



**Rotich v University of Eastern Africa Baraton (Employment and Labour Relations
Petition E012 of 2022) [2022] KEELRC 13425 (KLR) (21 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13425 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS PETITION E012 OF 2022
NJ ABUODHA, J
NOVEMBER 21, 2022**

BETWEEN

PASTOR JOB ROTICH CLAIMANT

AND

UNIVERSITY OF EASTERN AFRICA BARATON RESPONDENT

RULING

1. The application before me is the Notice of Motion dated 14th April 2022 filed by the Petitioner herein seeking for orders that;
 - i. Spent
 - ii. Spent
 - iii. Pending the hearing and determination of the Petition, this Honourable court is pleased to issue a temporary injunction restraining the Respondent ,its agents, employees ,servants or any organ of the Respondent thereof constituted from conducting or continuing with any discipline proceedings or further disciplinary hearing as commenced by the Respondent against the Applicant.
 - iv. Costs of this Application be provided for.
2. An affidavit sworn by the Petitioner on 14th April 2022 is annexed to the notice of motion in support of the grounds.
3. The background of the application is that the Applicant / Petitioner was employed by the Respondent in the year 2007 where he has held different positions and was currently serving in the position of Dean of Men-on campus.



4. The Petitioner averred that on 15th February 2022, the Applicant was summoned by the Vice Chancellor's secretary through a phone call to attend an administrative board meeting at 11 am and that in the said meeting, the Vice chancellor played an audio recording appearing to be collated in parts purporting it to be of the Applicant speaking and invited the applicant to defend himself on the contents where on his part, the Applicant demanded a copy of the full or original audio recording to enable him respond to any allegations but he was not given one.
5. The Petitioner contended that through a letter dated 15th February 2022, the Respondent invited the Applicant to show cause why a disciplinary action should not be taken against him for using insulting language against the Chancellor, the leader of the Respondent institution in violation of section 4.6.1 of the Employee Handbook , specifically offences number 12 and 47 thereof.
6. According to the Petitioner, on 21st February 2022, the Applicant informed the Respondent of his inability to respond to the show cause letter because the Respondent had not provided him with full or original recording together with its transcription and raised apprehensions on the circumstances of the recording and details of how it was obtained particularly the identity of the person who recorded it
7. That while the Respondent invited the Applicant to the university for the purpose of receiving the full audio recording, the Respondent's vice chancellor chaired the meeting on 23rd February 2022 where he only insisted on playing the audio recording in his possession
8. That notable, the said meeting was attended by non board members namely Grace Maiyo, Kevin Nyamaika and Adams Tuwei contrary to the establishment of the organs of the university
9. That through a letter dated 3rd March 2022 , the Respondent wrote to the Applicant inviting him for the transcription of an audio recording whereupon the Applicant wrote to the Respondent reiterating his concerns on a copy of the alleged audio recording in full or its original form, the circumstances under which it was recorded and obtained.
10. The Petitioner averred that on 16th March 2022, the Respondent invited him to appear before the hearing committee on 30th March 2022 and on the 23rd March 2022, he was issued with another invitation to appear before the administrative board on 31st March 2022 in response to which the petitioner's advocates wrote the letter dated 29th March 2022 to the Respondent
11. It was the Petitioner's contention that on the 30th March 2022 and on 31st March 2022, the purported disciplinary meeting was adjourned and that consequently, the Petitioner was informed of the Respondent's decision to suspend him from duty through a letter dated 4th April 2022.
12. According to the Petitioner , the Respondent has effectively failed or refused to furnish him with sufficient details and the information on the charge against him to enable him to prepare for him defence and that as such, the Respondent's actions do not conform to the principles of natural justice and are in violation of his rights to a fair trial and fair administrative action
13. The Petitioner further averred that the actions of the Respondent through its officers are engineered and designed to serve the malicious and ill intended motive of the said officers , particularly the vice chancellor and the two other officers who have sued him in Milimani CMCC No. E1502 of 2022 over the alleged audio recording but insists on attending the disciplinary hearing founded on the same audio recording.
14. It is contended by the Petitioner that if the hearing is allowed to proceed, he is likely to suffer irreparable harm as he will be condemned unfairly as he will not have prepared adequately due to the Respondent's actions of not providing him with the audio recording.



15. The application was opposed. The Respondent filed a replying affidavit sworn on 4th May 2022 by its Human Resource manager, Judith Kibirango.
16. In the said affidavit, Madam Kibirango admitted the events as outlined by the Petitioner but maintained that the show cause letter issued to the Petitioner makes specific mention of the audio recording as the genesis and basis of the disciplinary action taken , clearly and unambiguously setting out the charge and particulars thereof.
17. It is further averred that the suspension was borne out of the Petitioner’s own conduct as the Respondent had entertained the petitioner on numerous occasions but the petitioner abused the privileges afforded to him. It is also averred that the hearing has been overtaken by events owing to the current suit and the orders of the court ensuing therefrom.
18. Accordingly, it has been contended by the Respondent that a disciplinary hearing as envisioned under the terms of service and under Section 41 of the *Employment Act* does not envision a quasi-judicial process conducted with the formalities of procedures, evidence and exigencies applicable in the formal judicial processes.
19. The Respondent’s contention is that the orders issued were granted prematurely and in doing so, the honorable court purported to take over the managerial prerogatives of the Respondent.
20. In Response, the Petitioner filed a supplementary affidavit on 20th May 2022 where he reiterated the contents in the supporting affidavit and further maintained that he has been cooperative, received the respondent’s communication, showed up when required to and raised his concerns about the process in a clear and respectable manner.
21. On 23rd May 2022, the court directed the application to be canvassed by way of written submissions. The Petitioner filed his submissions on 10th June 2022 whereas the Respondent filed its submissions on 27th June 2022.
22. I have scrutinized the application, the rival affidavits and the submissions of the parties at length.
23. The instant application falls within the purview of interlocutory injunctions. The conditions under which such an order may be granted were set in *Giella v Cassman Brown & Company Limited* [1973] E.A 358, as follows:

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide the application on the balance of convenience.”
24. The Petitioner has sought for orders restraining the respondent from conducting a disciplinary hearing against him on the grounds that he will suffer irreparable harm as he has not been furnished with the audio recording which is the subject of his suspension from work. The Respondent on the other hand has maintained that an employee aggrieved by the resultant findings of a disciplinary action has a right to move to court.
25. The question that I should address myself to with regard to this issue is whether the Petitioner has demonstrated that he will suffer irreparable harm that cannot be adequately compensated for in damages.



26. According to the Petitioner, the failure of the Respondent to supply him with the audio recording has made it impossible for him to prepare for his defence and that as a result, if the said hearing is conducted, he will not have been accorded a fair hearing. In my view this is not an irreparable harm that damages would not be an adequate remedy in the event that he succeeds in his claim against the Respondent.
27. As regards the issue on whether the Petitioner has demonstrated that he has a prima facie case, the Court of Appeal in *Mrao Limited v First American Bank of Kenya Limited & 2 others* [2003] KLR 125 defined a prima facie case as:
- “.....a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
28. The Petitioner has averred that the instant claim was necessitated by violation of his constitutional rights and fundamental freedoms. He contends that the respondent violated his rights as he did not consent to be recorded and that as such the recording violated his right to privacy. Can we then say that the alleged failure by the respondent to issue the audio recording to the Petitioner as a prima facie case to warrant the grant of the orders sought? I do not think so. It is my finding that the petitioner has failed to establish a *prima facie* case to warrant interlocutory injunction.
29. This court does not need to assess the balance of convenience in the circumstances set out above.
30. In the end, the application dated 14th April 2022 is thus dismissed with costs.
31. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 21ST DAY OF NOVEMBER, 2022

ABUODHA NELSON JORUM

JUDGE ELRC

