



**Kiganda v Kenya Utalii College (Environment and Land Miscellaneous Application E079 of 2022) [2022] KEELRC 12801 (KLR) (5 October 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12801 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E079 OF 2022  
JK GAKERI, J  
OCTOBER 5, 2022**

**BETWEEN**

**DAVID AYUMBA KIGANDA ..... CLAIMANT**

**AND**

**KENYA UTALII COLLEGE ..... RESPONDENT**

**RULING**

1. Before the court for determination is a Notice of Motion Application by the Applicant dated May 30, 2022 seeking Orders That:
  - i. Spent.
  - ii. Pending the hearing and determination of this application and Principal/CEO of the Respondent herein be compelled to produce within 3 days an Ad hoc disciplinary committee report of December, 2021 in respect of the Applicant.
  - iii. The court be pleased to compel the Principal/CEO of the respondent to implement the recommendations of the Kenya Utalii College Ad hoc Disciplinary Committee/Investigation Committee report of December, 2021 forthwith.
  - iv. Costs of this application be provided for.
2. The application filed under certificate of urgency is expressed under Article 159 of *the Constitution* of Kenya, 2010, section 12 of the *Employment and Labour Relations Court, 2011* and Rule 17 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* and supported by the affidavit of one David Ayumba Kiganda, the Applicant who depones that he was employed by the respondent in January, 2002 and is currently an Examination Assistant II.



3. The affiant states that on September 17, 2021, he received a show cause letter for undermining the management of the respondent, which he responded to via letter dated September 20, 2021 and was interdicted on September 27, 2021.
4. That the Principal/CEO of the respondent appointed a five man Ad hoc Disciplinary Committee by letter dated October 29, 2021 to investigate the interdiction of the Applicant.
5. The letter set out the terms of reference of the Committee and was tasked to recommend the most appropriate disciplinary action to be taken, if any, against the Applicant.
6. That the Applicant appeared before the committee on December 1, 2021.
7. Paragraph 8 of the supporting affidavit embodies the alleged recommendations of the Disciplinary Committee which the Applicant alleges are yet to be implemented.
8. The affiant states that the respondent's Human Resource Policy and Procedure Manual, 2018 does not constitute the Principal/CEO an appellate body against the recommendations of an Ad hoc Disciplinary Committee he had constituted and thus acted ultra vires.
9. That the role of the Principal/CEO in this regard is to enforce the recommendations of the Disciplinary Committee.
10. The affiant states that the respondent's Human Resource Policy and Procedures Manual has no provision for an extension of the disciplinary process for more than 6 months unless in cases of a criminal case.
11. That the respondent's Principal/CEO's failure to implement the recommendations of the Ad hoc Disciplinary Committee report is illegal, irregular and unlawful and has led to extended interdiction of the applicant for over 8 months.
12. That production of the Committee report is vital in the disposal of this application to save on judicial time.
13. That reliance is exclusively made on the respondent's *Human Resource Policy and Procedures Manual, 2018* and the Public Service Commission Disciplinary Manual, May 2016.

### **Respondent's case**

14. The respondent filed a replying affidavit by Tecla N. Kigen dated June 21, 2022.
15. The affiant states that the Applicant is an Examinations Assistant II in the Examinations Department and also the Branch Secretary, Union of Kenya Civil Servants.
16. That the applicant was suspended for a period of one (1) year from March 15, 2016 to March 23, 2017 for aiding a stranger to access the College Boardroom while the Council was in session and had been warned. That a show cause letter was issued via letter dated September 17, 2021. The Applicant was accused of;
  - i. Holding a staff general meeting in the college Dining Hall on September 9, 2021.
  - ii. Scheduled a general staff meeting on September 13, 2021 and invited the Chair of the Council as well as the management.



- iii. Holding a meeting on September 13, 2021 without permission contrary to the Recognition Agreement and disregard of the Principal/CEO memo dated September 10, 2021 and misinforming the Chair of Council about the purpose of the meeting.
- iv. Addressing the Principal/CEO discourteously and using derogatory remarks to describe the management.
- v. Unauthorised circulation of controlled college documents on Social Media dubbed “KUC STAFF PLATFORM.” Sending emails to staff, creating confusion, disharmony and incitement among the staff on management contrary to the Public Service Code of Conduct and Ethics.
- vi. Confronting the Human Resource and Administration Manager (HR&AM) with verbal threats in her office on September 8, 2021 demanding to know why the Human Resource team was holding meetings with staff regarding SRC/PSC grading and salary structure and told her that she would be sacked like her predecessor.
17. It is deponed that the Applicant responded to the notice to show cause on September 20, 2021 and was interdicted on September 27, 2021 since the allegations amounted to gross misconduct as provided by the *Human Resource Policy and Procedures Manual* 11.7.1(iii) (c) (d) & (g).
18. That by letter dated October 29, 2021, the Principal/CEO appointed an Ad hoc Committee to investigate the allegations and hear the Applicant as well as other witnesses.
19. The affiant states the Ad hoc Committee presented a report to the Principal/CEO, who by memo dated April 27, 2022 directed the Human Resource Management Advisory Committee (HRMAC) to review the case on the glaring gaps including the fact that the meeting on September 13, 2021 was unauthorised, union had no power to request for a general staff meeting, the union can only engage its members, the Applicant was guilty of defiance of authority, failure to obey instructions of the Principal/CEO, disrespect of Council and the Principal, and management, insubordination, incitement of staff, indiscipline, circulation of confidential information on social media as well as unsubstantiated allegations about other staff on procurement.
20. That the HRMAC reviewed the documents and submitted a report to the Principal/CEO on May 30, 2022.
21. That the respondent wrote to the Public Service Commission on February 25, 2022 requesting for extension of handling the disciplinary case for a period of 6 months to allow the new Principal make a decision on the issue and the disciplinary process was still in progress.
22. That the Applicant had relied on confidential documents and facts without explaining how he obtained the same, including the CEO’s letter to the PSC and the report and recommendations of the Ad hoc Committee. That the documents were obtained illegally and should not be admitted.
23. It is the respondent’s case that the Applicant rushed to court prematurely as the respondent had violated neither its Human Resources Policies and Procedures Manual nor the Provisions of the [Employment Act](#), 2007 and will suffer no prejudice if he is subjected to disciplinary proceedings.
24. Further, the affiant states that applicant has declared himself unaccountable to the employer and is seeking the court’s concurrence by this application.
25. That the applicant is aware of the charges he faces and disciplinary proceedings will be undertaken in strict compliance with the *Human Resource Policies and Procedures Manual* and section 41 of the [Employment Act](#).



26. That the applicant wants the court to micro-manage the Human Resource functions of the respondent.
27. The affiant states that the court will be acting in excess of its jurisdiction by stopping a process initiated by another competent body, the respondent, and the court should not pre-empt the expected outcome of the disciplinary process.
28. It is urged that the applicant has neither satisfied the requisite conditions nor established the grounds relied upon for the grant of the orders sought.

### **Applicant's submissions**

29. The applicant submits that the essence of the application is the enforcement of the Ad hoc Disciplinary Committee report presented to the former Principal/CEO before expiry of his term of office.
30. It is submitted that no reason has been given why the Ad hoc Committee report was not produced in court and the Principal/CEO had no power to re-open a concluded matter and conduct new investigations.
31. That the respondent's Disciplinary Manual was operationalized on January 28, 2022 and the applicant was interdicted on September 27, 2021 and the Ad hoc committee determined the matter on December 1, 2021 and gave oral recommendations and a duly signed copy was not provided by the CEO.
32. That the Human Resource Advisory Committee had no mandate to handle disciplinary matters and cannot appoint another Ad hoc Committee to set aside another decision.

### **Respondent's submissions**

33. The respondent identifies five (5) issues for determination namely; presumption of legality, scope of judicial review, procedure, courts jurisdiction over the respondent's human resource function and use of confidential information contrary to the law.
34. The Attorney General, representing the respondent, submits that the applicant has tendered no evidence to rebut the presumption that the disciplinary process is being undertaken in accordance with the respondent's Human Resource Policy and Procedures Manual and no case has been made for the court to interfere with an on-going disciplinary process. The decision in *Raila Odinga v IEBC & 3 others* is relied upon to underscore the common law principle of *Omnia Praesumuntur rite et solemniter esse acta* and the applicant's burden of proof to establish the facts he wishes the court to believe their existence.
35. As regards the scope and parameters of judicial review, the Attorney General urges that the applicant is seeking reinstatement at the interlocutory stage. That he is seeking the order of specific performance.
36. It is submitted that the applicant is seeking a public law remedy of mandamus in the domain of private law. Reliance is made on the Court of Appeal decision in *Republic v Professor Mwangi S. Kimenyi, Permanent Secretary, Ministry of Planning & another* (2013) eKLR to emphasize that judicial review remedies are not available in employment contracts where the court relied on the decision in *R v British Broadcasting Corporation Ex parte Lavelle* (1983) 1 WLR 1302.
37. The Attorney General submits that the applicant cannot benefit from public law remedies.
38. On the respondent being the master of its procedure, the Attorney General relies on the Court of Appeal decision in *Kenya Revenue Authority v Menginya Salim Murgani* (2010) eKLR to urge that bodies other than courts with defined procedures are masters of their own procedures. That the



respondent is mandated to conduct disciplinary process in accordance with its Human Resource Manual as provided by paragraph 12 of the response.

39. As regards the use of confidential information obtained contrary to the law, it is urged that the application herein is anchored on illegally obtained documents such as the letter to the Public Service Commission, among others.
40. It is urged that the applicant did not request for the documents from the Principal/CEO and has not demonstrated how he obtained the documents. That the documents were obtained in contravention of Article 35 and 50(4) of *the Constitution* and section 80 of the *Evidence Act* and thus the claimant has come to court with unclean hands. Reliance is made on the decision in *Nairobi Law Monthly & another v Kengen* (2013) eKLR to urge that the applicant obtained official documents clandestinely yet he could have requested for them.
41. Finally, as regards the absence of the court's jurisdiction to micro-manage the respondent's human resource function, reliance is made on the decision in *Judicial Service Commission v Gladys Boss Sholei & another* to underscore the need for courts to allow the work place to operate productively and harmoniously, as is the decision in *Teachers Service Commission v Thomas Joseph O. Onyango* to emphasize that courts should not as a general rule usurp powers of other bodies human resource function.
42. Finally, the sentiments of Rika J. in *Alfred Nyungu Kimungui v Bomas of Kenya* (2013) eKLR are relied upon to urge that courts should be cautious in exercising jurisdiction not to do so in a manner that would appear to take over managerial prerogative in employment situations.
43. It is urged that the court will be acting in excess of its jurisdiction if it were to direct the respondent to implement a decision in the midst of disciplinary proceedings.

#### **Determination**

44. After careful consideration of the application, grounds in support, response and the submissions by counsel, the issues for determination are;
  - i. Whether the applicant has made a case for the court's intervention.
  - ii. Whether the applicant is entitled to the orders sought.
45. It is common ground that the claimant is an employee of the respondent as well as the Branch Secretary of the union. It is also not in dispute that the applicant has had a previous interdictioin lasting one year. Equally not in contest is the fact that applicant received a show cause letter on September 17, 2021. The letter identified five (5) issues and required a response within 24 hours. The applicant responded by letter dated September 20, 2021.
46. As adverted to elsewhere in this judgement, the applicant was interdicted by letter dated September 27, 2021 and remains on interdiction and the respondent maintains that the disciplinary process is still in progress more than 10 months later.
47. Although the applicant argues that he was exonerated by the Ad hoc Disciplinary Committee, he has not tendered any evidence of the alleged exculpation and documents relied upon also not clear on the outcome of the proceedings.
48. But more significantly, the documents are alleged to have been obtained illegally and thus unreliable.
49. It is trite law that such evidence is generally inadmissible. A catena of decisions have so held (see *Okuya Omtatab Okoiti & 2 others v Attorney General & 4 others* (2020) eKLR).



50. In *Njonjo Mue & another v Chairperson of Independent Electoral & Boundaries Commission and 3 others* (2017) eKLR, the Supreme Court expressed itself as follows;
- “Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided by *the Constitution* and the constituting provisions of the law. It is a two way channel where the right has to be balanced with the obligation to follow due process.” (See also *David Ogolla Okoth v Chief Magistrates Court Kibera & 2 others* (2016) eKLR).
51. From the foregoing, it is clear that the applicant has not shown how he obtained copies of letters written by the Principal/CEO to the Public Service Commission or other senior officers as well as other materials relied upon.
52. The gravamen of the applicant’s case is that the respondent should be compelled to implement recommendations of the Ad hoc Disciplinary Committee/Investigation Committee of December 2021.
53. From the documentation on record, there is no evidence of such a report or why it has taken so long to have the report implemented.
54. The applicant, is as contended by the respondent seeking a judicial review remedy in the realm of private law.
55. As explained by the Court of Appeal in *Republic v Professor Mwangi S. Kimenyi, Permanent Secretary, Ministry of Planning & another* (*Supra*)
- “ . . . Judicial review is in the purview of public law, not private law. In normal circumstances, employment contracts are not the subject of judicial review.
- . . . In an ordinary contractual relationship of master and servant, if the master terminates the contract, the servant cannot obtain orders of certiorari . . . ”
56. It is not in dispute that the applicant has been an employee of the respondent since 2001.
57. The foregoing notwithstanding, it is clear to the court that the applicant has a genuine complaint against the employer. His interdiction/disciplinary process has taken inordinately long to conclude, the change of leadership at the respondent’s institution notwithstanding.
58. The respondent’s Human Resource Policy and Procedures Manual 2018, relied upon was signed on January 28, 2022 and is thus not applicable to the current case. The *Human Resource Policies and Procedures Manual* for the Public Service is thus applicable under this manual disciplinary cases, should be dealt with promptly and finalized within six (6) months and if impracticable the authorised officer must report the same to the Public Service Commission explaining the reasons for the delay.
59. In a similar vein, the court is alive to the fact that in as much as it has jurisdiction to intervene in employment disputes where circumstances render it necessary, it appreciates that managerial prerogative in the workplace is critical and the disciplinary process falls within this ambit.
60. This was eloquently explained by the Court of Appeal in *Judicial Service Commission V Gladys Shollei & another* (2014) eKLR.



61. Similar sentiments were expressed in *Teachers Service Commission v Thomas Joseph O. Onyango* in Civil Appeal No. 122 of 2015 as follows;

“ . . . the appellant is a Constitutional Commission with the express mandate of assigning teachers for service in any public school or institution, promoting and transferring teachers, exercising disciplinary control over them and terminating their employment . . . But the court cannot usurp the mandate of the appellant . . .”

62. Although the respondent has commandingly submitted that the disciplinary process is still in progress and the court should not interfere, it has not provided evidence of the stage at which the process is and how long it is likely to take to conclusion. An indication of the anticipated timeline would have sufficed. None was provided, the effect of which is to subject the applicant to further uncertainty about his employment and trajectory of his life. The suspense is unwarranted. It behoves the respondent to conclude the process without any further delay.

63. For the above reasons, it is the finding of the court that the applicant has established a sustainable case for the court’s intervention.

64. It is the further finding of the court that judicial review remedies are not available in the instant case as this is a Miscellaneous Application and there is no decision before the court.

65. As to whether the claimant is entitled to the reliefs sought, the court proceeds as follows;

66. The only outstanding order sought by the applicant is to compel the Principal/CEO of the respondent to implement the recommendations of the Ad hoc Disciplinary Committee of December, 2021.

67. Having found that the Applicant has failed to evidentially establish that indeed the alleged report exists and bearing in mind that the respondent has urged that it is not the duty of courts to conduct disciplinary proceedings and respondent has additionally indicated that it is yet to conclude the process, it is only fair that the respondent be accorded the opportunity to conclude the disciplinary process.

68. In conclusion, the following orders commend themselves for issue;

- a. The Respondent shall conclude the disciplinary process against the Applicant within 45 days from the date hereof failing which the interdiction shall be deemed to have lapsed.
- b. The respondent shall bear the costs of this application.

69. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF OCTOBER 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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

