# Kaloki v Kenya Pipeline Company Ltd (Cause E059 of 2022) [2022] KEELRC 3919 (KLR) (20 September 2022) (Ruling)

Neutral citation: [2022] KEELRC 3919 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE E059 OF 2022**

**JK GAKERI, J**

**SEPTEMBER 20, 2022**

**BETWEEN**

**CATHERINE MBULA KALOKI ........................................................ RESPONDENT**

**AND**

**KENYA PIPELINE COMPANY LTD ..................................................... APPLICANT**

## RULING

1. Before me for determination is a notice of motion Application dated 21st April 2022 seeking the following orders:

   a. This Application be certified urgent and be heard *ex-parte* in the first instance.

   b. The operation of the interim conservatory restraining orders granted *ex-parte* to the Petitioner herein on 12th April 2022 and all the consequential orders and processes be stayed, suspended and/or lifted pending inter- partes hearing of this application.

   c. In the alternative and without prejudice to prayer (b) above, the Petitioner do proceed on leave pending the hearing and determination of this Application.

   d. This Honourable Court be pleased to discharge, vary and/or set aside the *ex-parte* interim. Conservatory restraining orders granted to the Petitioner herein on 12th April 2022 as against the Respondent.

   e. This Honourable' Court be pleased to strike out the Petitioner's Petition dated 6th April 2022 together with the Notice of Motion Application herein' dated 6th April 2022 for being premature in irregularly before the Court.

   f. The Petitioner be ordered to pay punitive costs to the Respondent.

2. The application is expressed under Rule 5(c) and (d) (i) of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedures Rules, 2013*, Section 12 of the *Employment and Labour Relations Court Act* and all the enabling provisions of the law and is based on the following grounds:

   a. That the *ex-parte* interim orders were obtained by way of misrepresentation of facts and withholding of material facts that the honorable court would not have issued if the petitioner was candid.

   b. That the petitioner failed to disclose that she deliberately misled the respondent on her qualifications and procured the current role with the respondent out of deceit.

   c. That the petitioner failed to disclose that she deliberately represented herself to the respondent through her Curriculum Vitae and during the interview that she had been a principal auditor for five years which was untrue as she had only done 4 years 4 months as established by the office of the auditor general.

   d. That the petitioner misled the court that the respondent had discriminated upon her by singling out her matter out of many other auditors' queries which she knew was untrue as most of the issues raised were resolved save for the matter which she was unable to provide a plausible response.

   e. That the petitioner misled the court by stating that she had responded to a show cause letter on the 8th of march 2022 requesting for documents while she responded to the show cause letter on the 14th of March 2022 by admitting that at the time of employment, she had not met the mandatorily required work experience of 5 years as a principle internal auditor.

   f. That the petitioner failed to inform the court that she had been notified that her matter had been referred to the Board Human Resource Committee and was scheduled for a disciplinary hearing on 6th April 2022 when she feigned sickness to avoid the meeting.

   g. That the petitioner's intention of feigning sickness was with a view to procuring *ex-parte* court orders to terrorize her superiors and make it impossible for any meaningful objective to be carried out in the respondent's department of internal audit.

   h. That the court lacks the requisite jurisdiction to entertain, hear and determine and/or grant orders sought in the petitioner's application.

   i. That the petition as filed is incompetent and fatally defective for want of compliance with the mandatory provisions of section 74 of the *Public service commission Act* No 10 of 2017.

   j. That the petitioner is abusing the court process and applying the same to unduly harass the respondent and forcefully occupy the respondent's house without paying any consideration contrary to the law.

   k. That the operation of the said irregularly obtained *ex-parte* conservative restraining order is not only oppressive and prejudicial to the respondent but must be lifted in order to safeguard this honourable court's integrity.

3. The application is supported by annexed affidavit sworn by Flora Okoth on the 21st April 2022 that reiterates the grounds raised in the application.

4. In opposition to the application the petitioner filed a Replying Affidavit sworn on the 27th April 2022.

5. The affiant states that the notice of motion application dated 21st April, 2022 is misconceived, incompetent, vexatious, frivolous and an abuse of the court process.

6. The affiant further states that the applicant has not demonstrated how the application and petition suffer from material non-disclosure when all allegations of non-disclosure are part of the court record.

7. She depones that conservatory orders are not ordinary civil law remedies but are remedies provided under the *Constitution* and they are not issued to aid any party but to preserve the *status quo*.

8. The affiant states that she proceeded to court after being subjected to a disciplinary process that was marred by irregularities.

9. The affiant states that in 2020 she applied for the position of General Manager Internal Audit and disclosed all the information relating to her experience and presented all testimonials from former employers in the presence of officers from the Public Service Commission and did not receive any objection.

10. The affiant contends that she did not falsify any documents or make any false declarations and that she had the required experience for the job

11. Further, the affiant states that the respondent had subjected her to several incidences of harassment and mistreatment such as being publicly instructed to stop attending executive meetings.

12. The affiant states that on the 4th April 2022 she was feeling unwell and visited Nairobi Hospital and was given a sick off which she communicated to the respondent's Managing Director through an email and was later informed of the disciplinary hearing scheduled for 6th April, 2022.

13. The affiant further states that the allegation that there was a toxic working environment and animosity is not supported by any complaint from colleagues and they were working as a team to achieve the objectives of the company.

14. The affiant also states that the suit is not premature and the court has jurisdiction to determine the petition.

15. The Petitioner depones that she moved the court because the applicant failed to give her a fair and expeditious hearing as per the Human Resource Manual and failed to supply her with the reports requested which violated her fundamental rights of being deemed innocent until proven guilty.

16. Finally the affiant states that she has never been in occupation of the applicant's house since her employment.

**Respondent's/Applicant's Submissions**

17. The Applicant lists four (4) issues for determination namely:

    i. Whether or not this Honourable Court has the requisite jurisdiction to entertain, hear and determine the Petition filed herein together with the Petitioner's Application dated 6th April 2022?

    ii. Whether or not the Petitioner procured the *ex-parte* conservatory orders dated 12th April 2022 irregularly and through none disclosure of material facts? If so, should the orders be discharged, varied and or set aside?

iii. Whether or not the Respondent afforded the Claimant a fair hearing and consideration prior to making any decision on his disciplinary case? If so, was the punishment given to the Claimant lawful and justified in the circumstances of the case?

iv. Whether or not the Claimant has sufficiently proved his case against the Respondent to warrant the issuance of the orders sought?

18. On the first issue the applicant submits that the petitioner is an employee of the respondent which is a body corporate established under the Ministry of Energy with 100% government shareholding.

19. It submits that the petitioner ought to have exhausted the remedies provided under section 74 of the Public Service Commission and the disciplinary manual for public service before filing the claim which requires the claimant to appeal the decision of her employer to the Public Service Commission.

20. Counsel submitted that the petitioner was merely invited to attend a disciplinary hearing and that her complaint would have been best addressed through the Public Service Commission instead of clogging the court system with interlocutory claims.

21. The applicant submits that the petitioner has not proffered any reason why she did not appeal the decision to invite her to the disciplinary hearing to the Public Service Commission. The applicant submits that Section 9(2) of the Fair Administrative Actions Act provides that parties should exhaust internal appeal mechanisms before proceeding to court.

22. The applicant relied on the holding in Nyeri ELRC Case No 94 of 2017; *Dr Samuel Gitau Kinyanjui v County Government of Kirinyaga & another*, where the court considered the need to exhaust internal remedies and expressed itself as follows;-

> Section 77 of the *County Governments Act* provides that the decision of the Public Service Board is appealable to the Public Service Commission. Notably, there is no appeal indicated to have been preferred by the Claimant. In addition, Section 9(2) of the *Fair Administrative Actions Act* provides that parties exhaust the internal appeal mechanisms before initiating court action as the High Court should not review administrative action unless the internal mechanisms are exhausted. As held in the case of *James Tanui and 22 others v County Government of Kajiado & 22 others* [2015] eKLR where Mumbi J. (as she then was) stated where there was an alternative forum provided in law being the forum prescribed by Section 9 of the Fair Administrative Actions Act and Section 77 of the *County Governments Act*... Since the Claimant did not seek to exhaust the process under the Fair Administrative Actions Act, the decision to proceed with the suit was misplaced and premature. The suit is dismissed for failing to adhere to the provisions of the law.

23. The applicant urges the court to apply the reasoning in the above case to strike out the petition together with the application dated 6th April 2022 for being premature and an abuse of the court process.

24. The applicant submits that by upholding the above provisions of the law will encourage parties to first exhaust internal mechanisms before coming to court.

25. On the 2nd issue the applicant submits that the petitioner suppressed the material facts and failed to disclose numerous matters which if they were brought before the court's attention the court would not have issued the orders dated 12th April 2022.

26. The applicant submits that the petitioner failed to disclose that she deliberately misled the respondent on her qualifications and procured the current position both in the interview and in her Curriculum Vitae. She further misled the court that she was discriminated against which was not true

27. The applicant further submits that the Petitioner's conduct of feigning sickness with a view to procuring court orders demonstrates that she deliberately and deceitfully filed this claim to obtain interim injunctive orders.

28. The applicant relies on the holding in *Uhuru Highway development limited v Central Bank of Kenya & others* [1995] eKLR where the Court of Appeal held that the foregoing principles of full disclosure of all material facts in *ex-parte* applications apply in Kenya in the same way as England. The Court, therefore, proceeded to adopt the principles set out is *Republic v Kensington Income Tax Commissioner* and *Brink's MAT Ltd v Elcombe* in upholding the decision of the High Court whereby *ex-parte* injunction was declined due to non-disclosure of material facts.

29. The applicant submits that having considered the facts in support of the application and the opposition, it is satisfied that the application meets the threshold to warrant the setting aside of the *ex-parte* orders.

30. In conclusion, the applicant submits that the petitioner contravenes Section 9(2) of the *Fair Administrative Actions Act* that parties should exhaust internal appeal mechanisms before proceeding to court.

31. The applicant urges the court to consider the fact that the respondent has commenced disciplinary proceedings been should reject the invitation to micro-manage the respondent's employees.

**Petitioner's submissions**

32. The Petitioner identifies two issues for determination;

    i. Whether the court lacks jurisdiction to hear and determine the petition and application and for that reason should the petition and application be struck forthwith with costs.

    ii. Whether the petitioner procured the *ex-parte* conservatory orders dated 12th April 2022 irregularly

33. On the first issue the petitioner submits that the suit is neither premature nor does the court lack jurisdiction as the petition and the application do not offend the doctrine of exhaustion of remedies. She submits that Section 87 of the *Employment Act* 2007 clothes the court with jurisdiction and relies on the holding of the Supreme Court in the case of *Samwel Kamau Macharia & another v Kenya Commercial Bank and 2 others* (2012) eKLR where the court observed "A court's Jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written."

34. The Petitioner further submits that section 74 of the *Public Service Commission Act* requires the petitioner to appeal the decision of her employer to the Public Service Commission and the petitioner states that no decision has been reached by the employer she is only challenging the manner in which the disciplinary process is being conducted.

35. The petitioner further submits that that the petition meets the competency threshold for the constitutional pleading as set out in *Anarita Karimi Njeru v Republic (1989) KLR 1*.

36. It is further submitted that the emerging jurisprudence supports the view that the court can intervene in the internal disciplinary process for good cause being demonstrated by the employee. Reliance is

made on the holding in *Agnes Ongadi v Kenya Electricity Transmission Company Limited* [2016] eKLR where the court held that:

> "On the basis that there is a challenge to the manner and procedures applied against the Claimant during the disciplinary meeting held on 13th July 2016, upon the failure by the Respondent to demonstrate that indeed the due process of the law was followed, 1find good reason to find that the process lacked fairness and the resulting decision, whether made or pending was clothed with an illegality. Such a process cannot be allowed to proceed as its foundation is lost."

37. The Petitioner submits the Respondent failed to adhere the provisions of its own Human Resource and Procedures Manual, 2017, the *Employment Act*, 2007 and *Fair Administrative Action Act*, 2015 would have created exceptional circumstances to justify the non-exhaustion of remedies, a position supported by a plethora of decisions.

38. The Petitioner submits that the matter is not premature and urges the court not to strike or dismiss it as the respondent has refused to furnish the petitioner with necessary documents to defend herself.

39. On the 2nd issue the Petitioner submits that the orders were not obtained through deliberate misrepresentation of material facts to the court as she asserts that she disclosed all relevant material facts.

40. The petitioner further submits that the respondent has not demonstrated that the petitioner feigned sickness with a view to procuring orders when the respondent itself rescheduled the disciplinary hearing from 4th April 2022 to 6th April 2022.

41. The Petitioner submits that it disclosed all the material facts and further submits that where there is a constitutional violation by the employer, the court is obligated to intervene as recently held by Lady Justice Monica Mbaru in *Dr Miriam Ndunge Muthoka v Kenya Medical Training College* ELRC Pet E018 of 2022 eKLR where the learned judge dealt exhaustively with the doctrine of exhaustion and found in favour of the Petitioner.

42. The Petitioner submits that the main issue for determination in the petition is whether the intended disciplinary process is in violation of the Petitioner's rights and fundamental freedoms as enshrined under the *Constitution* and the *Employment Act*.

43. The Petitioner urges the court to dismiss the notice of motion application dated 21st April 2022 with costs.

**Analysis and Determination**

44. Having considered the Application, responses and submissions, the issues for determination are;

    i. Whether the court has jurisdiction to hear and determine the petition.

    ii. Whether the Petitioner/Respondent obtained *ex-parte* orders by non-disclosure.

45. As to whether the court has jurisdiction to entertain the Petition, it is elemental to reiterate the salient facts of this case for purposes of placing the issue into context and analysis.

46. From the documents on record, sometime in late 2020, the Respondent/Applicant advertised for the position of General Manager (Internal Audit) KPC2 and the Petitioner/Respondent then an employee of Kenya Bureau of Standards applied for the position, was shortlisted and interviewed on

4th September, 2020. A second and final interview by the Board of the Respondent/Applicant, took place on 2nd October, 2020.

47. The Respondent/Applicant made an offer to the Petitioner/Respondent by letter dated 19th November, 2020 which she accepted on 20th November, 2020 and reported to work on 4th January, 2021.

48. In a communication dated 19th August, 2021, the Respondent/Applicant's Managing Director notified the Petitioner/Respondent that her contract of employment had been adjusted from 3 years to 5 years in conformity with a communication by the State Corporations Advisory Committee (SCAC) dated 30th June, 2021. However, things took a different turn in early 2022 when the Respondent/Applicant received the draft Management Letter from the Office of the Auditor General for audit for the year ended 30th June, 2021 dated 10th January, 2022.

49. The letter queried the recruitment of the General Manager-Human Resource and General Manager-Internal Audit (The Petitioner/Respondent) and characterised the recruitment as unprocedural for non-compliance with the Respondent/Applicant's Human Resource Policies and Procedures, specifically section 2.2.1.

50. The letter states that the Petitioner/Respondent had not attained the requisite 5 years experience in Senior Management.

51. Finally, the recruitment had not been sanctioned by the National Treasury as provided in Circular No 22/2019. The letter jolted the Managing Director of the Respondent/Applicant into action.

52. By letter dated 2nd March, 2022, the Managing Director, Dr Macharia Irungu gave the Petitioner 72 hours to explain in writing, by 9th March, why she falsified information on her roles and responsibilities in her previous employment in the "New Employee Data Capture Form and the Curriculum Vitae. In the New Employee Data Capture Form dated 5th January, 2021, the Petitioner/Respondent indicated as follows;

> Kenya Bureau of Standards, Principal Internal Auditor, 2008 – 2020
>
> National Cereals and Produce Board Regional Auditor 2007 – 2008.

53. As structured, the form does not require the employee to set out the details of progression since joining the organization, typically captured in the Curriculum Vitae (CV) and attached documentation.

54. The Curriculum Vitae on the other hand states as follows; 2008 – Present Principal Internal Auditor, Kenya Bureau of Standards (KEBS), 2007 – 2008 Regional Auditor, National Cereals and Produce Board (NCPB).

55. The Petitioner is accused of having given false information which amounted to gross misconduct under section 44(4)(g) of the *Employment Act*, 2007, incorrectly cited as section 41(4)(g) and clause 11.7.1(c) of the Respondent/Applicant's Human Resource Policies and Procedures Manual.

56. The Petitioner responded by letter dated 8th March, 2022 denying the allegations and requesting for six (6) documents in order to provide an appropriate response. She also requested for an opportunity to clarify the issue.

57. By letter dated 8th March, 2022, the Managing Director of the Respondent/Applicant furnished the applicant with 4 of the documents.

58. The Petitioner/Respondent requested for the remaining two (2) documents by a letter dated 9th March, 2022.

59. The Managing Director's response dated 11th March, 2022, states in part;

> " The company's response to the Office of Auditor General inquiry is not material or relevant to the issues raised in the show cause letter issued to you.
>
> With regard to certificates and documents in your staff file, that support your Curriculum Vitae as filed with us, we wish to inform you that the same as provided by yourself and are not the subject of the query in reference herein . . ."

60. Significantly, the final management letter from the Auditor General dated 7th March, 2022 appear to have dropped the query on the General Manager, Human Resource but the query on the Petitioner and absence of approval by the National Treasury remained. This may have been the basis on which the Petitioner sought information about the Respondent's response to the Draft Management Letter. This was and remains crucial evidence to her defense and should have been furnished as requested.

61. The letter pushed the deadline for a response to 14th March, 2022.

62. In her response dated 14th March, 2022, the Petitioner denied having provided any false information in her application for employment.

63. The Petitioner explains that she had furnished the Respondent with all original certificates and testimonials including a letter of promotion from KEBS which accounted for 4 years, 4 months experience as a Principal and as Regional Manager at the NCPB from 4th June, 2007 to 1st December, 2008, a period of about 1 year 6 months, giving a total of about 6 years.

64. The Petitioner reiterates that she had provided all the necessary documentation during the interview, a fact the Respondent/Applicant has not controverted, and finally emphasizes of her honesty and diligence as a public officer.

65. By letter dated 17th March, 2020, the Managing Director of the Respondent/Applicant notified the Petitioner/Respondent that her case had been referred to the Board Human Resource Committee pursuant to clause 11.2.1 of the Human Resource Manual, 2019 and by letter dated 29th March, 2022, the Petitioner was invited to "offer your defense and/or explanation as to why disciplinary action should not be taken against you for gross misconduct . . . ", scheduled for 4th April, 2022.

66. In sum, the Petitioner was being invited for a disciplinary hearing by the relevant Board Committee.

67. While the notice period was sufficient, the invitation letter made no reference to the Petitioner's right to be accompanied by a colleague of her choice. This is a statutory right under section 41 of the *Employment Act*, 2007, a provision the Respondent/Applicant is required to abide by when undertaking any disciplinary process.

68. For unexplained reasons, the hearing did not take place on 4th April, 2022 and was postponed to 6th April, 2022 on which date the Petitioner was attended to at the Nairobi Hospital and given 5 offdays from 4th April, 2022 to 8th April, 2022. The Respondent/Applicant's contention that the Petitioner feigned illness is not supported by any evidence and is of no moment.

69. The Petition was filed on 7th April, 2022 and interim orders were obtained on 12th April, 2022.

70. It is the Respondent/Applicant's case that the court has no jurisdiction to interfere with the on-going disciplinary process as the Petitioner had not appealed the invitation letter to the Public Service

Commission (PSC) and thus has not exhausted the remedies under the *Public Service Commission Act* which provides for appeals against decisions made by employers. That the Petition is challenging an internal disciplinary process.

71. Using the decision in *Dr Samuel Gitau Kinyanjui v County Government of Kirinyaya & another*, it is urged that the sentiments of court that section 9(2) of the Fair Administrative Actions Act must be satisfied before initiating a court action, have neither been overturned nor reviewed.

72. In *Stephen Nyarangi Onsom & another v George Magoha & 7 others* (2014) eKLR, Lenaola J. (as he then was) expressed himself as follows;

> "... It is a well-accepted principle that even if this court has jurisdiction to determine a violation of the provisions of the *Constitution* under Article 165 and the 258 as it does, then it must exercise restraint and first give opportunity to the relevant constitutional bodies or state organs to deal with the dispute as provided in the relevant statute. This has been well articulated by the Court of Appeal in *Narok County Council v Trans Mara County Council* (2000) EA 161 at 164"

73. Similar sentiments were expressed by the Supreme Court in *Albert Chaurembo & others v Maurice Munyao & 148 others* (2019) eKLR on giving deference to the dispute resolution bodies with mandate to deal with specific disputes in the first instance.

74. These decisions though binding on this court cannot be construed to mean that the court cannot interfere with internal disciplinary process at all.

75. Are courts of law obligated by law to await even patently flawed processes to conclude or can they put things right to ensure the law is complied with by those undertaking the process when it is challenged by the affected employee.

76. The latter is more persuasive as elaborated in *William Odhiambo Ramogi & 3 others v Attorney General & 4 others* (2021) eKLR, *Eustace Muriithi Njeru v Energy Petroleum Regulatory Authority* (2020) eKLR, where the court stated as follows;

> "This court in the case of *Judith Mbaya Tsisiga v Teachers Service Commission* (2017) eKLR, this court has rendered its opinion regarding intervention in disciplinary cases in numerous decisions among those cited by the Claimant ... In all these cases, the court declined to interfere with the disciplinary process on the basis that this is a function of the employer as was stated in Fredrick Saundu Arnold's case, the courts will not intervene in any employers internal disciplinary proceedings until it has run its course. The only circumstances when the court will interfere are in exceptional circumstances where great injustice might result or where justice might not by any other means be attained ...
>
> Courts of law should be very slow to interfere in the internal disciplinary process at work place unless it is manifestly clear that the action by the employer derogates materially from the internal disciplinary process and the law ..."

77. Similar sentiments were expressed in *Stella Nkatha Kebongo v Barclays Bank Ltd* (2016) eKLR where the court stated *inter alia*

> "... The court will thus only interfere with the internal disciplinary process of an employer mid-way or before its conclusion where it is apparent to the court that grave injustice will be visited upon an employee and to allow the process to move one step forward would only

negate the principle of fair labour relations and in breach of the employment contract, law or the *Constitution* . . .”

78. A similar holding was made in *Agnes Ongadi v Kenya Electricity Transmission Co. Ltd* echoed earlier by Byram J. in *Geoffrey Mworia v Water Resources Management Authority* (2015) eKLR and the more recent decision in *John Mburu Kamau v Kenya Accreditation Service* (2021) eKLR where Onesmus Makau J. enumerated instances in which a court of law could intervene in an employers disciplinary process including;

    a. Where an employee establishes that the employer is proceeding in a manner that contravenes the provisions of the *Constitution* or legislation or

    b. In breach of agreed terms of the contract or employers policy.

    c. If the process is manifestly unfair and offends the rule of natural justice.

79. Having demonstrated the legal principles applicable in the circumstances of this case, the salient issue is whether the Petitioner/Respondent has demonstrated sufficient basis for the court to intervene in the intended disciplinary hearing.

80. The Petitioner/Respondent argues that the disciplinary proceedings thus far violate the provisions of Articles 10, 27, 28, 41, 47, 50(1) and 236 of the *Constitution*, Section 41 of the *Employment Act* and the Respondent’s Human Resource Policy and Procedures Manual, 2019.

81. The Respondent/Applicant’s disciplinary process against the Petitioner so far, may be faulted in the following respects;

    i. The flurry of activities by the Managing Director of the Respondent/Applicant are all traceable to the draft Management Letter from the Office of Auditor General dated 10th January, 2022 as opposed to its own initiative and comes slightly more than one (1) year after the Petitioner’s employment.

    But for the audit query, the circumstances in which the Petitioner was recruited, it would appear would have remained unknown.

    The allegations of alleged false declaration would not have arisen yet the Respondent had the documentation it seeks to rely upon. It is not in dispute that the Respondent took the Petitioner’s application through a short-listing committee guided by a short-listing criteria and which had minutes of the meeting. Neither of these documents have been provided in support of the allegations. This state of affair would appear to affirm that the Petitioner had furnished the Respondent with all the documentation it required to make an informed decision on her suitability for the position it had advertised.

    Relatedly, the Petitioner was interviewed by Management and the Board of Directors. Puzzlingly, neither interview sheets nor minutes have been provided to demonstrate the questions asked and clarifications sought from the Petitioner.

    Instructively, the Respondent is obligated to conduct due diligence to satisfy itself that it had the right person whose qualification, experience and documentation is correct.

Documents on record show that reference from the NCPB was sought on 9th February, 2022, more than one (1) years after employment. That is sufficient for now.

(ii) It is trite that the right to fair hearing is sacrosanct. The right to be heard traditionally encapsulated by the maxim audi alterum partem is now a constitutional and legislative imperative. Section 41 of the *Employment Act*, 2007 is explicit on the right to be heard.

Section 4(3)(g) of the *Fair Administrative Actions Act*, 2015 provides that where the Administrative Action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision

a. . . .

b. an opportunity to be heard and make representations in that regard.

c. . . .

d. . . .

e. . . .

f. . . .

g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.

82. Section 41 of the *Employment Act* prescribes the procedural formalities to be complied with by the employer when conducting a disciplinary process.

83. The Petitioner's right to fair hearing was derogated in two respects. First, neither of the invitation letters dated 29th March, 2022 and 4th April, 2022 inform the Petitioner his right to be accompanied to the meeting by an employee of choice.

84. Second and more significantly, the Petitioner requested for documents, a request the Respondent/ Applicant's Managing Director rebuffed and did not provide the documents. The Managing Director's response to the request adverted to elsewhere in this judgment clearly shows his disdain for the Petitioner's request. He is emphatic that the Respondent's response to the draft management letter was irrelevant. It is unclear why the Managing Director adopted this stance. The information may have been irrelevant to him but not to the Petitioner. The court is also alive to the fact that the response appear to have exonerated the General Manager, Human Resource and was thus crucial to the Petitioner's disciplinary case. Needless to emphasize, the documents in her staff file relate to her and ought to have been availed as requested. The Petitioner was preparing a defence and was entitled to these documents whether the Managing Director of the Respondent considered them irrelevant or not

85. Instructively, the invitation to the hearing informed the Petitioner that he was to appear before the Board Human Resource Committee (BHRC) to offer her defense and/or explanation why disciplinary action should not be taken. This was a disciplinary hearing as opposed to an inquiry and the safeguards prescribed by law had been triggered.

86. In addressing the issue of supply of documents and materials for purposes of a disciplinary hearing, the Court of Appeal in *Regent Management Ltd v Wilberforce Ojiambo Oundu* (2018) eKLR stated as follows;

> "In as much as we do not condone the Respondent's conduct of failing to attend the disciplinary hearing on 8th November, 2010, we cannot shut our eyes to the glaring procedural flaws committed by the appellant . . .
>
> We are at a loss as to why the appellant refused to grant the Respondent certified copies of the documents requested even at his own expertise. In our view, these documents were integral to the Respondent preparing his defense . . ."

87. The court is guided by these sentiments and finds that the sentiments of the Court of Appeal apply on all fours to the facts of the instant case. (See *Stella Nkatha Kebongo v Barclays Bank Ltd* (*supra*).

88. The right to facilitate the affected employee to produce relevant documents, produce witnesses and peruse documents against him or her is embodied in clause 11.10.1(a) and (b) of the Respondent's Human Resource Policies and Procedures Manual, 2019.

89. For the foregoing reasons, it is the finding of the court that the Petitioner has established a case for the courts intervention in the on-going disciplinary process as allowing it to proceed to conclusion in its present structure is likely to occasion grave injustice to the Petitioner and cannot withstand scrutiny. The procedure violates the *Constitution*, *Fair Administrative Action Act*, *Employment Act* and the Respondent/Applicant's Human Resource Manual.

90. As to whether the Petitioner/Respondent obtained *ex-parte* orders on account of non-disclosure of material facts, the Respondent's case is that the Petitioner did not disclose that;

    i. she had misrepresented the duration of her experience in management.

    ii. the Respondent had written to her on 2nd March, 2022 to explain why she had falsified information in her job application.

    iii. had been supplied with the documents requested for.

    iv. had been notified that her matter had been referred to the Board Human Resource Committee.

    v. had been invited for a disciplinary hearing on schedule for 6th April, 2022.

91. The Petitioner on the other hand maintains that she approached the court with clean hands.

92. In an affidavit sworn on 6th April, 2022, the Petitioner discloses that;

    i. The Managing Director of the Respondent/Applicant gave her a Notice of Show Cause dated 2nd March, 2022 and provided a copy.

    ii. As early as 24th January, 2022, the applicant had written to the Managing Director on the experience he attained at the NCPB and furnished a copy.

    iii. She responded to the notice to show cause on 8th March, 2022 and requested for certain documents some of which were supplied on the same day. A further request for the outstanding documents dated 9th March, 2022 was declined by the Managing Director.

    iv. She was notified that the matter had been referred to the Board Human Resource Committee.

v. She was notified of the disciplinary hearing slated for 4th April and 6th April 2022 on 29th March, 2022 and on 4th April, 2022.

93. The court is in agreement with the sentiments of the court in *Uhuru Highway Development Ltd v Central Bank of Kenya & others* (2015) eKLR and other decisions on disclosure of material or relevant matters and the tests enunciated by the courts.

94. From the foregoing summary, it is unclear to the court what other information the Petitioner ought to have disclosed for the court to exercise discretion in her favour.

95. The court perused the application, supporting affidavit and the annextures before granting interim orders.

96. In sum, the Respondent/Applicant has failed to demonstrate that the court was not misled by the Petitioner.

97. The issues of discrimination and harassment were not substantiated and were of no moment at that stage of the proceedings.

98. In the upshot, having found that the court has jurisdiction to intervene in the disciplinary proceedings being undertaken by the Respondent/Applicant against the Petitioner, and having further found that the interim conservative orders granted on 12th April, 2022 were not obtained on account of non-disclosure, the Notice of Motion Application dated 21st April, 2022 is unmerited and is accordingly dismissed with no orders as to costs.

99. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF SEPTEMBER 2022**

**DR. JACOB GAKERI**

**JUDGE**

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**