



Wamukota v Kenya Electricity Transmission Company Limited & 2 others (Petition E213 of 2023) [2023] KEELRC 3068 (KLR) (30 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 3068 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E213 OF 2023
B ONGAYA, J
NOVEMBER 30, 2023**

BETWEEN

ENG. ANTONY TAWAYI WAMUKOTA PETITIONER

AND

THE KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED 1ST RESPONDENT

THE ACCOUNTING OFFICER/CHIEF EXECUTIVE OFFICER OF KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED 2ND RESPONDENT

ETHICS AND ANTI-CORRUPTION COMMISSION 3RD RESPONDENT

RULING

1. The Petitioner filed a Notice of Motion application on 17.11.2023 through Sikuta & Associates Advocates. The application was under Articles 3, 10, 22, 23, 47, 48, and 165 of the [Constitution](#) of Kenya 2010, rule 2 and 7 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedom\) Practice and Procedure Rules](#), 2023 and all other enabling provisions of law. The petitioner applied for the following orders:
 - a. That this application be certified as extremely urgent and be heard forthwith exparte and service thereof be dispensed with in the first instance.
 - b. That the Honourable Court be pleased to make an order directing the 1st respondent to unconditionally lift the suspension of the applicant/petitioner from employment and order for his immediate reinstatement pending the inter-parties hearing and determination of the application and petition.



- c. That pending the hearing and determination of the application and petition, the Honourable Court do make an order suspending the letter dated 15.11.2023 suspending the applicant/petitioner herein.
 - d. That pending the hearing and determination of the application and petition, the Honourable Court do make an order suspending and/or staying the decision of 1st respondent contained in the letter dated 15.11.2023 suspending the applicant/petitioner herein.
 - e. That pending the hearing and determination of the application and petition, the Honourable Court do make an order suspending and/or staying the decision of the 3rd respondent contained in the letter dated 10.11.2023 directing the 2nd respondent to suspend the applicant/petitioner herein.
 - f. That pending the hearing and determination of the application and petition, the Honourable Court do make an order of injunction restraining the respondents either by themselves, employees, servants and/or agents from terminating the employment of the applicant/petitioner based on the illegal suspension.
 - g. That the costs of this application be borne by the respondents.
2. The said application is supported by the affidavit of Eng. Antony Tawayi Wamukota and made on the following grounds:
- a. That the board of directors of the 1st respondent on 15.11.2023 made a decision at its special general meeting, under the express directions of the 3rd respondent to suspended the applicant/petitioner for 12 months effective immediately contrary to paragraphs 11.3, 11.4, 11.5 and 11.3 of the 1st respondent's human resource policy and procedures manual.
 - b. That the 1st respondent never acted on any complaint or allegation per se and that the 3rd respondent usurped the powers of the 1st respondent powers at its board's meeting of 15.11.2023 and consequently the suspension is illegal, unreasonable, irregular and procedurally unfair, without foundation or basis.
 - c. That while the said special general meeting of the 1st respondent's board was ongoing and in what looks like an orchestrated plan to unfairly dismiss the petitioner, the 3rd respondent sneaked in a letter demanding the 1st respondent's board to immediately suspend the petitioner for 12 months purportedly pending investigation into the Ketraco-Loiyangalani-Suswa Transmission interconnection (II) line project.
 - d. That the 3rd respondent chose to issue adverse recommendations leading to immediate and illegal suspension of the applicant/petitioner even when there is still pending before the High Court, Constitutional & Human Right Division, a constitutional petition no. E111 of 2023 against the 3rd respondent in which the Honourable Court issued conservatory orders forthwith restraining the 3rd respondent from arresting, arraigning and/or charging/prosecuting the applicant/petitioner herein over any activity or any events relating to the said project: Ketraco -Loiyangalani-Suswa Transmission interconnector (II) line project.
 - e. That the 3rd respondent are purely on a fishing expedition having been stopped by the High Court from harassing, charging and/or arresting the applicant/petitioner herein relating to the above project in what they had employed unfair, unprocedural and unconstitutional tactics that flout the rules of the natural justice to threaten, arrest and detain the applicant/



petitioner without justifiable cause and the applicant had to seek refuge in court to protect his constitutional rights.

- f. That the 3rd respondent are now circumventing the orders of the said court through the purported recommendation to the 3rd respondent to suspend the applicant/petitioner herein without any justifiable cause and in a very draconian manner and are now prosecuting the case before the board of the 1st respondent in contravention of the said court orders.
- g. That the illegal suspension of the applicant/petitioner was a planned, and predetermined decision influenced by external forces – the 3rd respondent which the 1st respondent’s board deliberately decided to overlook or flout its human resource policy and procedures manual by taking the most abhorrent decision of illegally and immediately suspending the applicant/petitioner.
- h. That the petitioner was not allowed to show cause before the immediately and draconian suspension was handed down to him hence contravention his right to fair administrative action.
- i. That the 1st respondent acted at the behest of the 3rd respondent disregarding its own human resource policy and procedures manual which in any case caps suspension to 6 months.
- j. That at the time the applicant/petitioner was illegally suspended, he was in Mombasa attending the 30th Institution of Engineers of Kenya (IEK) 30th International Convention sponsored by the 1st respondent and which is ongoing slated to end on 17.11.2023.
- k. That the applicant/petitioner was never given an opportunity to be heard and the decision of his suspension was only communicated to him through email while he was attending the said engineering conference in Mombasa.
- l. That the suit pending before the High Court putting the applicant herein against the 3rd respondent is slated for hearing of application on 12.02.2024 in which the subject for the petitioner’s suspension is the central matter in question to which the court issued conservatory orders restraining the 3rd respondent from taking any adverse action against the petitioner until the matter is heard and determined.
- m. That unless the illegal action to suspend the applicant/petitioner herein is stopped by the Honourable Court, the applicant/petitioner will be greatly prejudiced.
- n. That the suspension of the petitioner offends the rules of natural justice, flouts the 1st respondent’s human resource policy and procedures manual, falls afoul of the constitutional provisions on fair labour practices, relevant laws and regulations.
- o. That fundamentally rendering the process illegal, unconstitutional, unlawful hence null and void ab initio.
- p. That an unconstitutional decision is not a law, it confers no rights, it imposes no duties it affords no protection, creates no office and it is in legal contemplation as inoperative as though it had never been passed. That, is the only fate that must befall the decision of the board of the 1st respondent in the instant case.
- q. The decision of the board of 1st respondent to immediately, abruptly and disgracefully suspend the applicant/petitioner is tainted with illegality, completely malicious and choreographed to defeat the ends of justice.



- r. That the mandate to hear and determine the suspension of the applicant lies with the 1st respondent's HRAC (Human Resource and Advisory Committee) which never sat to make such deliberations.
 - s. That the applicant is apprehensive that the respondents have a predetermined decision and are keen on locking him out from the seat and wheel of justice.
 - t. That unless the Honourable Court moves with speed, the interest of justice and the applicant, will be greatly prejudiced.
 - u. That is it in the interest of justice that this application is heard as matter of urgency.
 - v. That the respondents will not suffer any prejudice if the orders prayed herein are granted.
3. In reply the 1st and 2nd respondents have filed a Notice of Preliminary Objection dated 20.11.2023 through Lutta & Company Advocates and made on the following grounds:
- a. The court is divested of jurisdiction to entertain this matter by virtue of the doctrine of constitutional avoidance.
 - b. This court lacks jurisdiction to grant the reliefs sought by the petitioner challenging the 3rd Respondent's recommendation for his suspension pending his investigation for alleged corruption as the same ought to be entertained by the High Court (Anti-Corruption & Economic Crimes Division).
 - c. The respective affidavits of Eng. Anthony Tawayi Wamukota in support of the Petition and the Notice of Motion all dated 16.11.2023 are defective and thus not affidavits.
4. In reply the petitioner has filed grounds of opposition dated 20.11.2023 through Sikuta & Associates Advocates, and upon the grounds:
- a. That the instant preliminary objection as instituted is an abuse of the court process have no merit and is not only based on a misconception of the law but meant to waste court's time.
 - b. That the Honourable Court is clothed with the requisite jurisdiction to hear and determine the instant application and petition as both the application and petition raises issues that fall within the ambit of Employment & Labour Relations Court as stipulated under section 12(1) and (3) of the *Employment & Labour Relations Court Act*, No. 20 of 2011.
 - c. That the suspension of the petitioner was illegal, irregular, unlawful, unconstitutional and offends the petitioner's right to fair labour practices as such whether the alleged investigations pending or otherwise the suspension remains nullity and void *ab initio*.
 - d. That the US Supreme Court in *Norton v Shelby County* 118 US 425 (1886) held that an unconstitutional decision is not a law, it confers no rights, it imposes no duties, it affords no protection, creates no office and it is in legal contemplation as inoperative as though it had never been passed.
 - e. That in any case the alleged investigations had been conducted and completed as provided in the 3rd respondent's letter dated 10.11.2023 which in part stated
 - “...pursuant to the aforementioned mandate, the Commission conducted investigations into allegations of procurement irregularities that Mr. Antony



Wamukota was involved in the execution and processing of the fraudulent invoices...”

- f. That if the allegations of the 3rd respondent is anything to go by then they are insinuating that the petitioner violated the Code of Conduct which then leads to regulation 30 of the *Leadership and Integrity Regulations*, 2015 which provides:
30. Violation of Code
- (1) Where, on conclusion of investigations conducted under these regulations, a public entity or the Commission establishes that there has been a violation of the code by an officer, the Commission or a public entity may recommend-
 - (a) warning or caution
 - (b) suspension
 - (c) dismissal; or
 - (d) any other appropriate action against such officer.
 - (2) Notwithstanding the provisions of paragraph (1), where the Commission has investigated and established a violation of the code by a state or public officer, the Commission shall require the public entity to take such action against the officer as it may recommend.
 - (3) The Commission or a public entity shall, when taking a disciplinary action under this regulation, observe the principles of fair administrative action in accordance with articles 47 of the *Constitution*.
- g. That even section 42(7) of the *Leadership and Integrity Act* itself and which the respondents based on in suspending the petitioner provides that: Subject to the *Constitution* and any regulations for the enforcement of the Code made under this Act, a state officer may be suspended from office pending the investigation and determination of allegations made against that state officer where such suspension is considered necessary. This means that the respondents in implementing the administrative action had a mandatory obligation to provide the petitioner, a fair process and opportunity to be heard before taking such an action but they decided ignore the law.
- h. That Article 159(2)(d) provides that justice shall be administered without undue regard to procedural technicalities.
- i. That the respondent calls on the Court to take judicial notice of the fact that Hon Justice Chacha Mwita on 20th November suspended the directives and/or recommendations of the Head of public service and the 3rd respondent which had directed the suspension a number of state and public officers including the petitioner herein.
5. Additionally, the 1st & 2nd respondents filed the replying affidavit of Dr. (Eng) John M. Mativo, the Managing Director and Chief Executive Officer, sworn on 20.11.2023 and stated thus:
- a. That on 15.11.2023 there was a scheduled meeting of the 1st respondent’s board of directors to deliberate on other matters relating to the 1st respondent which began early that morning.



- b. That while in the meeting, the affiant, Dr. (Eng) John M. Mativo and the Chairman of the respondents' board of directors, Mr. Abdi Bare Duale, received the 3rd respondent's letter dated 10.11.2023 signed by the CEO Mr. Twalib Mbarak.
 - c. That in the said letter Mr. Mbarak informed the affiant of the investigations being undertaken by the 3rd respondent with regard to loss of public funds involving a contract between the 1st respondent and its contractor M/s Isolux Ingeneria SA and required that in accordance with the law, the petitioner be suspended from duty for a period of twelve (12) months being a public officer.
 - d. That by virtue of the petitioner being a senior officer of the 1st respondent, disciplinary matters involving him are deliberated upon by the board of directors.
 - e. That given that the board of directors was meeting on the same day, the affiant consulted with the chairman and it was agreed that the 3rd respondent's letter be processed and be presented to the board while sitting for deliberation.
 - f. It was agreed that the deliberations happen during the aforesaid meeting in order to avoid calling for a separate meeting which would be costly to the 1st respondent being a public body dependent on public funds, and it would also be difficult to get a date which is convenient to all the members of the board.
 - g. It was deliberated upon and the board resolved that the petitioner be suspended for 12 months and another person be appointed to act in his position.
 - h. That in compliance with the resolution of the board the petitioner was issued with a letter of suspension.
6. The 3rd respondent filed the replying affidavit of Elijah Williams, an Investigator with the 3rd respondent, sworn on 22.11.2023 through Joram Wambugu Advocate and stated thus:
- a. That the 3rd respondent is investigating allegations of procurement irregularities, contract mismanagement and fraudulent payments touching on a contract for the construction of 400KV transmission interconnector power line from loyangalani to suswa and related works, between Kenya Electricity Transmission Company Limited (KETRACO), the 1st respondent, and Isolux Ingenieria S.A (Isolux), which exposed Kenyan taxpayers to a loss of Kshs.18 billion and led to increased electricity tariffs.
 - b. That section 4(2) of *Leadership and Integrity Act* enjoins the 3rd respondent to oversee and enforce the implementation of *the Act*, and section 4(3) allows the 3rd respondent in undertaking its mandate to request a state organ to assist it in ensuring compliance with and enforcing chapter six of the *constitution* and *the act*.
 - c. That section 42(7) of the Act provides that a state officer may be suspended from office pending the investigation and determination of allegations made against that state officer where such suspension is considered necessary. Section 52(1) therefore brings the application of the Act to public officers generally by specifically stating that the act applies to all public officers as if they were state officers.
 - d. That preliminary findings by the 3rd respondent in the course of investigations revealed a scheme of corruption between senior government officials, including the petitioner and private entities where the public was exposed to a loss of Kshs.18 million.



- e. The petitioner’s understanding of the conservatory orders issued in HCCHR Petition no. E111 of 2023 is misconstrued as those orders are only specific to arresting, arraigning and/or charging/prosecuting the petitioner.
 - f. That the orders do not preclude the 3rd respondent from issuing its recommendation of 10.11.2023 as the recommendation was made on a matter within the 3rd respondent’s functions as per section 11(1)(g) of the *Ethics and Anti-corruption Act*, 2011, and as such the recommendation does not amount to harassment.
 - g. That lifting the petitioner’s suspension as prayed when he is facing investigations of the magnitude described, would not enhance constitutional values, additionally the principles of public interest, good governance and accountability militate against lifting the petitioner’s suspension to safeguard the integrity of investigations.
7. The 1st and 2nd respondent filed the further affidavit of Dr. (Eng) John M. Mativo sworn on 22.11.2023 and stated thus:
- a. That it is the practice of the 1st and 2nd respondent to suspend staff when the 3rd respondent institutes investigations.
 - b. That the petitioner suspended Mr. Peter Maina Njehia, senior manager, supply chain management of the 1st respondent on 16.03.2022 (erroneously dated 16.03.2021) when the 3rd respondent was carrying out investigations against the said Mr. Peter Maina Njehia.
8. The parties filed their respective submissions. The Court has considered the parties’ respective cases and makes finding as follows.
9. To answer the 1st issue, the Court returns that the petition is not trapped by the doctrine of constitutional avoidance. The doctrine of constitutional avoidance means that a Superior Court should determine the dispute based on statutory or other laws without the need to interpret the constitution. The current dispute relates to constitutional interpretation integrating public or state officer leadership and integrity standards and procedures as envisaged in Chapter 6 of the constitution on Leadership and Integrity, and, on the other hand, constitutional provisions on public service and protection of public officers as provided in Chapter 13 of the constitution, together with the enabling legislation. The 1st and 2nd respondents have submitted that the remedies prayed for in the petition are available under section 12 of the Employment and Labour Relations Act. However, it is also submitted, in a contradictory manner, that the impugned suspension is a special decision largely independent of the contract of service and in furtherance of the provisions of the Leadership and Integrity Act and subsidiary legislation under the Act by which the 1st respondent has evolved a practice of automatically suspending its employees whenever the 3rd respondent recommends such suspension. The petitioner has specifically pleaded and alleged violation of Articles 25, 27, 28, 47, 29, 35, 41,47, and 236 of the constitution. The Court has examined the reliefs prayed for in the petition and it cannot be said that they deviate from those envisaged in Articles 25, 22 and 23 of the constitution. Further, the remedies in section 12 of the Employment and Labour Relations Court Act, in the opinion of the Court, are not unique and capable of segregation or unavailable as reliefs in a constitutional petition. The remedies under the constitution and the Act, in the opinion of the Court are concurrently available in either an ordinary action or constitutional petition and what matters is what pleading and case the party seeking to get any of the remedies must show to persuade the Court to grant them. If the party has to establish alleged constitutional violations entailing interpretation and application of the constitutional provisions, then the best way to approach the Court would be by a constitutional petition as was done in the instant petition. It was submitted for the 1st and 2nd respondents that the prayers were about



reinstatement but a perusal of the record shows that the petitioner's contract of service is in place and the petitioner is claiming the imposed suspension is unconstitutional and ought to be lifted. The petitioner has not prayed for reinstatement.

10. To answer the 2nd issue, the Court returns that the Court has the Jurisdiction to hear and determine the petition because the impugned suspension relates to suspension of the contract of service between the petitioner and the 1st respondent. It was submitted for the 3rd respondent that indeed, the suspension could only be imposed by the 1st respondent in exercise of the employer's power of disciplinary control. It was submitted for 1st and 2nd respondent that the petitioner ought to have moved the High Court. The submission relies on Regulation 32 of the Leadership and Integrity Regulations, 2015 that a person aggrieved by any decision made by a public entity or the Commission under the Regulations may seek redress from the High Court. It appears that in the instant proceedings it is the suspension imposed by the 1st respondent that is questioned. The decision is by the 1st respondent as an employer and the Court holds that the Regulation being subsidiary legislation must comply with the parent statute, all statutes and needless to state, the constitution. It cannot override the employers' and employees' rights to accessing the Court as provided in Article 162 of the constitution, the Employment and Labour Relations Court Act, and, the other statutes conferring jurisdiction upon the Court.
11. By the findings on issues 1 and 2 the Court returns that the notice of preliminary objection is declined.
12. The 3rd issue is whether the petitioner has established a case for granting of the temporary reliefs as prayed for in the application. What are the guiding principles?
13. In Geoffrey Mworira v Water Resources Management Authority and 2 Others [2015]eKLR the Court held thus,

“The principles are clear. The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process.”

14. In Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR Court of appeal held thus,

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a *prima facie* case. The applicant need not establish title it is enough if he can show that he has a fair and *bona fide* question to raise as to the existence of the right which he alleges. The standard of proof of that *prima facie* case is on a balance or, as otherwise put, on a preponderance of probabilities. This means



no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed.”

15. In the instant case, the disputes between the 3rd respondent and the petitioner are subject of *Eng. Antony Tawayi Wamukota and 6 Others v The Ethics and Anti-Corruption Commission* High Court Petition No. E111 of 2023 and on 18.04.2023 the High Court (Thande J) ordered thus,

“i. This Honourable Court be and is hereby pleased to issue a conservatory order forthwith restraining the respondents, their agents, servants, or assistants from arresting, arraigning and/or charging/prosecuting the 1st applicant herein ENG.Antony Tawayi Wamukota over the activities and/or events relating to KETRACO-Loiyangalani-Suswa Transmission Interconnector (II) Line Project until 31.05.2023”

The petitioner's case is that the order is in place as extended and the matter at the High Court is fixed for hearing on 12.02.2024. it is the same project in the order upon which the 3rd respondent issued the letter dated 10.11.2023 recommending that the 1st respondent suspends the petitioner from office. By that recommendation, the 1st respondent suspended the petitioner from office for 12 months as per the letter dated 15.11.2023. The sub judice rule appears to trap the suspension decision. The investigations by the 3rd respondent and possible prosecution in that regard appears to be properly in issue before the Court in High Court Petition No. E111 of 2023 and that proceeding is the proper forum for the 3rd respondent to ventilate its concerns.

16. The Court has considered the Parliamentary policy on the issue. Section 62 of the *Anti-Corruption and Economic Crimes Act* provides that a public officer or state officer who is charged with corruption or economic crime shall be suspended at half pay with effect from the date of the charge until the conclusion of the case and provided the case shall be determined in 24 months. The section further provides that a suspended public officer who is on half pay shall continue to receive the full amount of any allowances. The section further provides that the public officer ceases to be suspended if the proceedings against him are discontinued or if he is acquitted. Further, the section does not derogate from the power or requirement under any law under which the public officer may be suspended without pay or dismissed. The Court considers that while the 1st respondent was entitled to suspend the petitioner independent of the investigations by the 3rd respondent, the 1st respondent could only do so by invoking its Human Resource Policy and Procedures Manual and the contract of service but which have not been shown to have been invoked. Further, by reason of section 62, the law appears to place a threshold for a charge of corruption or economic crime for the officer to be suspended. The issue of the possible criminal charge under the section is the subject of High Court Petition No. E111 of 2023. In the circumstances, the Court returns that the petitioner has established a *prima facie* case for grant of the interim orders as prayed for. While making that finding, the Court considers that the suspension for 12 months appears to suggest an unfair predetermination of the case as may be alleged against the petitioner and if indeed, the suspension is in the best interest and safeguarding of the integrity of the investigation process. The petitioner has met the threshold for grant of the orders sought.

17. In conclusion the notice of preliminary object dated 20.11.2023 and the application dated 16.11.2023 are hereby determined with orders:
- a. The preliminary objection is hereby dismissed.
 - b. That pending the hearing and determination of the application and petition, the order is hereby issued suspending or staying the decision of 1st respondent contained in the letter dated 15.11.2023 suspending the petitioner herein.



- c. That pending the hearing and determination of the petition, the order is hereby issued suspending or staying the decision of the 3rd respondent contained in the letter dated 10.11.2023 directing the 2nd respondent to suspend the petitioner herein.
- d. That pending the hearing and determination of the petition, the order of injunction is hereby issued restraining the respondents either by themselves, employees, servants or agents from terminating the employment of the petitioner based on the impugned suspension and the two letters in issue.
- e. That parties to take directions for further steps for expeditious hearing and determination of the petition.
- f. The costs of the preliminary objection and the application in the cause.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 30TH NOVEMBER, 2023.

**BYRAM ONGAYA,
PRINCIPAL JUDGE**

