



**Kariithi v Micro and Small Enterprise Authority (Petition
87 of 2020) [2021] KEELRC 1819 (KLR) (23 April 2021) (Judgment)**

Anne Nyambura Kariithi v Micro and Small Enterprise Authority [2021] eKLR

Neutral citation: [2021] KEELRC 1819 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

PETITION 87 OF 2020

MA ONYANGO, J

APRIL 23, 2021

**IN THE MATTER OF: ARTICLE 2, 3, 10, 19, 20, 21, 22, 23, 25, 27, 41, 47,
50, 232, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF: EMPLOYMENT ACT, 2007,

BETWEEN

ANNE NYAMBURA KARIITHI PETITIONER

AND

MICRO AND SMALL ENTERPRISE AUTHORITY RESPONDENT

JUDGMENT

1. The petitioner is an employee of the Respondent, having been employed by the Respondent on July 10, 2019 in the position of Senior Assistant Director Supply Chain Management. The Respondent is a state corporation established under Section 29 of the *Micro and Small Enterprises Act*, 2012.
2. This petition is expressed to have been brought under the provisions of Article 2, 3, 10, 19, 29(1), 22, 23, 27, 41(4), 47, 50, 232, 258 and 259 of the *Constitution of Kenya* and Section 46 of the *Employment Act*.

Facts

3. It is the Petitioner's case that on June 6, 2020 she received a show cause letter in which she was accused of insubordination, sabotage, dishonestly and inefficiency in the discharge of her duties. The show cause notice made reference to a memorandum dated May 30, 2020 from the Respondent's Director



General/Chief Executive Officer, to the Chairman, Human Capital Advisory Committee which had not been copied to the petitioner.

4. The Petitioner states that on June 9, 2020 she was issued with an interdiction letter dated June 8, 2020.
5. It is the Petitioner's case that the interdiction was unprocedural and irregular, as she had not been given an opportunity to be heard. It is further her case that the Human Capital Advisory Committee whose decisions it was to interdict her did not have mandate to indisciplin her as she had been appointed by the Board and therefore its decision was ultra vires.
6. It is further the Petitioner's case that she does not have any disciplinary record and has never received any verbal or written warnings in relation to the allegations preferred against her. That the Respondent's Human Capital and Administration Manual anticipates counselling, verbal and written warnings, show cause and interdiction, which the Respondent had not complied with.
7. It is the Petitioner's case that the allegations against her can be dealt with without her interdiction. That the issues raised against her had been fully responded to by her and there was no proof of sabotage and insubordination as alleged against her. That the allegations were fabricated, malicious and intended to malign her. She avers that the action taken against her was rushed with a view to driving her out of office.
8. The Petitioner prays for the following remedies: -
 - a) A conservatory order restraining the Respondent from continuing with an illegal and irregular disciplinary process.
 - b) An order do issue to bring unto this court for quashing the interdiction letter dated 8th June, 2020.
 - c) An order to quash the ongoing illegal disciplinary procedure.
 - d) A declaration that the disciplinary action is unconstitutional and therefore null and void ab initio.
 - e) General Damage including aggravated and exemplary damages.
 - f) Costs of this Petition and interest thereon on (e) above at court rates from the date of Judgement until payment in full and final satisfaction of the decree herein.
 - g) Any other and further relief that this Court may deem fit and just to grant.
9. Together with the petition, the Petitioner filed a motion seeking the following orders: -
 1. Spent.
 2. That a temporary Conservatory Order be issued restraining the Respondent from continuing with an illegal and irregular disciplinary' process pending hearing of this application inter parties.
 3. That this Court do issue an order maintaining status quo ante as before the purported letter of interdiction dated June 8, 2020 pending hearing of this application inter parties.
 4. That there be a stay of disciplinary proceedings at the Respondent against the Applicant pending the hearing and determination of this Petition.
 5. That other appropriate orders be made.



6. That the costs of this application be provided for.
10. The grounds in support of the application and the Petitioner's supporting affidavit both reiterate the grounds in the petition.
11. The Respondent filed a replying affidavit of Naomi W. Kariuki, its Director, Human Capital Development and Administration, who is also the Secretary, Human Capital Advisory Committee of the Respondent sworn on July 7, 2020.
12. In the affidavit, the affiant states that the Human Capital Advisory Committee, which is established under the Respondent's Human Capital and Administration Manual 2016 to discuss various issues pertaining to the administration of the Respondent, met on June 5, 2020 to discuss the Petitioner's disciplinary case. That this was consequential upon the Director General's internal memo to the Committee dated May 30, 2020, which set out various grievous acts of indiscipline by the Petitioner.
13. That after thorough analysis and consideration of the facts tabled before the Committee, the members resolved that the Petitioner's conduct warranted immediate commencement of disciplinary action.
14. That the affiant thereafter issued with a show cause letter to the Petitioner. That the Director General acted on the advice of the Committee and interdicted the Petitioner on June 8, 2020 in the advice of the Committee.
15. The affiant depose that the offences against the Petitioner have not been addressed and it is therefore necessary that the Respondent be allowed to proceed administratively with the disciplinary process under the framework of the Human Capital and Administration Committee.
16. The affiant deposes that the Petitioner was supplied with the record of charges and evidence and that the Committee applied the proper procedure under the Manual. That the Committee is impartial, efficient and professional and should the Petitioner be dissatisfied with its decision, the Manual safeguards her right to appeal to the Board under Section 10.26.
17. That this Court should not interfere with an employee's right to discipline its employees, citing the decision of this court in *Thomson Kerongo & 2 others v James Omaribe Nyaoga & 3 others*. She prays that the Petition and application be dismissed with costs.
18. In a supplementary affidavit sworn on July 21, 2020, Naomi W. Kariuki deposes that although the Petitioner was issued with a show cause letter dated June 6, 2020 and which she was required to respond to within 21 days, she had refused, ignored and/or failed to respond to the same. That the Petitioner had further refused, ignored and/or failed to report to her Supervisor to sign a register in line with the Human Capital and Administration Manual. That the Respondent has been extremely patient and tolerant with the Petitioner and on July 20, 2020, the Director General sent a reminder to the Petitioner reminding her to comply.

Evidence

19. The Petition and application were disposed of together by way of written submissions, which both parties duly filed. The Respondent also filed supplementary submissions.

Analysis and Determination

20. I have considered the pleadings and submissions. In my view the issues arising for determination are the following: -
 1. Mandate of the Human Capital Advisory Committee of the Respondent.



2. Whether the Petitioner has established a breach of her constitutional rights against the Respondent.
3. Whether the Petitioner is entitled to the remedies sought in the petition and application.

Mandate of the Respondent’s Human Capital Advisory Committee

21. The Respondent’s Human Capital Advisory Committee is established under Regulation 2.8 of the Micro and Small Enterprises Authority Human Capital & Administration Manual, June 2016 (herein after referred to as the Manual). The Regulation is set out below: -

2. Appointments by the Human Capital Advisory Committee

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2.8.1 The Authority will constitute a Human Capital Advisory Committee and the CEO or his appointed designate will be the Chair. The members of the Committee will be the Heads of Department while the Director, Human Capital will be the Secretary. The Committee will recruit candidates for positions in MSEA 8 to MSEA 10.

2.8.2 The CEO will be required to report such recruitments to the Board in the subsequent Board meeting for ratification.

22. Further powers of appointment are provided at regulations 2.6 and 2.7 of the Manual as follows: -

2.6 Powers to Make Appointments

2.6.1 The authority to appoint employees is vested in the Board. However, the Board may delegate some of these powers in writing and for a specific cadre of employees to the CEO.

2.7 Appointments by the Board

2.7.1 The CEO will be appointed by the Board through a competitive process.

2.7.2 The CEO will be appointed on contract terms in accordance with Regulation 2.4 of this Manual.

2.7.3 Appointments to positions in MSEA 1 to MSEA 7 shall be made by the Board in accordance with the approved procedures.”

23. Show cause letter and interdiction are provided for at Regulations 10.25.4 and 10.25.5 as follows: -

10.25.4 Cause Letter

10.25.4. The formal disciplinary procedure starts with a "show cause letter". The employee will be informed in writing by the supervisor of the nature of the complaint or allegation. The employee will be required to submit his response within twenty one (21) days.

10.25.4. Where an employee deserts duty or his whereabouts are unknown, the show cause letter will be addressed to the



employee's last known contact address by registered mail and he will be given twenty one (21) days to respond.

10.25.5 Interdiction

10.25.5. Interdiction is a procedure applied on serious disciplinary cases that require investigations involving any breach of the rules and regulations in order to allow establishment of fact(s) of the case.

10.25.5. The employee shall be interdicted from exercise of his duties by the CEO pending determination of the case.

10.25.5. This formal disciplinary punishment will be applied to major disciplinary offences. An employee who is on interdiction will be paid not less than 50% of his basic monthly salary less any statutory deductions. During this period the employee will continue to receive house allowance, commuter allowance and medical benefits at full entitlement.

10.25.5. While on interdiction, the employee will be required to report to his supervisor and sign a register at least once a month.

10.25.5. In the event the employee fails to report as instructed, the interdiction will automatically be translated to suspension.

10.25.5. Interdictions shall not exceed six (6) months, within which time investigations should be completed and disciplinary action determined.

24. It is the Petitioner's case that the Director General (herein after referred to as DG) relied on the deliberations of the Human Resource Advisory Committee, which is not provided for in the Manual to interdict her. That the advice and actions taken by the Human Resource Advisory Committee was therefore ultra vires and null and void. For emphasis, the Petitioner relied on the decision of *Esther W Kiege and another v Kenya Forestry Service and another* (2018) eKLR in which it was held that actions that deviate from authority flowing from law and policy are ultra vires.
25. The Petitioner also relied on the case of *Simon Rotich Ruto v Judicial Service Commission & another* (2019) eKLR where the court found that the Respondents acted ultra vires and as such an interdiction was declared null and void.
26. It is further the Petitioner's case that the Respondent draws its appointing authority from Section 37 of the *Micro and Small Enterprise Act, 2012* as operationalised by clause 2 of the Human Capital and Administration Manual 2016.
27. The Petitioner avers that she was appointed by the Respondent pursuant to Clause 2.7 of the Human Capital Administration Manual 2016, to the position of Senior Assistant Director Supply Chain Management MSEA Grade 4. That pursuant to clause 2.7.2, appointments to positions MSEA 1 to MSEA 7 are a preserve of the Board of Directors of the Respondents which provides; -

Appointments to positions in MSEA 1 to MSEA 7 shall be made by the Board in accordance with the approved procedures."
28. That vide the Replying Affidavit sworn by the Secretary to the Human Capital Advisory Committee, the Respondent confirms having held a meeting on the June 5, 2020 to consider the Director General's



memorandum dated May 30, 2020 and after deliberations invoked clause 10.25.4 to issue a Notice to show cause letter dated the June 6, 2020 to the Petitioner.

29. It is the Petitioner's submissions that pursuant to Clause 8 of the Human Capital and Administration Manual 2016, the Human Capital Advisory Committee has jurisdiction to only recruit and discipline officers in positions MSEA 8 to MSEA 10. That the Petitioner being an officer in the position MSEA 4 falls outside the ambit of the cadres that the impugned committee can consider. That the committee therefore acted beyond its powers as recognised in the Respondent's policy.
30. It is her further submission that by placing the memorandum dated May 30, 2020 before the Committee, the Respondent's sought to rush the interdiction of the Petitioner by circumventing the law as laid out in the Human Capital and Administration Manual 2016.
31. That although this court has laid down the principle a court ought not to interfere with management prerogatives or internal management, courts would interfere where the employer has failed to comply with its own procedure or the law and where actions of the employer as envisaged in this case are intended to achieve a predetermined outcome.
32. The Petitioner submits that in the case of *Geoffrey Mworira v Water Resources Management Authority* [2015] eKLR the court held as follows:-

The court will very sparingly interfere in the employer's entitlement to perform any of the human resources functions such as recruitment, appointment, promotion, transfer, disciplinary control. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provisions of the Constitution or legislation; or in breach of the agreement between parties; or in a manner that is manifestly unfair in the circumstances of the case; or internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through employer's internal process. "
33. The Petitioner submits that a similar principle was stated in the case of *Judith Mbaya Tsisiga v Teachers Service Commission* [2017] eKLR in which it was held that courts will interfere with employer's internal disciplinary proceedings in exceptional circumstances where great injustice might result or where justice by any other means may not be attained. That this case before the court presents a similar circumstance where the Respondent has contravened its Human Resource Policy in the issuance of an interdiction letter to the Petitioner.
34. The Petitioner submits that in the case of *Eustace Muriithi Njeru v Energy and Petroleum Regulatory Authority*[2020] eKLR this Court held that an interdiction that contravened Human Resource manual of the employer was illegal, null and void *ab initio*.
35. For the Respondent it is submitted that it is incorrect for the Petitioner to claim that the Human Capital Advisory Committee is non-existent as it is established under Regulation 2.8 of the Manual. That the Committee comprises Heads of Departments and the Director General has no authority to handpick who sits in the Committee and can therefore not influence the Committee's decisions. It is further the Respondent's submission that the Petitioner has not stated which Committee is charged with the responsibility of discipline. Further, that the decisions of the Committee have not been nullified.
36. As has been set out at Regulation 2.6 and 2.7 of the Manual, the responsibility to recruit lies with the Board.



37. Section 37 of the *Micro and Small Enterprises Act*, which establishes the Respondent provides as follows with respect to staff: –

37. Staff

The Authority may appoint such officers, agents and other staff as are necessary for the proper and efficient discharge of the functions of the Authority under this Act, upon such terms and conditions of service as the Authority may determine.

38. Further, Section 34 of the Act provides for delegation of powers and functions of the Authority as follows:-

34. Delegation by the Authority

The Authority may, by resolution either generally or in any particular case, delegate to any committee or to any member, officer, employee or agent of the Authority, the exercise of any of the powers or the performance of any of the functions or duties of the Authority under this Act or under any other written law.

39. It is evident from the foregoing that neither the Act nor the Manual specifies who is vested with the responsibility of disciplining the employees of the Respondent. In that case, the provisions of 51 of the *Interpretations and General Provisions Act* would apply. The Section provides as follows: -

51. Power to appoint to include power to suspend, dismiss, etc., and to reappoint, etc.

(1) Where by or under a written law, a power or duty is conferred or imposed upon a person to make an appointment or to constitute or establish a board, commission, committee or similar body, then, unless a contrary intention appears, the person having that power or duty shall also have the power to remove, suspend, dismiss or revoke the appointment of, and to reappoint or reinstate, a person appointed in the exercise of the power or duty, or to revoke the appointment, constitution or establishment of, or dissolve, a board, commission, committee or similar body appointed constituted or established, in exercise of the power or duty, and to reappoint, reconstitute or re-establish it.

(2) Where the power or duty of a person under this section is exercisable only upon the recommendation, or is subject to the approval or consent of another person, then the power shall, unless a contrary intention appears be exercisable only upon that recommendation or subject to that approval or consent.

40. It is therefore the responsibility of the Respondent's Board to discipline all employees unless such powers have been delegated in the manner provided in Section 34 of the Act or Regulation 2.6 and 2.8 of the Manual. Regulation 2.8 is explicit that the Committee as constituted under that Section will recruit candidates for positions in MSEA 8 to MSEA 10. The Petitioner's letter of appointment places her position at MSEA Grade 4 in the MSEA Staff Establishment.



41. From the foregoing, it is clear that the Committee which issued show cause notice to the Petitioner and which recommended her interdiction to the Director General has no powers to discipline her, as she does not fall within the cadre of staff whom the Committee can discipline. I however do not agree with the Petitioner that the Committee is non-existent. I also do not agree with the Respondent's submission that the Petitioner did not state which organ has power to discipline her. It is not the duty of the Petitioner to do that. It is the Respondent's duty to inform itself and staff about the disciplinary process as set out in Section 12 of the [Employment Act](#), which provides that: -

12. Statement on disciplinary rules

- (1) A statement under section 10 shall—
 - (a) specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules;
 - (b) specify the person to whom the employee may apply—
 - (i) if dissatisfied with any disciplinary decision relating to the employee; and
 - (ii) for the purpose of seeking redress of any grievance relating to his employment and the manner in which an application shall be made; and
 - (c) where there are further steps to be taken consequent to any such application, explain the steps or refer the employee to the provisions of a document which is accessible to the employee which explains the steps.
- (2) Subsection (1) shall not apply to rules, disciplinary decisions, grievances, or procedures relating to health or safety at work.
- (3) This section shall not apply where as at the date the employee starts work the employer has employed less than fifty employees.

42. To this extent, I would advise the Respondent to review its Manual to conform to the provisions of Section 12 of the [Employment Act](#) or prepare a separate manual which is in compliance with the Act to deal with disciplinary matters.

43. Having said that, the reference of the Petitioner's disciplinary matter to the Committee was obviously without authority, as the Committee has no capacity to deal with disciplinary cases for officers in job grades MSEA 1 to MSEA 7 as set out in Regulation 2.8 of the Manual. To this extent, the disciplinary process as initiated against the petitioner is null and void for being ultra vires.



Whether the Petitioner has established a breach of her constitutional rights against the Respondent

44. Prima facie case was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR as thus: -
4. A *prima facie* case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.”
45. In the instant case, I have already found that the Respondent’s Committee acted without authority and/or capacity in considering the disciplinary case. The Petitioner has thus established that the actions of the Committee were ultra vires.
46. On whether the same was unconstitutional, Article 236(b) of the Constitution provides that a public officer shall not be dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of the law.
47. Further, Article 47(1) requires that administrative action be expeditious, efficient, lawful, reasonable and procedurally fair.
48. In the instant case, the Respondent’s Director General sent a memo to the Committee requiring the Committee to advise him on action to be taken against the Petitioner. The memo is not copied to the Petitioner, yet it makes grave indictments against her. The memo makes a conclusion that the Petitioner is grossly negligent, and “look forward to your advice on the best way forward, keeping in mind the big picture of ensuring MSEA performance targets are not derailed whatsoever.” All the officers in the Committee report to the Director General. The directions in the memo are such that they were not able to depart from the predetermined conclusions by the Director General.

The memo is reproduced below -

From: The Director General/CEO To: Chairman, HCAC

Ref: Loose Memo Date: 30th May, 2020

RE: Disciplinary Issues by the Head of Procurement

There have been disciplinary issues gross in nature, committed by the Head of Procurement. Table 1 presents some of the issues.

Table 1: Disciplinary Issues by the Head of Procurement



<i>No.</i>	<i>Issue Description</i>	<i>Period/ Dates</i>	<i>Remarks</i>
1.	Delayed release of documentation for 21 CIDCs to facilitate handover to awarded contractors	- Requested on 16-04-2020 - Acted on 04-05-2020	Delayed Project implementation
2.	Non-Show to CEO's meeting to discuss the implementation of decentralization of procurement processes on CIDCs.	22/23 April 2020	Insubordination
3.	Delays in crucial tender processes affecting absorption - Memo not responded to.	24 th April 2020	Insubordination Sabotage
4	No show to CEO meeting for Procurement Staff. Head of Procurement no show, no apology.	29 May - 2 nd June 2020	Insubordination
5.	Failure to provide timely professional opinion on	28 th January – May 4 th 2020	Sabotage - leading to non-award and no



	evaluated tenders, albeit reminders from user department (D-ID).		absorption of -resources
6.	Delayed and lack of professional opinion on evaluation reports.	19-26 May 2020 (various)	Sabotage
7.	Delayed procurement for decentralized works - detailed summary by D-ID	2 June 2020	Sabotage
8.	Delays in SCM activities - occasioned by lack of professional opinion - selective signing off of professional opinion while refuting others by the same committee, citing irregularity in appointment, yet HoP turned down appointment to the said committee and	17 th March 2020	



	nominated her deputy		
9.	No response to CEO memo on: Status report - procurement of contractors under the decentralized procurement set-up	29, May 2020	Insubordination
10.	Failure to respond to professional guidance from field staff - to enable timely decisions - Garissa and the Northern Frontier	16-May to 4 th June 2020	Sabotage

The purpose of this memo is to bring the Officer's gross misconduct to the attention of the Human Capital Advisory Committee for deliberation and advice in-order to remedy further injury to the delivery of MSEA mandate. As clearly depicted from the adduced evidence, the issues are persistent, and repetitive in a manner to suggest that they are well planned and intentioned to derail the accomplishment of MSEA mandate within stipulated timelines. I find this grossly negligent of the officer, and look forward to your advice on the best way forward, keeping in mind the big picture of ensuring MSEA performance targets are not derailed whatsoever.

Signed

Henry Rithaa

DG/CEO”

49. Indeed in the minutes of the disciplinary hearing attest the Committee rubberstamped the DGs conclusions in his letter to the Committee. Min 02/06/2020 is relevant. The minutes are reproduced below; -

**“ Minutes of the Human Capital Advisory Committee Meeting Held on June, 2020
In Utalii House 10th Floor Boardroom**

Present

1. Samuel Matonda – Director, Business Development and Marketing -
Chairperson



2. Naomi Kariuki – Director, Human Capital Development - Secretary
3. Simon Nyamolo – Director, Corporate Services - Member
4. Edward Karani – Director, Infrastructure and Innovation- Member

Opening prayers

The meeting was called to order at 7:00 am and began with prayers led by the Secretary.

Communication from the Chair

The Chairperson briefed the members that the meeting scheduled 21st May 2020 did not take place following conflicting Authority activities including but not limited to Procurement Tender evaluations and other field activities where some of the committee members were participating.

MIN 01/06/2020 Adoption of the Agenda

The below agenda was adopted for discussion

1. Reading and confirmation of the previous meetings
2. Matters arising
 - (a) Suitability interviews
 - (b) Recruitment of vacant positions
 - (c) Deployment of staff
 - (d) Staff confirmation
3. COVID 19 update
4. Disciplinary case
5. Any other business.

Following a field activity in Othaya, and Laikipia County on 5th June 2020, where the committee chair was expected to accompany the CEO and other Ministry and County staff, members found themselves constrained in terms of time and requested to discuss agenda number 4 only on disciplinary case.

Min 02/06/2020 Disciplinary Case

Members were appraised by the Chair of a memo dated 30th May 2020 regarding disciplinary issues by the Senior Assistant Director Supply Chain Management the issues ranged from insubordination, sabotage, delayed project implementation, dishonesty and inefficiency.

After a thorough analysis of the issues presented, members found the above offences as guided by the Human Capital & Administration Manual 2016 clause 10:23.1 warranting for a disciplinary action.

It was thus recommended that the officer be issued with a show cause letter as per the Human Capital Administration Manual 2016 of the Authority 10:25.4.1 giving her twenty one (21) days to respond to the issues raised by her supervisor. Members found it necessary that



once the response is received the committee would invite her to make an oral submission in regards to the same.

However pending the finalization of the case with the Human Capital Advisory Committee, members recommended that the Chief Executive who is the supervisor may wish to interdict the officer as guided by the Human Capital & Administration Manual 2016 (10.25.5) to allow for investigations.

Adjournment

The meeting was adjourned at 8:00 am.

Next meeting

Members proposed Monday 8th June 2020 at 6:30 am.

Signed

1. Samuel Matonda – Chairperson
2. Naomi Kariuki – Secretary
3. Simon Nyamolo – Member
4. Edward Karani – Member”

50. It is material that the Committee did not seek to hear from the Petitioner before reaching its conclusions and giving its advice to the Director General. This confirms that it was rubberstamping the position taken by the Director General in the memo to the Committee.

51. It is further material that the notice to show cause was issued on June 6, 2020 giving the Petitioner 21 days to respond thereto but before she could respond and further before the lapse of the 21 days, was issued with a letter of interdiction.

52. This confirms the Petitioner’s fears that the process was intended to circumvent the law as set in the Respondent’s Manual and to reach a predetermined decision.

53. As was stated by this court in the case of *Eustace Muriithi Njeru v Energy Regulatory Authority* (2020) eKLR –

Interdiction should therefore not be resorted to unless it is necessary as it exerts punishment on an employee who has not been proved to be guilty of misconduct. That is why it should, only be resorted to after giving the employee an opportunity to respond to the charges against him through a notice to show cause, or where investigations have been carried out and the employee has already been engaged and has responded to the charges during investigations."

54. In *Esther W. Keige & Another v Kenya Forestry Service & another* [2018] eKLR it was held that treatment that departed from the laid down procedure in Human Resource Policy and Procedure Manual violated the Petitioner’s right to fair labour practices and right to fair administrative action under Article 41, 47 and 50 of the Constitution.

55. It is clear from the foregoing that the Petitioner was interdicted without compliance with both the Respondent’s Manual and Articles 47(1) and 236(b) of *the Constitution*. Her rights under the two Articles were therefore violated by the Respondent.



Whether the Petitioner is entitled to the remedies sought

56. The Petitioner sought several remedies. The first is a conservatory order restraining the Respondent from continuing with an illegal and irregular disciplinary process. The second is to bring before this court and quash the introduction letter dated June 8, 2020. The third prayer is seeking an order to quash the ongoing illegal disciplinary procedure and the fourth is seeking a declaration that the disciplinary action is unconstitutional and therefore null and *void ab initio*.
57. All these prayers seek the same remedy even though framed in multiple prayers.
58. The Respondent has submitted that disciplinary process is the preserve and prerogative of the employer and that this court should be cautious about interfering with the same. In support of this position, the Respondent has relied on several decisions of this court including *Thomson Kerongo & 2 others v James Omariba Nyaoga & 3 others* [2017] eKLR where this Court held as follows:
- Due process is an internal disciplinary process to be exercised by an employer. The Court is not expected to enter into the boardrooms of the employers to micro manage their affairs.... The court will only interfere where there is breach of the process and even so, only with a view to setting the process right.”
59. The Respondent further relied on the case of *Alfred Nyungu Kimungui v Bomas of Kenya* [2013] eKLR where my brother Rika J. held as follows:
14. The Industrial Court should be cautious in exercising its jurisdiction, so as not to appear to take over and exercise managerial prerogatives at workplaces. Grant of interim orders that have the effect of limiting genuine exercise by management of its rights at the workplace, should be avoided. Termination of employment, and initiation of disciplinary processes at the workplace, are presumed to be management prerogatives. The Court should be slow in intervening, particularly at interlocutory stages, otherwise the Court would be deemed to be directing the employers in regulation of their employees.”
60. The Petitioner agrees with this position and submits that indeed, this court laid down the principle of non-interference with management prerogatives or internal management. That however courts would interfere where the employer has failed to comply with its own procedure, the law and where actions of the Respondents as envisaged in this case are intended to achieve predetermined outcome.
61. The Petitioner submits that in the case of *Geoffrey Mworira v Water Resources Management Authority* [2015] eKLR the court stated as follows:-
- The court will very sparingly interfere in the employer's entitlement to perform any of the human resources functions such as recruitment, appointment, promotion, transfer, disciplinary control. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provisions of the Constitution or legislation; or in breach of the agreement between parties; or in a manner that is manifestly unfair in the circumstances of the case; or internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through employer's internal process.”
62. That a similar principle was held in the cases of *Judith Mbaya Tsisiga v Teachers Service Commission* [2017] eKLR in which it was held that courts will interfere with employer's internal disciplinary proceedings in exceptional circumstances where great injustice might result or where justice by any other means may not be attained. The Petitioner submits that the case before court presents a similar



- circumstance where the Respondent has contravened their Human resource policy in issuance of an interdiction letter to the Petitioner.
63. The Petitioner submits that in *Eustace Muriithi Njeru v Energy and Petroleum Regulatory Authority* [2020] eKLR the Court held that an interdiction that contravened Human Resource manual of the employer was illegal null and void ab initio.
 64. In the instant case, the respondent has not only violated its own Manual, but also the Constitution. The directions of the Director General to the Committee were conclusive and directional on what the outcome of the Committee's deliberations should be, and the Committee did just that. Further, the process did not comply with Sections 34 and 37 of the *Micro and Small Enterprises Act*, and the Committee acted without authority in deliberating over the issue as directed by the Director General.
 65. The show cause letter was by a person without authority. It is clear that the whole process of discipline as commenced by the Respondent was irregular and unconstitutional. The Petitioner could not get justice from that process.
 66. This is therefore one of the rare circumstances when this court is called upon to interfere with internal processes of an employer and correct the process. In this particular instance, the process was indeed void for lack of authority.
 67. It is for these reasons that I declare the whole process a nullity right from the memo dated May 30, 2020 through to the notice to show cause and the letter of interdiction. The process having been null and void, I do not have to issue any conservatory orders or quash the same as there is nothing to quash, the whole process having been null and void ab initio.
 68. The Petitioner has sought general damages, aggravated damages and exemplary damages. She however did not seek any orders against the Director General who initiated this process and who should be held personally accountable. She has confirmed this by the annexure of a letter from the Chairman of the Respondent to the Cabinet Secretary, Ministry of Industrialisation, Trade and Enterprise Development where the Chairman complains about the conduct of the Director General and defended the Petitioner.
 69. The Board being the body mandated to manage the Respondent, has through its Board Chairman disagreed with the actions taken by its Director General. I would therefore decline to grant any damages to the Claimant against the Board. It is my view that the release of the Petitioner's withheld salary as well as her reinstatement to office would be reasonable remedy in the circumstances.
 70. The Director General – Henry Rithaawill however personally meet the Petitioner's costs to this petition.
 71. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF APRIL 2021

MAUREEN ONYANGO

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.

MAUREEN ONYANGO

JUDGE

