court. The prayers are as outlined in paragraph 1 above.

#### **Respondents’ and interested party’s case in summary**

21. As per the replying affidavit of Boaz Odemu Bulimu who was the the 2<sup>nd</sup> Respondent’s Chairman, the Respondents and the Interested Party stated that the Petitioner’s Contract lapsed by effluxion of time and there is no contract that confers on the petitioner an employment term of 5 years allegedly expiring on 30<sup>th</sup> April 2025. (BOB-1).
22. That the petitioner was appointed in line with Section 13 of the Kakamega County *Water Act*, 2019(now Repealed) which provided that the Respondent was to serve for three years, which would be renewable upon satisfactory performance.
23. That the Repealed Act was replaced by the Kakamega County Water and Sanitation Services Act, 2021(BOB-3) under whose transitional provisions Part X, persons previously engaged under Corporations under the repealed Act would become staff of the respective company on the same or improved terms and conditions of service as may be specified by the Board of Directors in consultation with the County Executive Committee Member.
24. The Respondents and Interested Party faulted the petitioner’s reliance on the Human Resource Manual which came in force in December 2020, eight months after the Petitioner took up office as CEO; and the Amended Articles of Association which came into force on 30<sup>th</sup> April 2021 after Registration(BOB- 3A), and stated that the same do not operate retrospectively, unless the same expressly provided the incorporation of the previous contracts under these subsequent documents.
25. The Respondents argue that Human Resource Manuals are general documents that ought to be expressly incorporated into an employee’s contract and do not apply automatically. They argued that under the Human Resource Manual, Clause A:2, the Letter of Appointment takes precedence over the terms of the manual(BOB-4).
26. The Respondents and interested Party relied on Clause 18 of the Employment contract which provided that, ‘The contract of employment constituted a binding contract superseding all other



documents between the petitioner and the corporation” and the same would only be reviewed in the same manner and not through auxiliary documents.

27. The Respondents argued that in the law of contract no extrinsic material is admissible to vary a contract unless the parties intended to do so, in this case that was not demonstrated and no evidence has been supplied to show that the provisions of the Human Resource Manual pursuant to Section 66 of the Kakamega County Water and Sanitation Services Act, 2021 were expressly incorporated into the petitioner’s contract to extend his term as alleged.
28. The respondent urged that the Court pronounced itself on the term of the Petitioner’s contract as Three years and the same is settled(paragraph 57 of BOB-5).
29. The Respondents and Interested Party corrected the Petitioner’s assertion as to the term of office of a CEO not a being a mandatory term of Five years but limited to five years pursuant to Section B.4.3. (9) of the HR Manual (BOB-6) and asserted that the notice of 30<sup>th</sup> March 2023, sending the Petitioner on terminal leave before the end of Contract was lawful under Section E.19 of the said Manual for a smooth transition(BOB-7).
30. The Respondents and Interested Party urged that the Petitioner’s petition’s reliance on articles of *the Constitution* without any nexus to any violation is incompetent, misconceived and an abuse of the process of this court, as the petitioner’s claim is disguised as a constitutional petition contrary to the Principle of Constitutional Avoidance and ought to be dismissed.
31. That in compliance with the judgement in Bungoma ELRC Petition No. E004 of 2022(AMA-2), The Petitioner had resumed his duties until the point of the lawful terminal leave (BOB-9) and in respect of the monetary payment due to the petitioner, the respondent argued that the same was awaiting a ruling on an application for review before the Respondents could comply.
32. The Respondents stated that the Petitioner’s contract term having expired, he has no hand in the operation and appointments of KACWASCO and for the aforementioned reasons the Application and petition ought to be dismissed with costs.

## **Determination**

### **Issues for determination.**

33. The Petitioner addressed the merit of his Petition without outlining the specific issues for determination.
34. The Respondents and the Interested Party identified the following issues:-
  - a. Whether the petition meets the threshold of a constitutional petition.
  - b. Whether the Petitioner’s Contract was varied.
  - c. Whether the remedies sought by the Petitioner are available to him
  - d. Whether the doctrine of constitutional avoidance is applicable in this case
  - e. Whether the Petitioner was entitled to remedies sought.
35. The court having perused the pleadings by the parties and their respective submissions was of the considered opinion that the issues placed before the court by the parties for the determination of the petition were as follows:-
  - a. Whether the Petition meets the threshold of a constitutional Petition.



- b. Whether the doctrine of constitutional avoidance is applicable in this case
- c. Whether the petitioner's Contract was varied.
- d. Whether the Petitioner was entitled to remedies sought.

**Issue a. Whether the Petition meets the threshold of a constitutional Petition**

- 36. The Respondents and the interested party submitted that the Petitioner's Petition cited Articles 1, 10, 19,20,21,22,23(3)(a)(b)(c), 27(2) , 28, 41, 47(10) , 50, 165,236(a)(b), 258(1) of *the Constitution* of Kenya, without setting out the particulars of how the articles were contravened and thus does not meet the pre-requisites for a proper constitutional Petition under Rule 10(2)(d) of *the Constitution* of Kenya(Protection of Rights and Fundamental Freedoms)Practice and Procedure and as such it is fatally defective.
- 37. The Respondents and Interested party submitted that the Petitioner's petition failed the test of a constitutional petition and relied on the authority in Anarita Karimi Njeru v Attorney General [1979] eKLR where it was stated; "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."
- 38. The Respondents relied on various decisions affirming the Anarita Karimi Njeru case (Supra) namely David Mathu Kimingi V SMEC International PTY Limited 92021) eKLR, David Gathu Thuo V Attorney General & Another(2021)eKLR and further the decision by Hon Justice John Mativo in Kenya Pharmaceutical Association & Another v Nairobi City County and 46 other County Governments & Another (2017) eKLR.
- 39. The Petitioner on his part argued that the 1<sup>st</sup> Respondent's failure to respond to his request for clarification on his term of employment and the subsequent suspension were contrary to the provisions of Fair Administrative Action, No, 4 of 2015; Article 47 of *the Constitution* and under Article 236(b) under which due process is required to be followed before a public officer is removed from office, which was not complied with.

**Decision**

- 40. It is a trite principle of constitutional litigation that where a party seeks reliefs through a constitutional Petition on the basis of an alleged violation of *the constitution*, constitutional rights and fundamental freedoms, he or she must plead with a reasonable degree of precision; show the constitutional or fundamental freedoms violated, the manner of violation, the constitutional provision in question or violated and the jurisdictional basis for the litigation. This is the threshold that was established in the Anarita Karimi Njeru v Attorney General [1979] eKLR case where the court held:
 

"Where a person is seeking redress from the High Court on a matter which involves a reference to *the constitution*, it is important 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."
- 41. This same tenet was echoed by the Supreme Court in the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR, thus:"..... although Article 22 [1] of *the Constitution* gives every person the right to initiate proceedings claiming that a



fundamental right[s] has been violated, denied or infringed a party invoking that Article has to show the rights said to be infringed as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru -vs- Republic [1979] eKLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have contravened and the manifestation of the contravention or infringement.”

42. The court will turn to consider the Petition and determine whether it meets the constitutional threshold in the Anarita Karimi case(supra).
43. In the Petition, the Petitioner has put forth Articles 1,2,3 10(2), 19(1), 20(1), 21(1), 22, 23(1) 47(1), 165, 236(a)(b), 258(1) of the provisions of *the Constitution* as the alleged foundation for his grievance.
44. The court having analysed the Petition, all that the Petitioner has done elaborately under his Petition Part C titled “Violation of *the Constitution* by the Respondents” is setting out what these constitutional provisions under Articles 1,2,3 10(2), 19(1),20(1),21(1),22,23(1), 165, 236(a)(b), and 258(1) stipulate and in fact picked almost word by word from *the constitution*.
45. Having looked at the replication of the Constitutional Articles from the petition, there is no doubt, this is not what is meant by pleading with a reasonable degree of precision. Mere general statements as outlined above here do not help the Petition meet the legal threshold of the constitutional petition.
46. The court finds that Articles 20, 21, 22,23 and 258 are about the access to the constitutional court.
47. However, the petitioner outlined that the failure to be accorded an opportunity to respond to the allegations allegedly contained in the letter that recommended his suspension violated his rights to fair administrative action and was unfair as per Section 45 of the *Employment Act* and under Article 47. He argued that under Article 236(b) his right to due process in disciplinary proceedings was violated as he was suspended in the absence of any due process which is required for public officers.
48. The court disagrees with the Respondents and the Interested party assertion that they cannot understand the facts complained of and the provisions of the law upon which the petitioner’s cause of action was anchored. Consequently, the court rejects this ground.
49. This court having analysed the Petition as set out by the Petitioner comes to one conclusion that the petition is sufficient in content on how the fundamental rights and freedoms have been violated or are threatened to be violated as they relate to the Petitioner, and finds that the Petitioner met the threshold under Anarita Karimi case.

#### **Issue b. Whether the doctrine of constitutional avoidance is applicable in this case**

50. I now turn to discuss the principle of constitutional avoidance, how it relates to, and its import on the Petition herein.
51. This issue was raised to challenge the validity of the petition by the Respondents and interested Party in their replying affidavit to the Petition. The Petitioner did not address the issue in its supplementary Affidavit or its submissions.

#### **The Respondents’ & Interested Party’s submissions**

52. The Respondents and Interested party in their replying affidavit submit that the Petitioner’s petition was a regular claim disguised as a constitutional petition and the same was contrary to the letter and spirit of the principle of Constitutional avoidance.



53. The Respondents and interested Party relied on the decision of Hon. Justice D.Ohungo In Kakamega Environment And Land Court Petition No. E003 Of 2021 – Kenneth Shitsugane Olembo Vs The County Government Of Kakamega & Another where the Court held that:-

“The Law constitutional matters is that where there exists ample statutory options for redress must be followed and the Constitutional court will decline to entertain the dispute. This is what is called the Principle of Constitutional avoidance . It frowns upon the practice of bringing ordinary disputes to the constitutional court. The Court observed as follows in Communications Commission of Kenya v Royal media services and 5 others (2014) e KLR: :-‘ [256]. The appellants in this case are seeking to invoke the principle of avoidance also known as the constitutional avoidance. The principle of avoidance entails that a court will not determine a constitutional issue when a matter may be properly decided on another basis.” In South Africa, in S v Mhlungu 1995 (3)SA 867(CC) the constitutional court Kentridge AJ. Articulated the principle of avoidance in his minority Judgement as follows [at paragraph 59];:- ‘ I would lay it down a general principle that where it is possible to decide any case , civil of criminal, without reaching a constitutional issue , that course which should be followed.”

54. The Respondents and interested party submit that the doctrine of constitutional avoidance was applicable in the instant case and argued that since the present suit does not meet the threshold of a constitutional petition , it is fatally defective and ripe for striking out with costs.

#### **Decision on the issue of constitutional avoidance**

55. The Petitioner seeks reliefs outlined in paragraph (1)above. The court finds that whereas most of the Declarations sought by the petitioner cite constitutional violations and seek relief under Article 23 of *the constitution*, the final orders sought are for compensation for unfair and unlawful termination remedies under Section 49 of the Employment Act.

56. The Court upholds its finding in ELRC Petition No. E012 of 2022; Dr. Beatrice Awimbo Sabana versus the County Government of Kakamega County & 2 Others, (delivered on 7<sup>th</sup> July 2023), where the Court held that:-

“.....The court of Appeal in County Government of Garissa & another v Idris Aden Mukhtar & 2 others (2020)eKLR the court of appeal upheld the court’s jurisdiction to grant orders in the nature of remedies under Article 23 of *the Constitution* and stated that the doctrine of constitutional avoidance was inapplicable. This would run contrary to its own earlier decision in Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another (2016)e KLR where the court observed:- ‘ In employment matters, such as was the case here, the contract of employment should have been the entry point. The terms and conditions of employment in the contract, govern the employment relationship, except to the extent that the terms are contrary to the law; or have been superseded by statute. Certainly invoking the constitutional route in the circumstances of this case was misguided. *The Constitution* should not be turned into a thoroughfare for resolution of every kind of common grievance.”

39. Due to the conflicting decisions of the court of appeal on this issue the court upholds the recent decision in County Government of Garissa & another v



Idris Aden Mukhtar & 2 others (2020)e KLR to find that it has jurisdiction to hear and determine the petition.”

57. I uphold my above decision in ELRC Petition No. E012 of 2022; Dr. Beatrice Awimbo Sabana versus the County Government of Kakamega County & 2 Others, (delivered on 7<sup>th</sup> July 2023) to find the remedies sought could be granted under *the constitution* petition guided by the Court of Appeal decision in County Government of Garissa & another v Idris Aden Mukhtar & 2 others (2020)e KLR and decline to strike out the petition.

**Issue c. Whether the Petitioner’s Contract was varied.**

58. The Petitioner submits that as per Clause B.4.3 of the Human Resource Manual (AMA-5) his term of contract was reviewed from Three(3) years to a term of Five(5) years, subject to renewal, not exceeding two terms once, upon satisfactory performance as evaluated by the Board of Directors.
59. Further, the Petitioner argues that the registration of the Amended Articles of Association (AMA-4) cemented the said changes to his terms of employment at Page 36, Clause w.
60. The Petitioner argues that, pursuant to the above revisions by a letter dated 22<sup>nd</sup> March 2023(AMA-3) addressed to the 1<sup>st</sup> Respondent, the Petitioner sought guidance on the review of the terms of his contract but the 1<sup>st</sup> respondent remained mum on the issue, only for the 2<sup>nd</sup> Respondent on the 30<sup>th</sup> March 2023 to issue a Notice to all Staff(AMA-6) informing them that following a Board meeting of 22<sup>nd</sup> March 2023, the interested party herein was engaged as the acting Chief Executive officer in place of the Petitioner whose term was allegedly ending on 30<sup>th</sup> April 2023 and the Petitioner. The petitioner was then issued with a notice to proceed on terminal leave on the 30<sup>th</sup> April 2023.
61. The Petitioner argues that his contract term is yet to lapse and he has the 4<sup>th</sup> and 5<sup>th</sup> years to serve on his contract and the decision by the 2<sup>nd</sup> respondent to relieve him of his duties is unfair and violated his right to fair administrative action, as he was not accorded any opportunity to deliberate on his alleged terminal leave, a reason for his alleged suspension given or taken through any disciplinary process for due process to establish any wrongdoing on his part.
62. The Petitioner cited discrimination in the renewal of his contract citing that the Respondents renewed the Contract terms of other employees/heads of Departments with whom he had commenced their contracts at the same time with, excluding his , which he cited violated of Section 5(3) of the *Employment Act*, which frowns upon discrimination of workers at workplace. The Petitioner singled out one Christabell Ashiono, the Principal Legal Officer and Company Secretary, whose contract was renewed vide the Letter dated 21<sup>st</sup> May 2023. (AMA-2) to buttress his discrimination assertion he relied on Francis Chamwor P.S.O Muken & 2 others V Speaker Trans Nzoia County Assembly & 3 others (2020) eKLR.
63. The Petitioner relied on various decisions to buttress his claim of unlawful termination from employment. He referred to Stephen Mbugua Chege V Nairobi City Water & Sewerage Company (2017) e KLR and quoted as follows:-

“What was the urgency, necessity and reason for such summary action? I find the decision thus tainted with illegality and fundamentally grounded on unfairness. It cannot stand the test of the law in the interim or in the end as held in the case of Agnes Ongadi versus Kenya Electricity Transmission Company Limited [2016] eKLR. Where a decision taken is shrouded with illegality, to place the same and await full hearing would not change the same



as ultimately the illegality is apparent and cannot be sanctioned. The purported termination of employment being a summary dismissal without basis is invalid.”

64. Other decisions relied by the Petitioner on were Kenya Medical Research Institute V Mukhwana(2019)eKLR; Galgalo Jarso Jillo V Agricultural Finance Corporation (2021)eKLR, David Kipchumba Kimosop V Kerio Valley Development Authority (2022)eKLR; Nicholas Muasya Kyula V Farmchem Limited ICN; MTM V KIE Limited & Another (2020)eKLR; and Raphael Munyua Ndung’u v County Government of Lamu & Another (2021) eKLR.
65. The import from the authorities cited by the Petitioner is that the Respondents failed to accord the Petitioner an opportunity to be heard before his suspension from employment, in flagrant breach of his right to fair administrative action, as no notice whatsoever was issued to the Petitioner on his intended suspension from employment when his contract term was yet to expire in 30<sup>th</sup> April 2025.

## **Response**

66. The Respondents and the Interested Party stated that the Petitioner’s Contract lapsed by effluxion of time.
67. The Respondents and interested party faulted the petitioner’s reliance on the Human Resource Manual which came in force in December 2020, eight months after the Petitioner took up office as CEO; and the Amended Articles of Association which came into force on 30<sup>th</sup> April 2021 after Registration(BOB- 3A), and stated that the same do not operate retrospectively, unless the same expressly provided for their incorporation in the Petitioner’s contract. To this end, The Respondents relied on the decisions in Mbarak Abdulqadir Abdalla V County Government OF Lamu & County Public Service Board, Lamu County(2022)Eklr; and James Ang’awa Atanda & 10 others v Judicial Service Commission [2017] eKLR.
68. The respondents and Interested party argued that a variation of an employment Contract must be in writing as espoused in Section 10(5) of the Employment Act and for a variation to take effect on account of any extrinsic documents, the parties must have intended so.
69. The Respondents and the Interested party further argued that the petitioner’s Employment Contract as outlined in Clause 18 was a binding employment contract with the Corporation.
70. The Respondents and interested party argued that the amended Human Resource Manual and Articles of Association did not amend the contract of the Petitioner and their effect would only be subject to a new contract entered into by the Petitioner and the Respondents. They relied on the decision of Justice Byram Ongaya in Commission for Human Rights and Justice V Michelle Bibi Fondo & 2 Others eKLR.
71. The respondents and interested party argued that the renewal of a fixed-term contract is based on the discretion of an employer and an employee cannot have a legitimate expectation thereof that their contract will be renewed. To buttress their assertion, they relied on the decision in Nairobi Civil Appeal No. 81 Of 2018; Transparency International -Kenya Vs Teresa Carlo Omondi.

## **Decision**

72. Justice Radido in James Ang’awa Atanda & 10 others v Judicial Service Commission [2017] eKLR observed that:-

“ The common law



34. A long chain of authorities on the common law suggest that for a variation of an employment contract to be lawful, there should be mutual agreement between the employer and the employee (or their representatives where there is organised labour).
35. The authorities also envisage that an employee's consent to the variation may be express or implied and can be inferred from conduct such as by remaining at work after revised terms have been imposed (see *Harlow v Artemis Ltd* (2008) IRLR 629; *Wandsworth B.C. v D'Silva* (1998) IRLR 193 and *Airlie v City of Edinburgh* (1996) IRLR 516).
36. The authorities further show that a unilateral variation of an employment contract without consent of the employee would amount to breach of contract or repudiation (*Rigby v Ferodo Ltd* (1987) IRLR 516, *Security and Facilities Division v Hayes* (2001) IRLR 81 and where the employee accepts the repudiation that would amount to constructive dismissal.
37. And as to the options available to the employee, the Employment Appeal Tribunal (UK) held in *Hogg v Dover College* (1990) ICR 39 that where an employer fundamentally varies a contract and the employee continues to serve, the employee may be taken to be serving a fresh contract and it is open to such an employee to bring an action for breach of contract in respect to the earlier contract while serving the new contract (see also *Alcan Extrusions v Yates & others* (1996) IRLR 327).

“Statutory law

38. The principal legal architectural framework for employment contracts in Kenya is the *Employment Act*, 2007. This Act has fundamentally shifted the parameters within which the employment relationship is based.
39. It has codified some of the common law principles and outlined new protective rights particularly to employees.
40. Although predating *the Constitution*, 2010, the declared purpose of the Act was to assert and define the fundamental rights and basic conditions of service of employees and therefore in a certain respect, it sets out the contours of the right to fair labour practices envisaged under Article 41 of *the Constitution*.
41. Part III of the *Employment Act*, 2007 has tried to provide for the essentials (essentialia) of an employment contract and of particular interest in the instant case are section 10(2) which provide NA written contract of service shall state—
  - (a) the name, age, permanent address and sex of the employee;
  - (b) the name of the employer;
  - (c) the job description of the employment;
  - (d) the date of commencement of the employment;
  - (e) the form and duration of the contract;



42. And section 10(5) which is to the effect that  
Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.
43. The *Employment Act*, 2007 appears to contemplate consultations between an employer and employee where the essentialia of an employment contract are being altered.
44. The essentialia of a contract in this respect would include duration of contract, job description, identity of the employer, place and hours of work and remuneration among others.” I uphold the decision to apply in the instant case as it reinstates the law on essentials of contract of employment and its variation both at common law and under the *Employment Act*.
73. At the first instance, the court wishes to address itself on the respondents’ assertion that this court already pronounced itself on the issue of the Petitioner’s Employment term in Petition No. E004 of 2022. The court wishes to state that the issue of the term of the Employment had not arisen previously vis -a -vis the stated amended documents(AMA-4 and AMA-5) and the court was not invited to address the said issue at that juncture.
74. The court agrees with the decision of Justice Radido in the James Angawa Case (Supra) that an employment Contract may only be amended in writing and in consultation with the employee in compliance with section 10(5) of the *Employment Act*.
75. The Petitioner alleges his contract was varied through supplementary documents which this court finds are of general application and were never addressed to the Petitioner in relation to his employment.
76. The petitioner’s letter of appointment(AMA-1) provided that:-  
“This offer and your acceptance thereof will constitute a binding employment contract between you and the Corporation. This Offer supersedes all other letters, correspondences, contracts or understanding hitherto entered with you and the corporation.”
77. A plain reading of the above excerpt from the Contract affirms that the petitioner’s contract was bound in the four corners of the said letter of Appointment and only a subsequent contract that expressly provided for change and takeover of these terms enunciated above could signify a change of contract terms. This was not the case.
78. Further, of significance to the case is the Kakamega County Water and Sanitation Services Act, 2021 transitional provisions in Part X Section 66, where persons previously engaged under the Corporations under the repealed Act would become staff of the respective company on the same or improved terms and conditions of service as may be specified by the Board of Directors in consultation with the County Executive Committee Member.

The Section is reproduced below:-

“ 66. Any person who at the commencement of this Act is a member of staff of Kakamega County Urban Water and Sanitation Corporation shall on commencement of this Act become a member of staff of the respective company on the same or improved terms and conditions of service as may be specified by the Board of Directors in consultation with the Executive committee member :



Provided that –

- (a) any such member of staff may retire on the basis of abolition of office in accordance with this Act;
- (b) any such member of staff may be deployed in the county public service with mutual consent of any such member and the County Government.”

79. The court holds that the Petitioner’s contract was never reviewed but he continued to serve on the same terms as previously engaged under his Letter of Appointment and no new contract has been produced in this court to show a change in the contract terms.
80. The Petitioner alleged discrimination in the renewal of contracts and alluded to the fact that his contract had been automatically renewed by the amended Human Resource Manual and the Articles of Association. The Court holds that the terms of renewal of contract for each employee are the prerogative of an employer and the petitioner who was an employee answerable to the Board of Directors could only seek for renewal terms from the 2<sup>nd</sup> Respondent.
81. This court found that the letter of the Petitioner addressed to the 1<sup>st</sup> Respondent fell short of procedural requirements, bearing in mind that under Clause aa of the Amended Articles of Association(AMA-5) as read with Section 66 on transitional Provisions of the Kakamega County Water and Sanitation 2021; the Authority to consider any issues relating to the appointment of the Petitioner was transferred to the 2<sup>nd</sup> Respondent’s company and the Petitioner ought to have addressed the said letter to the Board of Directors, which is responsible for consulting with the County Executive committee in deciding issues of contractual terms. The 1<sup>st</sup> respondent could not interfere in the employment of the Petitioner as it is stranger, as the holder of the office, he was only available for consultation before a decision is made by the 2<sup>nd</sup> Respondent. The employment contract expressly stated that the letter of appointment was between the Petitioner and the 2<sup>nd</sup> Respondent’s Company and only the 2<sup>nd</sup> respondent could respond to the issue on the renewal or alleged variation to the employment terms of the petitioner.
82. Needless to say, the 2<sup>nd</sup> Respondent was copied in the letter addressed to the 1<sup>st</sup> Respondent and on the said day, the 2<sup>nd</sup> Respondent communicated its decision on the engagement of an Acting CEO in place of the Petitioner. No delay can be seen in communicating to the petitioner on the issue of his clarification.
83. The court finds that the petitioner’s contract term was never varied and the term of contract remained three(3) years, subject to renewal on performance. The court upholds the decision of the Court of Appeal in Nairobi Civil Appeal No. 81 Of 2018; Transparency International -Kenya Vs Teresa Carlo Omondi that:-“ ...indeed, the doctrine of legitimate expectation does not arise in the renewal of a fixed contract and its non-renewal cannot constitute unfair termination or dismissal having noted that the contract came to an end at the appointed time, we are of the view that any reliefs sought by the Respondents on basis of her assertion that her employment was unfairly terminate was automatically not available to her.....”
84. The Petitioner’s contract having come to an end by effluxion of time, the 2<sup>nd</sup> Respondent issued the petitioner with a terminal leave of one month before the expiry date for successive procedures in the 2<sup>nd</sup> Respondent’s company, the claim for salary for the 4<sup>th</sup> and 5<sup>th</sup> years and the prayer for a declaration for the automatic renewal after the five years cannot stand as the contract fixed term of three years terminated all benefits accruing to the Petitioner beyond the said period.



85. The Petitioner's claim for suspension cannot stand as the term for his employment has lapsed and the terminal leave did not amount to suspension to require the Respondents to have provided the petitioner with a notice before suspension and / or any disciplinary proceedings.
86. The court holds that the letter to the Petitioner sending him on Terminal leave was a clear communication that the employment Contract was not to be renewed.
87. The allegations of discrimination in renewal fell short of the requirements of an employer to exercise its discretionary power. The court cannot interfere with the internal working of the 2<sup>nd</sup> respondent in the exercise of its mandate to run the company in appointing its employees. The Petitioner pointed to this court to an advert meant for the appointment of a new Chief Executive Officer. The engagement of the Interested party is on an acting Capacity pending the appointment of a new CEO after a competitive process. The court can therefore not interfere in the reorganization procedures of the 2<sup>nd</sup> Respondent's Company.
88. To that end, the court holds that the Petitioner's Contract of employment remained unchanged as per the Letter of appointment of 23<sup>rd</sup> March 2020 and it was for a term of three years.

**Issue d. Whether the Petitioner was entitled to remedies sought.**

89. The term of employment of the petitioner ended by effluxion of time and having held that the claim for unlawful suspension could not have arisen when the petitioner was sent on terminal leave after the end of his contract, the court noted all other orders sought were under the *Employment Act* being the claims for full salary for years 4 and 5; General Damages for unlawful suspension and save for uncommuted terminal benefits do not accrue to the Petitioner after the effluxion of his term and claims for conservatory orders to interfere with the working of the 2<sup>nd</sup> respondent's Company do not fall on this court unless an illegality has been manifested and presented before this court.
90. The Court already pronounced itself in Bungoma ELRC Petition No. E004 of 2022 and the fora for the parties to uphold their rights arising therefrom is available in law and this court cannot usurp it.
91. The court holds that the prayer for uncommuted terminal dues with respect to end of contract was premature. The petitioner approached the court while still on terminal leave.

**Conclusion and disposition**

92. In the upshot the court holds that the term of employment as CEO of KACWASCO of the petitioner expired on 30<sup>th</sup> April 2023 by effluxion of time and the claims for unfair and unlawful suspension and discrimination had no basis.

**Conclusion**

93. In the upshot, the Notice of Motion and the Petition both dated 14<sup>th</sup> April 2023 are held to be without merit and are dismissed in their entirety.
94. The parties have had protracted employer employee relations for some time. I exercise my judicial discretion in this case on costs and hereby order each party to bear its own costs in this petition further taking into account the fact that the respondents were represented by the office of the County Attorney and do not pay fees in court.
95. It is so ordered



**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 27<sup>TH</sup> DAY OF  
JULY 2023**

**JEMIMAH KELI**

**JUDGE**

**In the presence of**

For Petitioner:- Somba Advocate h/b Lakicha Advocate

For Respondents/interested party:- Wambuko Advocate for the Kakamega County Attorney, Ms. Mmbaka

