



**Alwala v Kenya University Staff Union (Petition 1 of 2023)
[2023] KEELRC 3246 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3246 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
PETITION 1 OF 2023**

JW KELI, J

DECEMBER 7, 2023

**IN THE MATTER OF ARTICLE 27, 41(1) & (5), 47, 159 (1) & (2),
162(2), 165, 230(4) & (5) OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ARTICLE 20 OF THE KENYA
UNIVERSITY STAFF UNION CONSTITUTION**

AND

IN THE MATTER OF LABOUR RELATION ACT, 2007

BETWEEN

JOSECK ALWALA PETITIONER

AND

KENYA UNIVERSITY STAFF UNION RESPONDENT

JUDGMENT

1. The Petitioner is an employee of Kibabii University and a member of the Respondent through his branch KUSU -Kibabii University. He is the Branch Secretary of his Branch and a member of the Branch Executive Committee(BEC) alongside the Branch Vice Chairperson, Branch Deputy Secretary, Branch Treasurer, Branch Organizing secretary, Branch trustee, and Branch Women Representative. He states that on 4th January 2023, through the Respondent’s Secretary, he was suspended for ninety(90) days by the National Governing Council’s(NGC) sitting on 20th December 2022. The Petitioner being aggrieved by the suspension filed the instant Petition dated 12th January 2023 and filed on an even date seeking the following reliefs: -



- a. A Declaration that the decision by the Respondent emanating from the resolution of its National Governing Council(NGC) sitting of 20th December 2022 suspending the Petitioner for 90 days is unlawful, unconstitutional null and void and is of no consequences.
 - b. A declaration that the decision by the Respondent emanating from the resolution of its national governing council of 20thDecember 2022 suspending him from office for a period of 90 days pending hearing, violates the Petitioner’s fundamental rights and freedom and is entitled to compensation.
 - c. An order that the Petitioner be reinstated back into office to serve the remaining period of his tenure unless removed or suspended through lawful means.
 - d. An order of injunction restraining the Respondent from purporting to suspend the Petitioner from office as they are not the body/organ mandated to do so.
 - e. An order that the Respondent do bear the costs of this petition.
 - f. And other or further orders that the court deems just and fit to grant in the circumstance.
2. Accompanying the Petition was the affidavit in support of the Petition, the supporting affidavit (all sworn on 12th January 2023), the List of Documents dated on even date, and the annexures.
 3. The Petition was opposed. The Respondent filed a Replying affidavit sworn by Charles Mukhwaya on the 4th of February 2023 and received in court on the 6th of February 2023.
 4. The Petitioner filed a Supplementary affidavit sworn on 15th February 2023 and filed on 20th February 2023 in response to the Respondent’s Replying affidavit. Additionally, the Petitioner on 16th May 2023, filed his witness statement dated on even date, the witness statement of Martin Nandaki Wayong’o, and that of Isaac Wamalwa Manje all dated on even date.
 5. The Respondent on 3rd July 2023 filed the witness statement of Dr. Charles Mukhwaya dated 1st July 2023

Written Submissions

6. The parties agreed and the court directed that the Petition be canvassed by way of written submissions. The Petitioner ’s written submissions drawn by D.C Chitwah & Co. Advocates were dated 15th September 2023 and received in court on 19th September 2023. The Respondent’s written submissions drawn by Bruce Odeny & Company Advocates were dated 30th October 2023 and received in court on 1st November 2023.

Petitioner ’s case in summary

(The case as per affidavit in support of petition and supporting affidavit of the Petitioner sworn on 12th January 2023 and the supplementary affidavit sworn on 15th February 2023)

7. The Petitioner is an employee of Kibabii University and the Branch secretary of his branch KUSU -Kibabii University which is an affiliate of the Respondent and performs his mandate as the spokesperson of his Branch by convening branch meetings, issue notices for meetings and ensure minutes are recorded, maintaining membership and registration records, a co-signatory to the branch’s bank account, presents reports to the Branch Annual General Meeting on behalf of the Branch Executive Committee and ensures compliance of the branch with labour laws and other regulations.



8. The Petitioner states that the Respondent convened the 16th KUSU Annual Delegates Conference (ADC)(Hereinafter “ the Conference”) on 9th December 2022 at Traveller’s Beach Hotel-Mombasa, and the Petitioner as a member of his Branch’s Executive was in attendance accompanied by nine persons delegated from his branch comprising eight other officials and one member.
9. The Petitioner states that he was assigned the role of spokesperson during the conference on behalf of his branch, which deliberated in the Judgment delivered by the Honourable Justice Maureen Onyango on 18th March 2022 in Petition No. E026 of 2021 between Francis Chengoli & others vs Kenya University staff Union which had declared the Union’s constitution registered on 15th July 2022 a nullity and reinstated the previous constitution registered on 3rd April 2013.
10. The Petitioner had been tasked to seek guidance on the impact of the subsequent differences that had been created by *the Constitution* declared a nullity.
11. The Petitioner acting on his branch’s behalf noticed that the judgment delivered on 18th March 2022 was not an agenda for the Conference and yet his branch had been supplied with the Repealed Constitution. During the plenary session, he sought confirmation from the Union leadership on how the union was implementing the Honourable judge’s declaration about the voided Constitution of the Union as the same was affecting the union branches.
12. The Petitioner states that before he could complete his question, security was ordered to escort him out and he was not allowed to the meeting hall again. He believes that his question did not augur well with a section of the National Leaders who had been elected under the voided Constitution and who wanted to maintain the status quo based on the repealed Constitution.
13. The Petitioner states that surprisingly on 4th January 2023, he received a letter dated 4th January 2023(JA-1) suspending him as Branch Secretary for 90 days, and the letter was signed by the General Secretary of the Respondent and copied to Registrar of Trade Unions, the Branch Chairman-Kibabii University, Vice Chancellor – Kibabii University, and his Deputy branch secretary.
14. The Petitioner states that the said letter appointed his deputy Secretary General as the acting Branch Secretary. He states that he was never given any notice or opportunity to be heard before his suspension and finding the suspension illegal sought for legal intervention.
15. The Petitioner states that during these proceedings the General Secretary sent another letter to all Branch Secretaries of the Respondent informing them of the Petitioner’s suspension and thus not allowed to conduct the Respondent’s business and delegating all the powers to the deputy Branch Secretary.
16. The Petitioner states that this violated his rights and amounts to character assassination, as the same portrays him before branch members as an arrogant and unruly individual and this may affect any prospects of him seeking votes from his branch and other branches.
17. The Petitioner states that his suspension was illegal as neither the members of the branch, the Branch Executive Committee (BEC), nor the Branch Annual General Meeting (BAGEM) recommended his suspension or found him guilty of any offence, and that the National Executive Committee(NEC) never recommended his suspension to the National Governing Council (NGC).
18. The Petitioner states that as per the Union’s repealed (JA -2a) and current operative Constitution (JA-2b) he can only be suspended after being accorded a hearing through a well-established structure.
19. The Petitioner states that his suspension was ill-motivated since the disciplinary process did not follow the prescribed process in *the constitution*.



Supplementary affidavit by Petitioner

20. The Petitioner states that the court has jurisdiction to supervise and correct excesses and illegal actions of the Respondent by dint of articles 2,23,41,47 and 48 of the Constitution and has the power to issue orders to meet the interests of justice.
21. The Petitioner stated that he was never involved in any misconduct during the conference and any alleged breach is denied. The Petitioner points the court to take judicial notice of the decision of Honourable Maureen Anyango voiding the later Union's Constitution and consider the provisions on suspension in both the repealed and operative Constitution.
22. The Petitioner contends that the Respondent's reliance on article 19 (g) of the repealed union constitution which alleges that disciplinary action may be carried out on recommendations of NEC is myopic and selective as further reading on article 19f) states that no member may be suspended or expelled unless they are allowed to be heard and express themselves in writing, and a notice to appear before a Disciplinary hearing given fourteen days before the hearing and setting out the details of what the member is alleged to have committed.
23. The Petitioner argues that from face value the Respondent's actions are outright illegalities, impropriety, and an abuse of the Constitution they profess to follow, and the ninety day's suspension is unwarranted as no disciplinary proceedings are against the Petitioner. That the Respondent has failed to show that their decision was sanctioned by NEC as no proof was availed.
24. That the Suspension was not lawful and the Petitioner's rights under the Constitution were violated.

Respondent's case in summary

(The case as per the Replying affidavit of Charles Mukhwaya (the Secretary of the Respondent) sworn on 4th February 2023)

25. It is the Respondent's case that the Petitioner's petition is defective and an abuse of court process.
26. The Respondent states that the Petitioner was suspended on 4th January 2023 following his uncalled-for misconduct during the Respondent's 16th Annual Delegates Conference meeting that took place on 9th December 2022, when the Petitioner caused a breach of peace by becoming unruly, disorderly, and disrupted proceeding.
27. The Respondent submits that the Petitioner's conduct had nothing to do with the decision in Petition No. E026 of 2021 but the same was a breach of peace and conduct unbecoming of an official, that warranted intervention.
28. It is the Respondent's case that the Respondent's National Governing Council sitting of 20th December 2022 took great exception to the Petitioner's misconduct and suspended him pending appropriate disciplinary proceedings in line with its constitution.
29. The Respondent states that disciplinary proceedings are an internal mechanism governed by the Respondent's constitution and which it complied with.
30. That the Petitioner is not remorseful as he has yet to respond to the complaints against him and unilaterally chose not to participate in the disciplinary process and the move to court is premature.



31. The Respondent argues that under article 19(g) of the Respondent's constitution, the National Governing Council(NGC) has the power to undertake disciplinary action against any official of the Respondent including suspension of the official in question.
32. That the NGC therefore executed its mandate by suspending the Petitioner on 4th January 2023, which suspension it states was lawful and does not amount to expulsion or removal of the Petitioner as an official or member of the Respondent.
33. The Respondent states that the suspension of 90 days is an initial stage intended to give the Petitioner a fair hearing and the Petitioner had a right to attend the disciplinary hearing proceedings and defend himself.
34. The Respondent alleges that the Petitioner had failed to identify the constitutional, and labour laws and rights violated after the commencement of the disciplinary proceedings that could warrant the court's intervention.
35. The Respondent argues that the petition is unnecessary in the absence of any violation of *the constitution* or labour rights and the Petitioner has nothing to fear and ought to be patient and trust the process in that his rights during the disciplinary proceedings will be protected.
36. The Respondent urges that the court ought not to interfere with the Respondent's disciplinary process and allow the same to run full length.
37. The Respondent argues that the Petitioner has not exhausted all internal dispute resolution mechanisms available to him in the Respondent's constitution if he is not happy with the suspension.
38. That the Petitioner's petition is fatally defective and ought to be dismissed.

Determination

Issues for determination.

39. The Petitioner did not identify issues for determination and submitted generally on the illegality of his suspension by the Respondent.
40. The Respondent in its submissions addressed the following issues:-
 - a. Whether the Petitioner is properly before this court having failed to exhaust the Respondent's internally available mechanisms for dispute resolution.
 - b. Whether the National Delegates Council is mandated to suspend members as disciplinary action.
 - c. Whether the suspension of the Petitioner pending the disciplinary proceedings is an infringement of his rights enshrined under the Labour laws and *the Constitution* of Kenya that would warrant this Court's interference.
41. The court discerned that the issues for determination under the Petition are as follows:-
 - a. Whether the court has first instance jurisdiction to determine the Petition taking into consideration the provisions of the Union Constitution.
 - b. Whether the Petition meets the threshold of a constitutional Petition
 - c. Whether the Petitioner's suspension infringed on his right to a fair hearing.



d. Whether the Petitioner is entitled to the reliefs sought.

Issue a). Whether the court has first instance jurisdiction to determine the Petition taking into consideration the provisions of the Union Constitution.

42. The issue of whether a suit is premature goes to the question of whether the court's jurisdiction is properly invoked.
43. The Respondent argues that the Petitioner failed to adhere to the set clear procedure for redress of any grievance that arises among the Respondent's members which required the Petitioner to escalate the matter to the National Delegates conference before invoking the court's jurisdiction.
44. The Respondent states that the suspension letter required the Petitioner to appear before the National Governing Council to defend himself, but he failed to respond to the complaint against him and filed the present suit prematurely.
45. The Respondent argued that the principle of exhaustion serves to postpone the judicial consideration of matters where there exists alternative mechanisms for the resolution of disputes and relied on the decisions in *Geoffrey Muthinja & Another v Samuel Muguna Henry & 1756 others* (2015)eKLR and *Rich Productions ltd v Kenya pipeline company & Another* (2014)eKLR.
46. The Respondent argues that the court can only interfere with the internal disciplinary process if the same is unlawful, and our rightly flawed and that such interference is limited to correcting wrong procedural internal mechanisms and relied on the decision in *Kebeso David V Kenyatta University & 3 others* (2017) eKLR.
47. The Petitioner on his part argues that his right to fair administrative action, that is reasonable and fair was violated as under the Respondent's Constitution under Article 19, he was entitled to a hearing before any action be it suspension or otherwise could be taken and suspending him pending hearing was an infringement of his fundamental rights.
48. The Respondent's Constitution registered on the 15th of July 2020 by the Registrar of Trade Unions was declared a nullity and unconstitutional and *the constitution* registered on the 3rd of April 2013 by the Registrar of Trade Unions reinstated by Justice Maureen Onyango in *Francis Cheng'oli & 2 others v Kenya Universities Staff Union* [2022] eKLR. This position was not denied by the Respondent. As at the time of the suspension of the Petitioner, the operative constitution that was regulating the affairs of the union is *the Constitution* registered on 3rd April 2013 and there should be no reference to the voided Constitution.
49. Article 20 (Discipline) of the 3rd April 2013 constitution provided that:-
- ‘a member may be suspended or expelled from the Union as may be determined by the National Governing Council after recommendation by the National Executive Committee if s/he:-
- i.
 - ii. Infringes any of the terms of this Constitution or acts in a manner which is detrimental to the interests of the union. provided that any member suspended or expelled shall have the right of appeal against such suspension or expulsion to the first Annual Delegates Conference following such action by the council. Notice of any appeal shall be forwarded or handed to the Secretary-General in



writing within fourteen days of the date on which the decision of the national Governing council was communicated to the member concerned.

- a. No member shall be suspended or expelled unless s/he has been given an opportunity to state her /his case personally or in writing at a meeting the Executive Committee of which s/he has received not less than seven days' notice in writing. Such notice shall include details of allegations with which the member is charged.
- b. A member who has appeared before the Executive Committee in accordance with sub-section (b) of this Rule shall if s/he is dissatisfied with the decision of the Governing Council, and has lodged an appeal in the manner provided have the right to re-state his case at the Annual Delegates Conference when the matter shall be considered.
- c. A member attending a meeting of the Executive Committee or Annual Delegates Conference in terms of Sub Section (a) and (b) of this Rule shall be entitled to call witnesses in support of her/ his case.
- d. Any officer of the union may be suspended from office by a two-thirds majority decision of all members entitled to attend and vote at the Branch Annual/Special meeting in the event of such suspension the Branch Annual Special meeting has the power to appoint one of its members to act in such post pending the decision of the Annual Delegates Conference whether or not such an officer should be reinstated or dismissed.
- e. Any decision taken by the Executive Committee to recommend suspension or expulsion of a member to National Governing Council shall, when an appeal has been lodged in the manner provided, be subject to ratification by delegates at the annual conference.”

50. The Respondent's constitution required that before any suspension, a member of the union was to receive a seven days' notice in writing from the Executive Committee setting out allegations against the member and be given an opportunity to state their case either personally or in writing at a Meeting of the Executive Committee. At the meeting, the member would have an opportunity to have a witness. The Executive Committee would then make a recommendation to the National Governing Council which could suspend the member. A member dissatisfied with the decision of the Governing Council was then allowed to appeal the said decision before the next Annual Delegates Conference when they could re-state their case and have witnesses.

51. The suspension letter stated in part that “.....The National Governing Council sitting of December 20, 2022, took exception of your action during the ADC. The Council Viewed your utterances / action during the Plenary of ADC in Mombasa as deliberately intended to incite disaffection and cause despondency in the Union, and therefore NOT in furtherance of KUSU objectives.

” Consequently, the NGC has suspended you from the office of Branch Secretary for a period of ninety 990) days from the date of this letter to allow time for you to be heard. You will



be required at an appropriate time to appear before the NGC to help it understand your action at the ADC”

52. The Court finds that contrary to the set procedure by the Respondent that the Executive Committee would invite a member to be heard after notice of allegations to the member within seven days, the Respondent’s National Governing Council without the recommendation from the Executive Committee which was supposed to recommend any action against a member, proceeded and usurped the power of the Executive Committee and instead of issuing a seven days’ notice to the Petitioner to respond to the allegations against him, proceeded to suspend him for ninety days.
53. The National Governing Council, then states that the Petitioner would at the appropriate time appear before the National Governing Council to explain himself.
54. The Respondent’s procedure required that a member facing any disciplinary action was to appear before the National Executive Committee which is distinct from the National Governing Council, whose mandate is to either adopt the recommendations of the Executive Committee or not on the action to be taken against a member.
55. The National Governing Council (NGC) under Article 8 comprises the National Chairperson, National Chairperson, Secretary General, Deputy Secretary General, National Treasurer, National Deputy Treasurer, National organizing secretary, national Trustees, and one representative from each branch. The NGC is responsible for enforcing the union constitution, rules and regulations, standing orders, and by-laws of the union and take steps as may be deemed necessary for such purposes whether by way of dissolution of a branch, suspension or expulsion of a member or members of the union which actions must be reported to the Annual delegates conference for ratification.
56. The National Executive Committee under ARTICLE 19 of its constitution comprises of the National Chairperson, National Chairperson, Secretary General, Deputy Secretary General, National Treasurer, National Deputy Treasurer, and National organizing secretary. the National Executive Committee may co-opt not more than two committee members as it may deem fit taking into account the gender balance and is responsible for the day-to-day management of the affairs of the union.
57. There was no indication in *the Constitution* that a member was to appear before the National Governing Council which is differently constituted for disciplinary action.
58. The Respondent argues that the Petitioner ought to have appealed to the National Delegates conference as the next level of appeal.
59. The Petitioner’s case before the court relates to the process leading to the suspension. While it is not disputed that a member who is legally suspended has a right to appeal to the National Delegates Conference, the instant case emanates from the Respondent’s failure to adhere to its procedure before suspending the Petitioner.
60. The Respondent failed to issue the Petitioner with a Seven days’ notice containing the allegations against him and inviting him before the National Executive Committee to present his case or issue a written statement before suspending him, but rather preceded with the suspension and informed the Petitioner that he would be called to a hearing on a subsequent date to be communicated.
61. The Respondent at that point failed to uphold its procedure. The doctrine of exhaustion is that where a dispute resolution mechanism exists outside the court, the same must be exhausted before the court’s jurisdiction is invoked. In the instant case the Respondent illegally exercised its mandate and against the Rules of natural justice suspended the Petitioner before allowing him an opportunity to be heard, against its own Constitution.



62. The European Court of Human Rights in CASE OF SHKALLA v. ALBANIA(Application no. 26866/05) held that:-

“ 57. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges those seeking to bring their case against the State before the Court to use first the remedies provided by the national legal system. The complaints should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law and, further, that any procedural means that might prevent a breach of the Convention should have been used (see, amongst others, *Laska and Lika v. Albania*, nos. 12315/04 and 17605/04, § 41, 20 April 2010).

58. Turning to the present case, the Court recalls that it has ruled that a request for the review of a final decision is an extraordinary remedy, which cannot, as a general rule, be taken into account for the purposes of applying Article 35 § 1 of the Convention (see *Laska and Lika*, cited above, §§ 50-51).

59. The Court further notes that Article 147 of the CCP provides an accused with the possibility of requesting leave to appeal out of time. However, the Government failed to provide the Court with domestic case-law on the interpretation in practice of the provisions of that article. The Court reiterates that it is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was capable of providing redress in respect of the applicant’s complaints and offered reasonable prospects of success...”Emphasis added

63. The Respondent in claiming that the Petitioner has not exhausted the internal mechanisms before it has not shown how the Petitioner’s appeal against his suspension is effective given that the same must await the Annual Delegates Conference and whether the Annual Delegates Conference would be within the relevant time provide redress to the Petitioner’s complaint of the illegality of the suspension.

64. The Respondent having failed to follow its procedure before suspending the Petitioner could not expect the Petitioner to wait for its Annual Delegates Conference which is held annually and in most instances at the end of the year for the Petitioner to raise the issue that he was suspended before being heard. It could be impracticable for the Respondent to have expected the Petitioner to wait to be heard on an issue raising the legality of the Decision rather than the substantive issue.

65. Therefore, it is the Court’s finding and determination that the Principle of exhaustion was not suitable in the instant case as the Petitioner’s petition before the court was not on the substantive issue relating to the allegations against him but rather on the legality of the suspension decision and especially the process.

Issue b). Whether the Petition meets the threshold of a constitutional Petition

66. The Respondent argued that none of the Petitioner’s rights were infringed whether under *the Constitution* or the Labour laws. The Respondent argued that the Petitioner should avail tangible evidence of the violation of their rights and freedoms and to buttress this argument relied on the decisions in *Christian Juma Wabwire V Attorney General*(2019) eKLR and *Anarita Karimi Njeru* (1979) eKLR.



67. The Court in *Anarita Karimi Njeru v Attorney General* [1979] eKLR case, 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.”

68. 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.”

69. The Petitioner in his grounds of the petition stated that his right to fair administrative action that is lawful, reasonable, and procedural has been trampled upon.

70. That he was entitled to a hearing before suspension as per the Respondent’s constitution and in its absence his fundamental rights were infringed.

71. That there was no provision whether in the Union’s constitution or Labour laws that allowed suspension for 90 days and thus the respondent’s actions were unconstitutional and the same was both unlawful and procedurally flawed..

72. The Petitioner did not set out the Articles infringed in the body of the petition but the same was on the title to the petition on *the Constitution* articles alleged to have been contravened as Article 27, 41(1) & (5), 47, 159 (1) & (2), 162(2), 165, 230(4) & (5).

73. Article 41(1) of *the Constitution* states that “Every person has the right to fair labour practices and Article 47(of the states that Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

74. Article 159 (1) and (2) provides that:-

- (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
- (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
 - (a) justice shall be done to all, irrespective of status;
 - (b) justice shall not be delayed;
 - (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
 - (d) justice shall be administered without undue regard to procedural technicalities; and



SUBPARA (e) the purpose and principles of this Constitution shall be protected and promoted.”

This Article relates to the authority of the Court to administer justice without regard to procedural technicalities.

75. The other articles quoted by the Petitioner were:- Article 162(2) relating to the establishment of the Special Courts that is the Employment and Labour Relations Court; and the Environment and Land Court and Article 165 on the Establishment of the High Court and its powers. These Articles are about access to the constitutional courts.
76. Article 230 relates to the Salaries and Remuneration Commission and was not relevant to the petition.
77. The Petitioner’s petition set out with a reasonable degree of precision, that his right to a fair hearing was curtailed having been suspended without a hearing which is a right under Article 47, and that the suspension was not done in compliance with the Respondent’s constitution, which falls under the right to fair labour practices falling under Article 41 of *the Constitution*.
78. I do not agree with the Respondent’s position that the Petitioner did not identify any violations in his Petition. The petition is sufficient in the content on how the fundamental rights and freedoms of the Petitioner relating to his right to a fair hearing and fair labour practice were violated or are threatened to be violated as they relate to his right to be accorded a hearing before suspension and that thus the Petition met the threshold under Anarita Karimi case.

Issue c). Whether the Petitioner’s suspension infringed on his right to a fair hearing.

79. Article 20(c) of the Respondent’s union constitution states that “No member shall be suspended or expelled unless s/he has been given an opportunity to state her /his case personally or in writing at a meeting the Executive Committee of which s/he has received not less than seven days’ notice in writing. Such notice shall include details of allegations with which the member is charged.”
80. Article 20(a) then stated that “a member may be suspended or expelled from the Union as may be determined by the National Governing Council after recommendation by the National Executive Committee”.
81. Article 20(c) provided that:- “A member who has appeared before the Executive Committee in accordance with sub-section (b) of this Rule shall if s/he is dissatisfied with the decision of the Governing Council, and has lodged an appeal in the manner provided have the right to re-state his case at the Annual Delegates Conference when the matter shall be considered.”
82. The import of the above provisions is that no member of the union could be suspended unless they had been heard by the Executive Committee. They were to be given a seven-day notice of allegations against them and a notice to issue written submissions or appear in person accompanied by another person during the hearing of their case before the Executive Committee.
83. The Respondent’s letter stated that the Petitioner was being suspended before he could be heard and the time when he could appear before the National Governing Council would be at “an appropriate” time.
84. The Respondent argues that the suspension of the Petitioner was only a preliminary measure, not a punitive one that was intended to set in motion the disciplinary process. To buttress this point The Respondent relied on the decision in the case of Nancy Makokha Baraza V Judicial Service Commission & 9 others (201) eKLR where the court cited the case of Evan Rees and others v Richard



Alfred Crane (1994)2 WL where it was held: "in most types of investigations there is in early stages a point at which action of some sort must be taken and must be taken firmly in order to set the wheels of injustice in motion. Natural justice will seldom, if ever at that stage demand the investigator should act judicially in the sense of having to hear both sides"

85. From the Respondent's submission above the Respondent purports to state that it was not required before suspending the Petitioner to hear the Petitioner and consider its case but rather that it could suspend the Petitioner and then commence the disciplinary process.
86. Where a set procedure is available and in this case *the Constitution* of the Respondent sets out how discipline within the Union can be undertaken. The respondent's conduct is regulated by its Constitution and it cannot act outside the said Constitution. *The Constitution* required the Respondent before suspending a member to accord them an opportunity to be heard. *The Constitution* did not require the Respondent to suspend a member and then begin to accord them an opportunity to be heard.
87. The Petitioner alleged that alleges that his right to fair administrative action that is lawful, reasonable, and procedural fair was trampled on and the suspension for 90 days was unlawful and procedurally flawed.
88. Article 47 of *the Constitution* provides that a fair expeditious, efficient, lawful reasonable, and procedurally fair. The Petitioner was not accorded a chance to be heard before he was suspended and the Respondent suspended him for ninety days which was not available under its own rules and the said period was unreasonably long bearing in mind that the Petitioner was not informed of when his hearing would be, but the same was left to be on a future uncertain time.
89. In the upshot, the Court finds that the suspension of the Petitioner violated the Petitioner's right to a fair hearing, by denying him an opportunity to be heard before suspending him as was required under the Respondent's union constitution.

Issue d). Whether the Petitioner is entitled to the reliefs sought.

90. The Petitioner prayed for:-
 - a. A Declaration that the decision by the Respondent emanating from the resolution of its National Governing Council(NGC) sitting of 20th December 2022 suspending the Petitioner for 90 days is unlawful, unconstitutional null, and void and is of no consequences.
 - b. A declaration that the decision by the Respondent emanating from the resolution of its national governing council of 20th December 2022 suspending him from office for a period of 90 days pending hearing, violates the Petitioner's fundamental rights and freedom and is entitled to compensation.
 - c. An order that the Petitioner be reinstated back into office to serve the remaining period of his tenure unless removed or suspended through lawful means.
 - d. An order of injunction restraining the Respondent from purporting to suspend the Petitioner from office as they are not the body/organ mandated to do so.
 - e. An order that the Respondent do bear the costs of this petition.
 - f. And other or further orders that the court deems just and fit to grant in the circumstance.



91. Having found that the suspension was unprocedural and violated the union constitution as well as provisions of Article 47 of *the Constitution*, I find the Petitioner has been successful in his petition. The Petition dated 12th January 2023 is allowed as follows: -

- a. A Declaration is hereby issued that the decision by the Respondent emanating from the resolution of its National Governing Council(NGC) sitting of 20th December 2022 suspending the Petitioner for 90 days is unlawful, unconstitutional null, and void and is of no consequences.
- b. A declaration is hereby issued that the decision by the Respondent emanating from the resolution of its national governing council of 20th December 2022 suspending him from office for a period of 90 days pending hearing, violates the Petitioner 's fundamental rights and freedom and is entitled to compensation. The Court awards the Petitioner compensation of Kshs. 300,000/- (Three Hundred Thousand Kenya shillings).
- c. An Order is hereby issued that the Petitioner is reinstated back into office to serve the remaining period of his tenure unless removed or suspended through lawful means. The Secretary General to facilitate the reinstatement of the petitioner within 14 days of this Order.
- d. The Respondent to bear costs of the petition.

92. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 7TH DAY OF DECEMBER 2023

JEMIMAH KELI

JUDGE

In the Presence of:

C/A- Emmanuel

For Petitioner : - Absent

For Respondent: Kibiti (Ms)

