



**Kirigo v Mount Kenya Academy Foundation (Petition 15 of 2019)
[2022] KEELRC 13088 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13088 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
PETITION 15 OF 2019
DKN MARETE, J
OCTOBER 31, 2022**

**BETWEEN
JANE KIRIGO GIKUHI ALIAS JANE KIRIGO WAIGWA CLAIMANT
AND
MOUNT KENYA ACADEMY FOUNDATION RESPONDENT**

JUDGMENT

1. This is a constitutional contest *inter partes*. It is originated by an Amended petition dated 3rd February, 2020.
2. The respondent in an Amended response to the petition dated December 14, 2019 sworn on February 15, 2020 denies the petition and prays that it be dismissed with costs.
3. The petitioner's case comes out as follows;
 1. The respondent is a non-profit organization registered in the state of Atlanta in the USA and carrying on business in Kenya as an education institution and whose address for service for purposes of this petition shall be care of P O Box 521 Nyeri.
 2. The petitioner being a person and citizen within the meaning of article 20(2) of the *Constitution of Kenya, 2010*, is entitled to each and all the fundamental rights and freedoms expressed and or implied in the Constitution.
 3. Article 3 of the *Constitution of Kenya, 2010*, obliges all person to uphold and defend the constitution and in particular to insist that all organs and/or bodies of the Government of Kenya equally respect, uphold and defend the constitution.
 4. Article 22(1) of the *Constitution of Kenya, 2010* entitles the petitioner (and indeed all other persons) to move the honorable court whenever a right or fundamental freedom in the Bill of rights is denied, violated, infringed or threatened.



5. Article 10 of the *constitution of Kenya*, 2010 obliges the respondent to observe human rights, non –discrimination, equity, social justice, rule of law, good governance, and integrity in exercise of their functions.
 6. Article 28 of the *constitution of Kenya, 2010* guarantees the petitioner the right to be treated with dignity.
 7. Article 29 of the *Constitution of Kenya* guarantees the petitioner the right not to be treated or punished in a cruel, inhuman or degrading manner.
 8. Article 31 of the *constitution of Kenya* guarantees the petitioner the right not to have their possessions seized.
 9. Article 40 of the *Constitution of Kenya, 2010* protects the petitioner’s right to property.
 10. Article 41 of the *Constitution of Kenya, 2010* protects the petitioner’s right to fair labour practices.
 11. Article 43 of the *Constitution of Kenya, 2010* protects the petitioner’s right to accessible and adequate housing and reasonable standards of sanitation.
 12. Article 47 (1) of the *Constitution of Kenya, 2010* entitles the petitioner to a fundamental and inalienable right to a lawful and procedurally fair administrative action.
4. It is the petitioner’s case that the respondents have in blatant violation of various provisions of the constitution and particularly articles 28, 29, 31, 40, 43 and 47 and various statutory provisions and especially the *Fair Administrative Action Act* and the *Employment Act* denied the petitioners right to fair administrative Action and have evicted the petitioner from the dwelling house that had been provided to the petitioner during her employment.
 5. It is the petitioner’s further case that she is an employee of the respondent vide an appointment on January 5, 2011.
 6. Her further case is that on May 2, 2019 the respondent sent her on leave without loss of benefits which included housing until the outcome of ELRC No 13 of 2019 *inter partes*. She posits that article 41 of the *Constitution of Kenya, 2010* provides her right to fair labour practices.
 7. The petitioner’s other case is that on July 30, 2019 the respondent welded her house located in the school compound thereby keeping her and her family out and forcibly holding the petitioner’s property in the form of travel documents, clothing, business document, child’s provisions, play items and piano in the house.
 8. Upon such eviction, her salary was stopped from July, 2019 and that she has not been paid to date. All this was done without giving her an opportunity to be heard, notice or consultation or warning whatsoever.
 9. Her other case is that the effects of the respondent’s actions are that the petitioner and her family have been deprived of her property and have had to live in a guest house at considerable expense and inconvenience. The said expense in terms of rent is currently at Kshs 717,000 as at January 15, 2020 when the petitioner was able to settle down in her new rental house.
 10. Again, the petitioner comes out as follows;The petitioner is a family person and has been put to great expense and inconvenienced by the forcible eviction from her house by the respondent.The respondent’s actions are in breach of her fundamental rights as enshrined in the Constitution of Kenya,



2010. Pursuant to the court orders dated December 18, 2019 in the claim the petitioner valued the damage to her property in the staff house at Kshs 334,625.00 and holds the respondent responsible for such loss and damage and this includes Kshs 20,000.00 being valuation fee. The petitioner has since moved out of the respondent's staff house. This matter involves an interpretation of the Constitution as it relates to the right to fair labour practices, protection to property, rights to dignity, privacy and administrative action and therefore urges this court to safeguard the same.

11. She prays thus;
 - i. A declaration that the respondent's action of evicting the petitioner from the staff dwelling house is unconstitutional, in breach of the petitioner's fundamental rights and freedoms as enshrined under articles 28, 29, 30, 31, 40, 41, 43 and 47 of the Constitution and therefore null and void.
 - ii. A conservatory order be issued ordering the respondent to open the staff dwelling house and giving the petitioner 15 days' notice or such other notice as the court may deem reasonable to value the loss and damage to her property and to vacate with dignity and in peaceful and humane manner.
 - iii. (a) An order that the respondent pays the petitioner the sum of Kshs 717,000 as at 15.1.2020 being the amount the petitioner has incurred in seeking alternative accommodation.
 - iv. An order that the respondent pays the petitioner the full salary plus all other benefits from July 1, 2019 until the determination of Nyeri ELRC No 12 of 2019.
 - v. An order of compensation/damages plus interest at court rates.
 - v(a) An order that the respondent pays the petitioner the sum of Kshs 334,625 being the value of the damaged property as a result of the illegal eviction plus Kshs 20,000 being the valuer's fees.
 - vi. Costs plus interest at court rates.
 - vii. Such other order(s) as this honorable court shall deem just.
12. The respondent in an Amended response to the petition sworn on February 15, 2020 avers that the petition should fail and be dismissed with costs.
13. The respondent denies being a non-profit organization registered in the State of Atlanta in the USA and avers that it is a company limited by guarantee and registered in Kenya.
14. The respondent's further case and aversion is that she fails to achieve 100% student enrollment with the student population dwindling and therefore the necessity for restructuring which was done a different times.
15. Her further case is that the petitioner was employed by respondent on January 5, 2011 up to April 4, 2019 when the board of directors abolished her position. She was fully aware of the financial position of the respondent and was involved in the decision on redundancy as its required of the law. This was communicated to her in a meeting with the director on April 1, 2019 and subsequently by letter dated April 4, 2019. She thereon filed ELRC No 258 of 2019 which sought, *inter alia* a stay of a redundancy. This was granted on April 18, 2019 and confirmed on 20th June instant.
16. The respondent's further case and averments is that the matter was set down for hearing on July 12, 2019. Both parties attended but counsel for the petitioner applied for an adjournment which



- adjournment was granted on terms that the interim orders be discharged. This meant that the suspension of the redundancy meeting was lifted and the said notice was effective.
17. The discharge also meant that without prejudice of the outcome of Nyeri ELRC No 12 of 2019, the petitioner was no longer an employee of the respondent. She was not therefore entitled to any salary or residency accommodation as she was no longer a member of staff. She was requested to vacate her dwelling house vide a letter dated July 12, 2019 but continued her residence without authority. This continued until July 30, 2019 when she left to attend court never to return.
 18. The respondent's other case is that vide a letter dated August 6, 2019, the petitioner did a demand letter alleging unlawful and illegal eviction and this was replied to vide a letter dated 7th August instant. After various exchanges *inter partes* and in a letter dated November 26, 2019 the respondent agreed to give the petitioner 5 days to remove her belongings as requested. Instead, she chose to seek court orders to access the house without any further demand notice and has accessed it as ordered by the court.
 19. The respondent denies evicting petitioner but reiterates that her right to the house was obliterated by the discharge of the court orders on redundancy. She was thereafter not entitled to accommodation by the institution. She denies a breach of any further fundamental rights of the petitioner and avers that this was a contractual engagement with clear rights *inter partes*. The claimant ought to have complied with the respondent notice to vacate the house which she declined. She denies electrically welding the petitioner's house and put her in strict proof thereof.
 20. The respondent further avers that the petitioner is the author to her own misfortune and exposed herself to the loss purported to be incurred as she defied the notice to remove her belongings thereby refusing to mitigate her loss. She cannot therefore lay any claim on this account. She therefore denies the claim as set out.
 21. On the contrary, the respondent avers that it is the petitioner who breached the fundamental rights of the respondent by holding on to a dwelling house that she was not entitled to following the discharge of the interim orders. Again, upon being awarded 5 days to remove her belongings, she squandered this by unduly rushing back to court. She is therefore not entitled to any relief as sought or even cost of the petition.
 22. The matter came to court variously until February 15, 2022 when it was heard *inter partes*.
 23. The issues for determination therefore are;
 1. Whether the petitioner moved out of the staff house voluntarily or she was evicted by the respondent.
 2. Whether the staff house provided by the respondent was free or for pay by the petitioner.
 3. Whether the respondent has breached the petitioner's constitutional rights under paragraphs 28, 29, 31, 40, 41 and 47 of the *Constitution of Kenya, 2010*.
 4. Whether the petitioner is entitled to the relief sought.
 5. Who bears the costs of this petition.
 24. The 1st issue for determination is whether the petitioner moved out of the staff house voluntarily or she was evicted by the respondent. The petitioner's case and submissions is that she was evicted and in between lost in terms of damage to her property. The respondent denies this and specifically submits that this is not the case. The correct position is that there was massive back and forth on the removal of the petitioner and this was addressed through various correspondence *inter partes*. Over all, the



petitioner was never evicted until some date in August, 2019 when she penned a demand letter for forcible eviction which was not the case.

25. It is her further case that in the course of time, various arrangements were made inter partes for the petitioner to voluntarily and freely vacate the premises but to no avail. She persisted on illegitimate occupation of the premises despite her being awarded time to voluntarily vacate. She is therefore the author of her misfortunes and has nobody to blame.
26. The respondent's case overwhelms that of the petitioner. Through and through, there is overwhelming evidence for a case in favour of the respondent. On a balance of probabilities and preponderance of evidence, this matter tilts in her favour (respondent.) There was therefore no eviction of the petitioner by the respondent and I find as such.
27. The 2nd issue for determination is whether the staff house provided by the respondent was free or for pay by the petitioner. The parties agree that the staff house provision to the claimant was part of her terms and conditions of employment. It was an entitlement for as long as she remained in the employment of the respondent. This is the position derived from the respective cases of the parties and the evidence in such support. And this becomes the holding of this court.
28. The 3rd issue for determination is whether the respondent has breached the petitioner's constitutional rights under paragraphs 28, 29, 31, 40, 41 and 47 of the *Constitution of Kenya, 2010*. The petitioner insists and submits a breach of her fundamental rights whereas the respondent in toto denies the same. The petitioner in her submissions dated March 14, 2020 goes out to demonstrate and illustrate a breach of his fundamental rights but this amounts to nil. It is overwhelmed by the abundant evidence of the respondent to the contrary. The believable scenario is that the petitioner was not spectacular in the process of retaining or otherwise of the dwelling house after vacation of the court orders sustaining redundancy. The case of the respondent on the petitioner's conduct in the matter and process is the more likely of the two. Without the factual basis on the facts of breach by the petitioner, this theory becomes untenable.
29. The respondent's further submits that the petitioner's elements of breach of constitutional rights has not been proven or at all. Whereas these rights are provided for and also pleaded there has been no demonstration of a breach of any of the rights as envisaged. The entire dispute was and has always been contractual and not constitutional. A case of breach therefore is not demonstrated and I find as such.
30. The 4th issue for determination is whether the petitioner is entitled to the relief sought. She is not. In the absence of proof of a constitutional breach of her fundamental right, relief becomes unsustainable and unavailable.
31. I am therefore inclined to dismiss the petition with orders that each party bears their costs of the same.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER 2022.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr. Waweru Macharia instructed by Waweru Macharia & Co.Advocates for the Claimant.
2. Miss Lucy Mwai instructed by Lucy Mwai & Co.Advocates for the respondent.

