



**Oindo v National Land Commission (Employment and Labour Relations Petition  
E137 of 2022) [2023] KEELRC 2486 (KLR) (11 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2486 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E137 OF 2022  
NJ ABUODHA, J  
OCTOBER 11, 2023**

**BETWEEN**

**JOASH MOGAMBI OINDO ..... PETITIONER**

**AND**

**NATIONAL LAND COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. The petitioner through a petition dated July 29, 2022 alleged that he was an employee of the respondent but was on suspension. He was engaged as Deputy Director-Valuation on permanent and pensionable basis.
2. On or about April 25, 2019 the *Ethics and Anti-Corruption*(EACC) wrote to the respondent informing it of the charges facing the petitioner and in line with section 62(1) of EACC Act informed the respondent to suspend the petitioner on half salary awaiting the outcome of Milimani Anti-Corruption Case 9 of 2019: R vs Prof. Swazuri A. Muhammad & Others.
3. On May 2, 2019the respondent suspended the petitioner on half salary pending the outcome of the said criminal case.
4. On 25<sup>th</sup> July, 2022 the petitioner through his personal email received a Notice to show cause dated 17<sup>th</sup> February, 2022 informing him to show cause why disciplinary action should not be taken against him in relation to the criminal charges herein.
5. The petitioner raised several breaches of legal and constitutional safeguards including but not limited to article 41 on fair labour practices, article 47 on fair administrative action, article 50 on the right to be heard and section 62 of the Anticorruption and Economic Crimes Act on suspension on half pay.
6. The petitioner alleged that the respondent could not purport to open a parallel inquiry on issues that were pending in the Anti –corruption Court as they were largely sub-judice and that the respondent’s



- code of conduct could not supersede and/or contradict section 62 of the EACC Act, if the two contradict then the Act would supersede under the doctrine of ‘lex specialis’.
7. The petitioner alleged that as part of bail terms in the criminal case he was barred from interacting with witnesses who were staff at the commission or to visit the commission’s offices hence it would be practically impossible for the petitioner to respond to and where necessary attend a disciplinary hearing at the respondent’s premises and that the Notice to show cause is dated February 2022 was sent and received by the petitioner on 26<sup>th</sup> July, 2022.
  8. The petitioner prayed for an order of certiorari to quash the Notice to show cause dated 17<sup>th</sup> February, 2022 and an order of prohibition prohibiting the respondent from taking any disciplinary action in relation to matters raised in the notice to show cause dated 17<sup>th</sup> February, 2022 or any other issue in relation to the criminal case in Milimani.
  9. The respondent responded to the petition and the motion through its Replying Affidavit sworn on 23<sup>rd</sup> March, 2023 in which it alleged that its officers were guided by the Commission’s code of conduct and NLC/HR Manual clause which were brought to the knowledge of each officer joining the Commission.
  10. The respondent further averred that the petitioner was facing criminal charges in a court of law following his involvement in economic crime activities and was arraigned in court for the same charges.
  11. The respondent further stated that it initiated administrative action against the petitioner in line with the Commission’s code of conduct and NLC/HR Manual Clause 10.29.1, 10.29.2 & 10.29.3 which provided that the commission shall have discretion to finalize such cases administratively separate from the court process.
  12. The respondent averred that section 10.23.2 of the commission’s code of conduct and NLC/HR Manual clause duly provides that if any criminal proceedings are instituted against an officer or where an officer has been acquitted of a criminal charge in a court of law the CEO shall not be prevented from dismissing him or otherwise punishing him on any other charge arising out of his conduct in the matter.
  13. That the respondent informed the petitioner of the irregularities that bordered on gross misconduct under Commission’s code of conduct clause 10.21.1(x), (xx) and (xxvii) and in view of contemplating the petitioner’s dismissal the respondent issued the petitioner with a show cause letter dated 17<sup>th</sup> February, 2022 where he was called to show cause why he should not be dismissed on account of the aforesaid irregularities.
  14. It was the respondent’s case that the ongoing procedures, that is the criminal proceedings and disciplinary action were independent and could occur concurrently and there was nothing that prevented both the court and the commission from hearing and determining the matter before them concurrently.
  15. The court directed on 25<sup>th</sup> October, 2022 that the matter be fixed for hearing of the main suit since the prayers in the motion were the same as in the petition and the parties agreed to dispose this Petition by written submissions.

### **Determination**

16. The Court has reviewed and considered the pleadings, testimonies and submissions by both counsel in support and opposition to the petition; the Court has further considered authorities relied on by Counsel and is of the opinion that there is only one main issue for determination, which is I have Aa.



- aa.whether the Court should quash the Notice to Show Cause dated 17<sup>th</sup> February, 2022 and prohibit the intended disciplinary action against the petitioner.
17. It is noted that the petitioner did not raise any issue with his Suspension on half pay pending the determination of the Anti-corruption case.
  18. In this case, the respondent suspended the petitioner from duty on 2<sup>nd</sup> May, 2019 on allegation of involvement in economic crime activities and he was charged in Milimani Anti-Corruption Case 9 of 2019:R vs Prof. Swazuri A. Muhammad & Others.
  19. The respondent's Code of conduct clause 10.29.1 and 10.29.2 provides for the suspension which should not exceed three months as investigations should have been completed while section 62 of the EACC Act provides for the said suspension of public officer/state officer who is charged with corruption or economic crime to be suspended at half pay until conclusion of the case.
  20. The Claimant raised the issue of the show cause letter being dated 17<sup>th</sup> February, 2022 but received to his personal email on 26<sup>th</sup> July, 2022 and the same not having been proved and either way its effect was not very crucial at this stage because what mattered was that he received it and sought to quash the same together with the intended disciplinary proceedings.
  21. The Court notes that the criminal case has not yet concluded and the respondent under Clause 10.29.3 was mandated to finalize such cases administratively, separate from the court process.
  22. Whereas the petitioner was of the view that the disciplinary process should not run concurrently with the court case and that the court case ought to have taken the first priority this was not the position. There was no nexus between the criminal case and the respondents' internal disciplinary mechanism since the standard of proof in disciplinary action was different from that of a court of law which was beyond reasonable doubt. In this regard the court is guided by *Attorney General & Another v Andrew Maina Gitbinji & Another* [2016] eKLR where the court of Appeal addressed itself on this distinction as follows:

“...Finally, I may refer to two decisions where a distinction between internal disciplinary proceedings of an employer and criminal proceedings was upheld for the reason that the internal disciplinary proceedings are anchored on the contract of employment and the burden of proof is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required.
  23. In *Nabason Muriithi Wambugu v Teachers' Service Commission* (2016)eKLR it was stated that the court needed to ask itself if the action by the employer was one that would have been taken by a reasonable employer acting on a fair understanding of the facts and appreciation of the law.
  24. In this case the petitioner's involvement in economic crime activities and the fact that he was charged in a court of law on the same charges made it reasonable for the respondent as an employer to initiate the disciplinary process.
  25. The respondent was also guided by its code of conduct which gave it discretion to finalize such cases administratively separate from the court case.
  26. The actions of the petitioner amounted to gross misconduct as per section 44(4) of the *Employment Act* together with the respondent's Code of conduct clause 10.21.1(x) (xx) and (xxvii). The embarrassed the respondent, amounted to negligence of duty and being dishonest. Any reasonable employer in the circumstances could have initiated disciplinary process.



27. It is also important to note that the show cause letter marked the start of the Disciplinary process and the respondent was mandated to give the show cause letter to the petitioner before the disciplinary hearing as required by the law. This was held in the case of *Vicky Kemunto Ocharo v Independent Policing Oversight Authority* [2018] eKLR where it was held as follows:-
- The formal disciplinary procedure starts with a “show-cause letter”. The employee will be informed in writing by the supervisor of the nature of the complaint allegation. The employee will be required to submit his response within twenty one (21) days
28. The petitioner was suspended and put on half pay as per the code of conduct and section 62 of the *EACC Act* so even if the suspension had taken quite some time, it was imperative that the court did not interfere with the respondent’s internal disciplinary processes. The petitioner at the disciplinary would get an opportunity to be heard and state his case before the respondent makes its decision to terminate his service or not.
29. The court is however concerned over indefinite suspensions but in this particular case suspension was statutory and was expressed to abide the outcome of the criminal prosecution.
30. To this extent the court is satisfied that the respondent followed the law in initiating the disciplinary process by issuing the show cause letter dated 17<sup>th</sup> February, 2022 and will not interfere. In conclusion the petitioner’s Petition is found without merit and is hereby dismissed with cost.
31. It is so ordered

**DATED AT NAIROBI THIS 11<sup>TH</sup> DAY OF OCTOBER, 2023 DELIVERED VIRTUALLY THIS 11<sup>TH</sup> DAY OF OCTOBER, 2023**

**ABUODHA JORUM NELSON**

**JUDGE**

