



Kulundu v Chief Executive Officer, Independent Electoral and Boundaries Commission & 9 others (Petition E170 of 2022) [2023] KEELRC 3069 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3069 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E170 OF 2022**

L NDOLO, J

NOVEMBER 30, 2023

IN THE MATTER OF ARTICLES 2, 19, 20(1-4), 21(1) & (3), 22(1) & (2)(B) & (C), 23(1) & (3), 25(A) & (C), 27, 28, 29(A), (C) & (D), 41(1) & (2)(B), 47, 48, 50(1),73,75,159,162(2)(A), 165(3)(B), 232, 258(1)&(2)(B)&(C) AND 259(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

AND

**IN THE MATTER OF CONTRAVENTION OF THE PETITIONER’S
FUNDAMENTAL RIGHTS AND FREEDOMS PROTECTED BY
ARTICLES 27,28,31,41,48 AND 50 OF THE CONSTITUTION**

AND

**IN THE MATTER OF CONTRAVENTION OF NATIONAL VALUES AND PRINCIPLES
OF GOVERNANCE UNDER ARTICLE 10, PRINCIPLES OF LEADERSHIP AND
INTEGRITY UNDER ARTICLE 73 AND VALUES AND PRINCIPLES OF PUBLIC
SERVICE UNDER ARTICLE 232 OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

RUTH KHATIEVI KULUNDU PETITIONER

AND

**CHIEF EXECUTIVE OFFICER, INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION 1ST RESPONDENT**

**INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION 2ND
RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

WAFULA CHEBUKATI 4TH RESPONDENT



BOYA MOLU	5 TH RESPONDENT
PROFESSOR ABDI YAKUB GULIYE	6 TH RESPONDENT
JULIANA CHERERA	7 TH RESPONDENT
FRANCIS WANDERI	8 TH RESPONDENT
JUSTUS NYANG'AYA	9 TH RESPONDENT
IRENE MASIT	10 TH RESPONDENT

JUDGMENT

Introduction

1. The Petitioner, Ruth Khatievi Kulundu, is the Deputy Commission Secretary-Operations, at the Independent Electoral and Boundaries Commission (IEBC), the 2nd Respondent herein.
2. Following her interdiction soon after the General Elections held on 7th August 2022, the Petitioner came to court by filing a Petition accompanied by a Notice of Motion under Certificate of Urgency, both dated 29th September 2022.
3. I considered the Notice of Motion at the interlocutory stage and by a ruling delivered on 26th January 2023, I issued the following interim orders:

The Petitioner's interdiction as communicated by the 1st Respondent's letter dated 19th September 2022 is suspended pending determination of the Petition;

- a) The disciplinary process commenced against the Petitioner on account of the matters contained in the letter of interdiction dated 19th September 2022 is stayed pending determination of the Petition.

4. What falls for determination at this stage is the main Petition.

The Petition

5. By her Petition dated 29th September 2022, the Petitioner seeks the following remedies:
 - a) declaration that the action of the 1st and 2nd Respondents to interdict the Petitioner was in excess of their powers and in violation of the human rights and fundamental freedoms of the Petitioner and an abuse of fair labour practices;
 - b) A declaration that the actions of the 4th, 5th, 6th, 7th, 8th, 9th and 10th Respondents resulting to interdiction of the Petitioner were in excess of their powers and a violation of the human rights and fundamental freedoms of the Petitioner and an abuse of fair labour practices;
 - c) An order of certiorari removing into this Court and quashing the decision of the 1st Respondent dated 19th September 2022 placing the Petitioner on interdiction, without justifiable reasons, contrary to fair labour practices; An order of mandamus compelling the Respondents to stop any investigation, harassment and/or intimidation of the Petitioner;
 - d) An order of mandamus directing the Respondents to unconditionally recall the Petitioner back to work;



- e) A declaration that the fundamental rights and freedoms of the Petitioner under Articles 27, 28, 31, 41, 47, 48 and 50 of *the Constitution* have been violated by the Respondents;
 - f) Compensation for violation of the Petitioner’s constitutional rights.
6. In setting out the particulars of alleged violation of her fundamental rights and freedoms under *the Constitution*, the Petitioner accuses the 1st Respondent of assuming a mandate that he did not have, by initiating disciplinary proceedings and interdicting the Petitioner without the approval of the majority of the Commissioners of the IEBC, in excess of his legal mandate.
 7. The Petitioner therefore pleads that to the extent that the 1st Respondent arrogated to himself a mandate he did not have, he acted in excess of his legal mandate and thereby breached the following provisions of *the Constitution* and the *Independent Electoral and Boundaries Commission Act*:
 - a. Article 24 of *the Constitution*, which provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law and only to the extent that the limitation is reasonable and justifiable and that the limitation does not derogate from the core or essential value of the right or fundamental freedom;
 - b. Article 25 which decrees that the right to a fair trial cannot be limited;
 - c. Article 50 on the right to have disputes decided in a fair and public hearing before a court or tribunal of competent jurisdiction;
 - d. Section 5 of the Second Schedule of the *Independent Electoral and Boundaries Commission Act*, which provides that the quorum for the conduct of business at a meeting of the Commission shall be at least half of the existing members of the Commission, provided that the quorum shall not be less than three members.
 8. The Petitioner further pleads that to the extent that the 1st Respondent failed to grant her full access to the minutes of the Commission’s meeting leading to the decision to interdict her, evidence of the alleged threats and intimidation of staff, the following provisions of *the Constitution* and *Access to Information Act* were contravened:
 - a. Article 35 of *the Constitution*, on the right of access to information required for the exercise or protection of any right or fundamental freedom;
 - b. Article 46 of *the Constitution*, which entitles every person access to information necessary to gain full benefit from goods and services;
 - c. Section 41(1) & (3) of the *Access to Information Act* which entitles every person access to information held by the State or any other person where that information is required for the exercise and protection of any right or fundamental freedom.
 9. The Petitioner asserts that the failure and denial by the 1st Respondent to provide her with the minutes of the 2nd Respondent’s meetings and reasons for the interdiction amounted to violation of the Petitioner’s rights to information and fair administrative action.
 10. It is the Petitioner’s case that the actions of the 2nd Respondent as perpetuated by the 1st Respondent are malicious, unfair and irregular and are unlawfully aimed at ensuring that the Petitioner remains out of office indefinitely without any legal basis, and to that extent the following provisions of *the Constitution* and the law have been violated:



- a. Article 21(1) of *the Constitution*, which directs every state organ to observe, respect, protect, promote and fulfill the fundamental freedoms in the Bill of Rights;
 - b. Article 24 of Constitution, which provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law and only to the extent that the limitation is reasonable and justifiable and that the limitation does not derogate from the core or essential value of the right or fundamental freedom;
 - c. Article 25 which decrees that the right to a fair trial cannot be limited;
 - d. Article 27 on the right to equal treatment of all persons, including the right to equal protection and equal benefits of the law;
 - e. Article 28 on the right to human dignity of all persons, including the right not to be subjected to inhumane treatment;
 - f. Article 47(1) of *the Constitution* and Section 4(1) of the *Fair Administrative Action Act* which guarantee the right to administrative action that is procedurally fair;
 - g. Article 50 on the right to have disputes decided in a fair and public hearing before a court or tribunal of competent jurisdiction;
 - h. Section 41 of the *Employment Act* on the right to a fair disciplinary process;
 - i. Section 43 of the *Employment Act* that requires an employer to establish a valid reason for termination of employment;
 - j. Sections 11 and 11A of the *Independent Electoral and Boundaries Commission Act*, which require the Commission and its Secretariat to effectively and harmoniously perform the functions of the Commission;
 - k. Paragraphs 5, 6 and 7 of the Second Schedule of the Independent and Boundaries Commission Act, which set the required quorum for decisions of the 2nd Respondent.
11. In her affidavit in support of the Petition, the Petitioner sets out her employment record with the 2nd Respondent, from her employment in November 2009 to her appointment as Deputy Commission Secretary-Operations, on 11th March 2022.
 12. The Petitioner asserts that she had successfully carried out her duties, ahead of the General Elections which took place on 9th August 2022.
 13. Regarding the issues giving rise to her interdiction which is the subject of this Petition, the Petitioner depones as follows:
 - a. That her woes escalated when the Ag. Director, Voter Registration and Electoral Operations, Moses Sunkuli, unreasonably and persistently breached the Commission’s protocol by reporting directly to the 1st and 4th Respondents, an act that was condoned by the Respondents;
 - b. That during the 2nd week of August 2022, while the Petitioner was conducting duties at the National Tallying Centre, the 4th Respondent re-assigned her to the peripheral role of Protocol and Dignitaries;
 - c. That nonetheless, the Petitioner went about executing her duties and while escalating concerns on the sanitary conditions for Returning Officers as observed at the Tallying Centre, she requested Moses Sunkuli and the Manager of Corporate Events, Tabitha Mutemi to find



a solution to those concerns. The Petitioner suggested that the lady Returning Officers be allowed to freshen up at any hospitality facility close to Bomas of Kenya but Sunkuli suggested a closer and more convenient facility within Bomas of Kenya;

- d. That unknown to the Petitioner, Sunkuli had informed the 4th Respondent that the Petitioner was intending to whisk away Returning Officers from the Tallying Centre, an allegation the Petitioner terms as malicious and erroneous. The Petitioner sought to clarify the position with the 4th Respondent but she was snubbed;
- e. That on 25th August 2022, the Petitioner received an invitation to attend a special plenary meeting of the 2nd Respondent, which meeting was called by four Commissioners, including the Vice-Chairperson, Juliana Cherera. According to the Petitioner, the invitation was also sent to all the Commissioners and the Commission Chief Executive Officer, Marjan Hussein Marjan;
- f. That the meeting took place on 26th August 2022 as scheduled, with the Petitioner, the 7th, 8th, 9th and 10th Respondents in attendance. The 1st Respondent and three Commissioners were absent;
- g. That the Petitioner took the minutes of the 279th plenary meeting but did not sign them as she was awaiting approval by the 1st Respondent. She states that her job description as Deputy Commission Secretary allows her to represent the 1st Respondent at various meetings that he is unable to attend and to assist him in taking plenary minutes;
- h. That following the meeting of 26th August 2022, the Petitioner received a notice to show cause why disciplinary action should not be taken against her. The notice accused the Petitioner of misconduct, with allegations that she had arranged for a Commission plenary meeting without authority or delegation by the 1st Respondent. The Petitioner was further accused of threatening and intimidating staff members;
- i. That the Petitioner responded to the show cause notice on 9th September 2022, denying all the allegations levelled against her. In her response, the Petitioner stated that the meeting, which she was accused of arranging, was in fact called by the 7th, 8th, 9th and 10th Respondents;
- j. That on 14th September 2022, the Petitioner was issued with another show cause notice, on allegations of breach of confidentiality, particulars being that she had circulated the contents of the letter dated 29th August 2022 on social media;
- k. That the Petitioner was required to respond to the second show cause notice within seven (7) days, contrary to Section 12.11.1 of the Human Resource and Administration Policies and Procedures Manual, 2020 which provides for a period of fourteen (14) days;
- l. That this notwithstanding, the Petitioner responded to this show cause notice on 20th September 2022, within the period afforded to her;
- m. That despite responding to both notices, the Petitioner's responses were not taken into account as she was issued with an interdiction letter dated 19th September 2022 pursuant to Section 12 of the IEBC Human Resource and Administration Policies and Procedures Manual, 2020;
- n. That due process of the law and internal regulations of the IEBC were not followed in the disciplinary proceedings against the Petitioner in that:



- i. The Commission Secretary/CEO, in excess of his mandate and without any evidence, issued an interdiction letter to the Petitioner, which power was vested in the Commission, to be exercised through its Disciplinary Committee as per Section 12.3.1 of the Human Resource and Administration Policies and Procedures Manual, 2020;
 - ii. The Commission Secretary/CEO, in excess of his mandate and without the approval of the majority of the IEBC Commissioners, issued an interdiction letter to the Petitioner;
 - iii. The Commission Secretary/CEO went against the Second Schedule to the IEBC Act, which provides for the conduct of the business and affairs of the Commission. The principle under this Schedule is that the Commissioners discharge the affairs of the Commission collectively provided there is a quorum, being at least half of the existing members of the Commission;
 - iv. The Petitioner was not afforded the stipulated and appropriate period to respond to the show cause notice as per Section 12.11.1(1) of the Human Resource and Administration Policies and Procedures Manual, 2020;
 - v. Upon receipt of the Petitioner's responses, the 1st Respondent did not refer the matter to the relevant Disciplinary Committee as per Section 12.11.1(4) of the Human Resource and Administration Policies and Procedures Manual, 2020. Instead, the 1st Respondent purported to interdict the Petitioner in his own capacity;
 - vi. The letter of interdiction was issued before the lapse of the time given to the Petitioner to respond to the show cause notice.
- o. That the Petitioner has suffered and continues to suffer intimidation, harassment, discrimination and victimisation;
 - p. That the Petitioner is at the verge of being illegally terminated by the 1st and 2nd Respondents on account of political vendetta and a desperate attempt by the Commission to find a scapegoat in light of the split that was witnessed during the elections. The Petitioner is being subjected to unfair procedures contrary to her fundamental rights and the provisions of the [Employment Act, 2007](#);
 - q. That the 1st Respondent has and continues to use his powers as the Commission Secretary to intimidate, dress down and make unlawful decisions, asserting that the Petitioner has acted in outright misconduct and is culpable of issuing threats and intimidating staff;
 - r. That the 1st Respondent has acted in excess of his powers by purporting to interdict the Petitioner, without the approval of a majority of the Commissioners, which actions are in excess of his legal mandate. Further, the 1st Respondent continues to act in a manner that completely flouts the provisions of the law on the rights of the Petitioner and continues to breach the Petitioner's right to fair labour practices;
 - s. That the Petitioner has been put through untold suffering, victimisation, witch-hunt and violation of her right to fair administrative action through a process that not only demonstrates lack of professionalism and bias on the part of the leadership of the Commission, but is also a breach of the constitutional provisions on leadership and integrity as well as violation of the [Public Officer Ethics Act](#) and the [Leadership and Integrity Act](#);



- t. That the disciplinary process initiated by the 1st Respondent against the Petitioner is marred with irregularities and is clearly stage-managed towards dismissal. This is evidenced by the 1st Respondent's disregard of the Petitioner's responses followed by the hurried interdiction;
 - u. That the Commission's policy is that a matter is referred to the Disciplinary Committee if the Commission Secretary is not satisfied;
 - v. That the impugned decision to interdict the Petitioner was utterly discriminative for the reason that the subject plenary meeting was called and attended by the 7th, 8th, 9th and 10th Respondents; none of these Commissioners has been condemned and none of them has denied instructing the Petitioner to attend the said meeting;
 - w. That the Petitioner wrote to the 1st and 2nd Respondents on 26th September 2022, requesting for minutes of the meeting that led to her interdiction, the record of the alleged threats and intimidation and any evidence in support of the allegations. The 1st and 2nd Respondents have ignored and/or refused to supply the information in violation of the Petitioner's right to access information;
 - x. That pursuant to the allegation that the Petitioner had violated the confidentiality clause by sharing information regarding her interdiction with the media, specifically the Standard Group, the Petitioner wrote to the said Media House requesting for disclosure as to whether the Petitioner had shared the information with the Media House;
 - y. That the Standard Group responded by letter dated 29th September 2022, stating that they had obtained the subject show cause letter from its sources who had pleaded confidentiality owing to the high stakes in the matter.
14. The Petitioner concludes by deponing that the allegations levelled against her are malicious, irregular and fatally defective. She terms the instant disciplinary process as a mere formality and a window dressing exercise, whose sole aim is to unlawfully and irregularly dismiss her from employment.

The 1st and 2nd Respondents' Response

- 15. In response to the Petition, the 1st and 2nd Respondents filed three replying affidavits all sworn on 9th October 2023.
- 16. The first affidavit was sworn by Moses Ledama Sunkuli, who describes himself as the Acting Director, Voter Registration and Electoral Operations at the IEBC.
- 17. Sunkuli depones that the Petitioner has not adduced any evidence to prove that he had in any way breached protocol. He states that on 12th August 2022, as he was concluding a meeting with a representative of Smartmatic, a company providing technical support to the 1st Respondent during the 2022 elections, the Petitioner stormed his office and started hurling insults and abuses that were offensive and demeaning.
- 18. Sunkuli claims that the Petitioner accused him of driving a wedge between her and the Chairman of the Commission, with the intention of perpetrating election offences in favour of one presidential candidate. He accuses the Petitioner of threatening and profiling him on the basis of his ethnic background, thus creating a toxic work environment. He states that he wrote to the 2nd Respondent expressing his grievances.
- 19. The second affidavit was sworn by Lorna Onyango who describes herself as the Director of Human Resource and Administration at the IEBC.



20. Onyango depones that Sunkuli had lodged a complaint against the Petitioner. She accuses the Petitioner of gross misconduct as defined in Section 12.10.1(xxiii) of the IEBC Human Resource and Administration Policies and Procedures Manual. She adds that the Petitioner's interdiction was justifiable within Section 12.11.1 of the Policies and Procedures Manual and that due process was followed.
21. Regarding the 279th plenary meeting, Onyango states that the Petitioner impersonated the CEO/ Commission Secretary, contrary to the Second Schedule of the IEBC Act.
22. Onyango also accuses the Petitioner of circulating the show cause letter dated 29th August 2022 on social media, in contravention of the principle of confidentiality, stipulated in the IEBC Human Resource Manual.
23. She supports the Petitioner's interdiction and asserts that the disciplinary process commenced against the Petitioner was lawful and fair.
24. According to Onyango, court action has been invoked prematurely since the Petitioner is yet to be invited to a hearing and no decision has been made against her.
25. She states that the Petition is meant to interfere with an internal disciplinary process established by the IEBC Human Resource and Administration Manual.
26. She avers the 1st and 2nd Respondents have neither breached the Petitioner's constitutional rights nor acted in excess of their powers. She adds that every step of the disciplinary process has been transparent and in accordance with the Constitution of Kenya, the Employment Act and the Human Resource and Administration Manual.
27. The third affidavit was sworn by the 1st Respondent, Marjan Hussein Marjan.
28. Marjan accuses the Petitioner of impersonating him and usurping his responsibilities as CEO/ Commission Secretary, by purporting to perform his duties at a meeting held on 26th August 2022, without his authority or delegation.
29. Marjan confirms having written a brief to the Chairman of IEBC vide memo dated 15th September 2022, informing him that the Petitioner's response to the show cause letters was not satisfactory and that further investigation was necessary.
30. Marjan contends that the prayers sought by the Petitioner in the Petition are meant to sweep under the rug all the allegations against the Petitioner, with the result that the Petitioner will be absolved without a fair hearing. According to him, this would interfere with the 2nd Respondent's human resource function prematurely.

Response by the 7th, 8th, 9th and 10th Respondents

31. The response by the 7th, 8th, 9th and 10th Respondents is contained in a replying affidavit sworn on 14th October 2022, by the 7th Respondent, Juliana Cherera, who at the material time, was the Vice-Chairperson of the IEBC.
32. Cherera depones that she is aware that during the General Elections held on 9th August 2022, the Chairperson of the Commission unilaterally assigned the Petitioner to protocol duties after assigning the Petitioner's role as the in-charge of election operations to one of the Petitioner's juniors.
33. Cherera further depones that following the filing of the Presidential Election Petition No. E005 of 2022 at the Supreme Court of Kenya, in which she and the 8th, 9th and 10th Respondents were named



as co-respondents, they wrote a memo dated 23rd August 2022 requesting the Chairperson of the Commission to avail a list of the Commission pre-qualified Advocates/ Law Firms to facilitate issuance of instructions but there was no response from the Chairperson.

34. Subsequently, the 7th, 8th, 9th and 10th Respondents asked for the convening of a special meeting of the Commission, through an internal memo dated 24th August 2022, pursuant to paragraph 3 of the Second Schedule of the *Independent Electoral and Boundaries Commission Act*, to deliberate on the Commission's position on the Presidential Election Petitions filed at the Supreme Court of Kenya.
35. According to Cherera, the silence from the Chairperson necessitated her together with the 8th, 9th and 10th Respondents to issue a notice on 25th August 2022 to the Chairperson, as well as to the 5th and 6th Respondents, convening a special meeting of the Commission on 26th August 2022 at 9.00 am, as the last day for filing of responses to the Presidential Election Petition was 27th August 2022.
36. The memo convening the meeting was also sent to the Petitioner and to the 1st Respondent, Marjan Hussein Marjan.
37. Cherera states that the Petitioner as the Deputy Commission Secretary, ordinarily took minutes of plenary meetings of the Commission.
38. The meeting of 26th August 2022, took place as scheduled but the 1st, 4th, 5th and 6th Respondents were absent. The Petitioner was asked to take the minutes of the meeting
39. Cherera asserts that at the meeting of 26th August 2022, the Petitioner performed her duties in accordance with her job description and as required of her position in the absence of the Commission Secretary, Marjan Hussein Marjan, whose absence amounted to insubordination and dereliction of duty.
40. On 25th August 2022 at 2300 hours, Cherera received a notice from Marjan Hussein Marjan indicating that a special meeting of the Commission would be held on 31st August 2022. Agenda 7 of the said meeting was listed as the 'Commission's position on the Presidential Election Petition filed at the Supreme Court on 22nd August 2022'. Cherera raises concern that this meeting was being convened after the deadline for filing of pleadings at the Supreme Court of Kenya.
41. Cherera depones that none of the allegations levelled against the Petitioner had ever been tabled before the Human Resource Committee or before a plenary meeting of the Commission.

The 3rd, 4th, 5th and 6th Respondents

42. Despite due notification, the 3rd, 4th, 5th and 6th Respondents chose not to participate in these proceedings.
43. The Court was informed that the 4th, 5th and 6th Respondents had since left the Commission. However, given the role they played in the Commission and being at the centre of the events leading to the subject matter of this Petition, I take the view that the Court would have benefited from their input.

Determination

44. According to the pleadings and supporting documents on record, the charges levelled against the Petitioner relate to her participation in a plenary meeting of the Commission held on 26th August 2022. In addition, there are allegations that the Petitioner had threatened and intimidated Commission staff.



45. In this regard, the Petitioner was issued with two show cause notices. The first one is dated 29th August 2022 and states thus:

“Dear Ms. Ruth,

RE: Notice To Show Cause

This is to convey the Commission’s displeasure over your incorrigible demeanour and outright misconduct in the past weeks.

The Commission has learnt that on 26th August 2022, you arranged for a Commission Plenary Meeting No. 279 without authority or delegation by the Commission Secretary/ CEO who by appointment shall be the “secretary at all meetings of the Commission” as stipulated by IEBC Act 2011, Second Schedule 9(1). Therefore, you impersonated the CEO and usurped his responsibilities as you purported to perform his duties without his authority or delegation. Moreover, Plenary Meeting No. 279 had already been held thus voiding the “other” meeting of 26th August 2022 where you were secretary, thus rendering it illegal.

Impersonation of the CEO and participating in illegal activities without the sanction of your Supervisor and Controlling Officer who is the Commission Secretary as indicated in your appointment letter clause 3 is insubordination and a serious breach of your employment contract.

The Commission has also received complaints against you for issuing threats and intimidation to staff in contravention of the Commission Regulations and Rules of Conduct. It is on record that on 12th August 2022, you allegedly attacked, insulted and threatened a Commission staff, Mr. Moses Sunkuli, without provocation thereby arousing in him a sense of fear and insecurity on his life.

It is a gross misconduct to use threats and intimidation or behave in a manner likely to cause a breach of peace as stipulated under the Commission Human Resource and Administration Policies and Procedures Manual, 2020, Section 12.20.1(xxiii). The Commission require[s] that all its employees “Carry out their duties in a manner that treats the public and the fellow employees with courtesy and respect,” section 11.7.1 of the manual.

The above allegations are very serious and constitute gross misconduct as stipulated under the EIBC HRA Manual, 2020, Section 12.10.1 and warrants very severe disciplinary action including dismissal from the service of the Commission if found culpable in accordance with section 12.13 of the manual.

The Commission is therefore contemplating taking appropriate disciplinary action against you. However, before this is done, you are accorded an opportunity to show cause why disciplinary action should not be taken against you.

Your response should be received by the undersigned within Fourteen (14) days from the date of this letter.

(Signed)

Marjan Hussein Marjan

Commission Secretary/CEO”



46. The second show cause notice is dated 14th September 2022 and states as follows:

“Notice to Show Cause-breach of Confidentiality

The show cause letter Ref. No. 2009000042 dated 29th August, 2022 addressed to you refers.

It is noted that the contents of the letter which was confidential and delivered to you personally have been circulating in social media as per the attached excerpts against the principle of confidentiality as stipulated under the Human Resource and Administration Policies and Procedures Manual, 2020 Section 12.10.1(xi) and states that unauthorized use of or disclosure of confidential information by an employee amounts to gross misconduct. Commission employees are required to “exercise confidentiality in dealing with the affairs of the Commission and ensure that no information is released to any person where the interest of the Commission could be prejudiced or harmed.”

The above provision is further reinforced by the *Public Officer Ethics Act*, 2003 which stipulates that a Public Officer should maintain confidentiality of the office, otherwise “A person who, without lawful excuse, divulges information acquired in the course of acting under this Act is guilty of an offence” Section 41. The letter under reference was addressed to you to respond accordingly and not to the media.

You are therefore required to explain within 7 days from the date of this letter circumstances under which contents of the confidential letter addressed personally to you were leaked to the social media.

(Signed)

Marjan Hussein Marjan

Commission Secretary/CEO ”

47. It would appear that the charge of breach of confidentiality was dropped in the course of time. This observation is borne from the fact that the interdiction letter dated 19th September 2022 makes no mention of this charge.

48. The interdiction letter of 19th September 2022 reads as follows:

“RE: Interdiction

Reference is made to the Notice to Show Cause dated 29th August, 2022 for disregard of the authority of the Commission Secretary, insubordination, and issuing threats and intimidation, incongruent with the Commission’s Code of Conduct.

Your written response vide letter dated 9th September, 2022 has been considered but was not satisfactory. Subsequently, owing to the gravity of the allegations levelled against you, you are, hereby, interdicted from exercise of duties of your office with immediate effect, pursuant to Section 12.11.1 of the IEBC Human Resource and Administration Policies and Procedures Manual, 2020.

During this period of interdiction, you shall be entitled to half basic salary, full house allowance and medical insurance, and shall report to the Commission Secretary/CEO every last Friday of the month.

You are also required to adequately hand over Commission property in your possession to the undersigned.



(Signed)

Marjan Hussein Marjan

Commission Secretary/CEO ”

49. From the foregoing, it is safe to conclude that the surviving charges against the Petitioner are alleged disregard of the authority of the Commission Secretary, insubordination, and threats and intimidation of Commission staff.
50. I am fully aware of the general principle that courts ought not to interfere with internal disciplinary proceedings at the workplace, save in exceptional cases where there is imminent injustice through an irregular process that is stage- managed to achieve an unlawful disciplinary action.
51. In the written submissions filed on behalf of the 1st and 2nd Respondents, reference was made to the decision in *Ann Wambui Kamuiru v Kenya Airways Limited* [2016] eKLR where it was held that:

“ ... courts on their part will not interfere with proper internal disciplinary processes unless the court is satisfied that the process is marred with irregularities or it is stage managed towards dismissal.”
52. The 1st and 2nd Respondents further relied on the decision in *Fredrick Saundu Amolo v Principal Namanga Secondary School & 2 others* [2014] eKLR where it was held that courts ought to allow internal disciplinary processes to run their full course, except in cases where grave injustice might result.
53. On her part, the Petitioner relied on the decision in *Mulwa Msanifu v Kenya Airways* [2013] eKLR where it was held that a court will intervene in an administrative disciplinary process if it is established that the procedure adopted offends due process or is in breach of the employer’s internal policy.
54. The Petitioner challenges the action taken against her on two fronts; first, that the allegations against her were no more than a witch-hunt and personal vendetta and second, that the 1st Respondent had no authority to take action against her, without the sanction of the Commissioners of the IEBC.
55. In the replying affidavit sworn on behalf of the 7th, 8th, 9th and 10th Respondents, Juliana Cherera gives a blow by blow account of the events leading to the meeting of 26th August 2022, which the Petitioner is alleged to have irregularly convened.
56. Cherera states that following the filing of the Presidential Election Petition No. E005 of 2022 at the Supreme Court of Kenya, in which she and the 8th, 9th and 10th Respondents were named as co-respondents, they wrote a memo dated 23rd August 2022 requesting the Chairperson of the Commission to avail a list of the Commission pre-qualified Advocates/ Law Firms to facilitate issuance of instructions but there was no response from the Chairperson.
57. According to Cherera, she together with the 8th, 9th and 10th Respondent’s called the meeting of 26th August 2022 and asked the Petitioner to attend and further instructed her to take the minutes.
58. Having received clear instructions from some of the Commissioners, to attend and take the minutes of the meeting of 26th August 2022, the Petitioner had no option but to obey.
59. Article 236 of *the Constitution* protects public officers, such as the Petitioner, from being disciplined for performing the functions of their office in accordance with *the Constitution* and the law.
60. This position was affirmed by the Court of Appeal in its decision in *Judicial Service Commission & another v Njora* (Civil Appeal 486 of 2019) [2021] KECA 366 (KLR) (7 May 2021) (Judgment).



61. The allegations of intimidation and threats to Commission staff arose from a complaint by the Acting Director, Voter Registration and Electoral Operations, Moses Ledama Sunkuli, who claims that the Petitioner stormed his office and threatened him. The Petitioner herself is said to have accused Sunkuli of driving a wedge between her and the Chairperson of the Commission.
62. The complaint by Sunkuli, which was not corroborated by an eye witness, must be seen within the context of a split among the Commissioners that played out in the public in the follow-up to the General Elections of 9th August 2022, with two factions infamously dubbed ‘the Chebukati 3’ and ‘the Cherera 4’ emerging.
63. Indeed, the split among the Commissioners and its impact on operations of the Commission was a major issue in the presidential election petition proceedings before the Supreme Court.
64. Regarding the procedure adopted in the impugned disciplinary process, the Petitioner accuses the 1st Respondent of usurping the power of the Commission. In her written submissions, she cites Section 12.3.1 of the IEBC Human Resource and Administration Policies and Procedures Manual, 2020 which provides:
 - 12.3.1 The power to exercise disciplinary control and removal of employees [are] is vested in the Commission. The Commission shall exercise disciplinary powers through its disciplinary committee.
65. The Petitioner further relies on paragraph 5 of the Second Schedule to the *Independent Electoral and Boundaries Commission Act* which provides that:
 5. The quorum for the conduct of business at a meeting of the Commission shall be at least half of the existing members of the Commission, provided that the quorum shall not be less than three members.
66. From the evidence on record, no disciplinary committee was constituted to deal with the Petitioner’s case and the matter appears not to have been discussed by the Commission. This was confirmed by Cherera in her replying affidavit and there was no evidence to the contrary.
67. Additionally, the Petitioner’s request for further information regarding the allegations made against her were ignored.
68. In its decision in *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2014] eKLR this Court rendered itself as follows:

“... in order for an employee to respond to allegations made against them, the charges must be clear and the employee must be afforded sufficient time to prepare their defence. The employee is also entitled to documents in the possession of the employer which would assist them in preparing their defence. The employee is further entitled to call witnesses to buttress their defence.”
69. Having established the major split among the Commissioners and the events leading to the Petitioner’s interdiction, I have no hesitation in reaching the conclusion that the action taken by the 1st Respondent against the Petitioner amounted to taking sides in a commission-wide grievance.
70. What is more, by proceeding to interdict the Petitioner, without recourse to the Commission or a duly constituted disciplinary committee, the 1st Respondent was clearly in violation of the IEBC Human Resource and Administration Policies and Procedures Manual, 2020.



71. Further, by taking over the disciplinary process, while being the complainant against the Petitioner, the 1st Respondent placed himself in the position of prosecutor and executioner.
72. The Court notes that in the replying affidavits sworn on behalf of the 1st and 2nd Respondents, these issues which were raised in the interlocutory ruling delivered on 26th January 2023, have been completely avoided. Instead, the deponents have persisted in levelling accusations against the Petitioner.
73. There is no commitment on the part of the 1st and 2nd Respondents to do the right thing, meaning that if the orders granted at the interlocutory stage are lifted, the unlawful disciplinary proceedings initiated against the Petitioner will be continued and concluded to her detriment.
74. I am satisfied that this is a case where the Court must interfere with the employer's disciplinary control.
75. Consequently, I return the following verdict:
 - a. A declaration is hereby issued that the action of the 1st Respondent to interdict the Petitioner was in excess of his powers and in violation of the law and the regulations of the 2nd Respondent;
 - b. The Petitioner's interdiction communicated by the 1st Respondent's letter dated 19th September 2022 is hereby quashed;
 - c. The Respondents are hereby restrained from initiating and/or continuing any disciplinary process against the Petitioner on account of any of the issues forming the subject matter of this Petition;
 - d. The Respondents are hereby restrained from interfering with the Petitioner's employment on account of any of the issues forming the subject matter of this Petition.
76. The Petitioner will have the costs of the Petition.
77. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF NOVEMBER 2023

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JUDGE

Appearance:

Mr. Manwa for the Petitioner

Mr. Nura for the 1st and 2nd Respondents

Mr. Mboya for the 7th, 8th, 9th and 10th Respondents

No appearance for the 3rd, 4th, 5th and 6th Respondents

