



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

**PETITION NO. 107 OF 2019**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF: ARTICLES 165(3) (d) (6), 47(1) (2), 23(1) & (3), 22(1) 3(d), 20(1) (2), 19(3)(b), 3(b), 3(a), & 10, 232 OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF: ALLEGED VIOLATION/INFRINGEMENT OF FUNDAMENTAL RIGHTS OF THE PETITIONER**

**AND**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA-(PROTECTION OF RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

**AND**

**IN THE MATTER OF: BILL OF RIGHTS; RIGHT TO FAIR AND EQUAL TREATMENT, FAIR LABOUR RELATIONS, FAIR ADMINISTRATIVE ACTION PURSUANT TO ARTICLES 20, 21, 22, 23, 24, 27, 41, 232, 236 OF THE CONSTITUTION OF KENYA, 2010.**

**AND**

**IN THE MATTER OF: EMPLOYMENT ACT, 2007**

**IN THE MATTER OF: EPZA HUMAN RESOURCE AND PROCEDURES MANUAL, 2017**

**BETWEEN**

**JONATHAN CHEPKWONY.....PETITIONER/APPLICANT**

**VERSUS**

**GEORGE MAKATETO, THE ACTING CHIEF EXECUTIVE OFFICER,**

**EXPORT PROCESSING ZONE AUTHORITY (EPZA).....1<sup>ST</sup> RESPONDENT**

**EXPORT PROCESSING ZONE AUTHORITY (EPZA).....2<sup>ND</sup> RESPONDENT**

**EXPORT PROCESSING ZONE AUTHORITY**

**(EPZA) BOARD.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner, Jonathan Chepkwony filed a Petition dated 24<sup>th</sup> June 2019 seeking for the following Orders:-

a) A Declaration that the process coined or presented as disciplinary process commenced by the Respondents jointly and severally against the Petitioner is devoid of legal and constitutional imperatives and thus null and void ab initio.

b) A Permanent Order of Injunction restraining the Respondents their agents, functionaries or officers by whatever name called from initiating, progressing, processing or actualizing a disciplinary action against the Petitioner without the requisite and justifications of the law.

c) A Declaration that the interdiction of the Petitioner is unlawful, unjustified, unconstitutional, incompetent, ultra vires, illegal, irregular, null and void, ab initio.

d) An appropriate order of the Court within the ambit of Article 23(1) & (3) of the Constitution of Kenya, 2010.

e) Costs of this Petition to the Petitioner.

## **Background**

2. The Petitioner avers that he joined the employment of the 2<sup>nd</sup> Respondent in January 2015 and that his last gross salary was Kshs.395,456/-. That he underwent a rigorous recruitment process and secured the appointment on merit and had to forego other opportunities in favour of his appointment with the Respondent.

3. He further avers that he was previously an employee of Kenya Police Service of good standing and professional proficiency. That on or about the 28<sup>th</sup> May 2019, the Respondent served a Notice to Show Cause letter on the Petitioner which letter he describes as being devoid of particulars and in flagrant breach of the Petitioner's rights to fair process within the meaning and contemplation of Article 3, 10, 22, 25(c), 27, 28, 35(b), 41(1), 43(1)(e), 47, 232.

4. The Petitioner reiterates that the Respondents prepared and served a list of allegations without particulars and summoned him to a Disciplinary Session on 24<sup>th</sup> June 2019. That the said summons were anchored on an ulterior motive, extraneous considerations, cavalier attitude and unexplained malice directed at the Petitioner in total disregard of the basic rights attendant to fair process. Further that the Respondents have demonstrated propensity and is likely to proceed and deliver an erroneous conclusion in flagrant breach of the Petitioner's rights to fair process.

5. He further avers that his right to a fair hearing has been limited by the Respondents in breach of Articles 25(c) and 47 of the Constitution of Kenya, 2010. That the Notice to Show Cause letters of 28<sup>th</sup> May 2019 and 13<sup>th</sup> June 2019 are devoid of particulars and that the disciplinary session that had been set for the 24<sup>th</sup> June 2019 at 2.00 pm amounted to a travesty of justice ab initio. That his request for particulars had been ignored by the Respondents.

6. That he stands to suffer grave and irreparable career loss and prejudice if the Respondents' decision is implemented in that he will lose his income/salary/loss of livelihood at the altar of the malicious scheme hatched and pursued by the Respondents.

## **Respondents' Case**

7. The Respondents jointly filed an Answer to Petition dated **6<sup>th</sup> November 2019** where they denied each and every allegation of fact and/or law contained in the Petition. They denied that they hatched and are in the process of pursuing an illegal procedure in a bid to remove the Petitioner from employment. They averred that the Petition against the 1<sup>st</sup> and the 3<sup>rd</sup> Respondents is a non-starter and has no legal basis pursuant to the provision of Section 8(1) of the Export Processing Zones Act Cap. 517 of the Laws of Kenya.

8. They further denied serving the Petitioner with a Notice to Show Cause letter devoid of particulars or in flagrant breach of the Petitioner's right to fair process. They maintain that the Notice to Show Cause letter dated 28<sup>th</sup> May 2019 was duly and procedurally served on the Petitioner whereupon he was invited to show cause why disciplinary action should not be taken against him on account of not meeting the required standards of performance, timelines and integrity.

9. The Respondents averred that the 2<sup>nd</sup> Respondent deemed it fit to interdict the Petitioner to allow for investigations on the allegations raised against him in the letter dated 28<sup>th</sup> May 2019. That this was in accordance with the guiding provisions of **clause 11.21.1** of the Human Resource Manual which provides that:

*"An officer may be interdicted to allow investigations to be conducted in a case where proceedings may lead to dismissal."*

10. The Respondents further response was that the Petitioner's interdiction by the 2<sup>nd</sup> Respondent is not in itself a punishment but is merely the beginning of a process for determination of the case and the veracity of the case will have to be determined by a disciplinary panel. Further that **Clause 11.1.3** of the Human Resource Manual gives the 2<sup>nd</sup> Respondent the right to impartially administer discipline on its employees hence the Court would be interfering with its prerogative powers in managing its business and administration of its staff if it were to grant the orders sought.

11. The Respondents further averred that the Petitioner was duly afforded a fair hearing by being invited to attend the disciplinary proceedings which he attended and agreed to submit to the jurisdiction of the disciplinary committee. That he is therefore estopped from accusing the 2<sup>nd</sup> Respondent of flouting the provisions of Articles 10, 25, 35 and 47 of the Constitution of Kenya, 2010 as alleged. That the

petition is full of generalities and mere apprehensions, and does not prove specifically how his right to fair administrative action has been violated or is likely to be violated.

12. The Respondents maintain that the Petitioner has put the cart before the horse by rushing to Court purposely to circumvent the internal disciplinary process which is vested in the Authority's Board. That the Human Resource Manual provides at clauses 11.2.3 and 11.2.4 for an appeal process hence the Applicant has failed to wait for the outcome of the disciplinary process and to exhaust all the internal dispute resolution mechanisms available to him if aggrieved by the outcome of the disciplinary proceedings.

13. The Respondents further aver that that it is only just and fair to allow the disciplinary process to take its course as interfering with the internal disciplinary processes would be tantamount to policing the employer in its day to day relationship with its employees. That the Petition dated 24<sup>th</sup> June 2019 as drawn and filed is frivolous, vexatious, abuse of the Court process and unmerited in the circumstances and should be dismissed with costs.

### **Evidence**

14. The Petitioner testified while the Respondents called upon two witnesses to testify.

15. PW1, the Petitioner herein, adopted his undated statement filed on 24<sup>th</sup> June 2019 and supplementary witness statement dated 8<sup>th</sup> November 2019 as his evidence in chief. He testified that the genesis of the petition herein is the Notice to Show Cause letter dated 28<sup>th</sup> May 2019.

16. He further testified that the said Notice to show Cause letter contained general accusations. That he requested for particulars of the said allegations via a letter dated 11<sup>th</sup> June 2019 but rather than send him the particulars requested for, the Respondents sent another notice to show cause letter. He maintains that the notice to show cause letters did not have the information he requested for to enable him to adequately respond to the allegations before him. For instance, he pointed out that in reference to charge No. 2, he needed the dates, the nature of the losses and the property lost. The notice to show cause letter did not give the particulars he requested for.

17. PW1 further testified that vide a letter dated 19<sup>th</sup> June 2019, he responded to the 2<sup>nd</sup> Notice to show cause letter and requested to be provided with the following documents;

- a) A copy of the Ad hoc committee report presented to EPZA special board meeting held on the 21<sup>st</sup> May 2019.
- b) Copies of witness statements/complaints attendant to the Ad Hoc committee report
- c) Copies of the minutes to the disciplinary proceedings/session of 11<sup>th</sup> June 2019.
- d) Copies of his appraisal report forms for the period 2015, 2016, 2017 and 2018.

18. That he was not given any of the documents above despite the aforementioned plea. He however managed to retrieve a copy of the appraisal form for the year 2017 from his personal documents. He maintained that the information he requested for was to show the committee that he had been appraised and had always exceeded expectations.

19. Petitioner further states that on 20<sup>th</sup> June 2019, he received a letter inviting him for a disciplinary hearing scheduled for the 24<sup>th</sup> June 2019. He responded to the invitation and insisted that he needed the information to enable him defend himself at the disciplinary hearing. That to date he has never received the aforesaid information. He however confirmed that he was still on the Respondent's payroll at half pay and that he was ready to respond to the allegations once he is supplied with the information sought.

20. On cross examination, the Petitioner confirmed that his complaint is about his interdiction. That vide the Notice to Show Cause dated 28<sup>th</sup> May 2019, he was accused of failure to protect the authorities and investors property. He also insisted that just like the first Notice to show cause letter, the 2<sup>nd</sup> Notice to Show Cause letter does not also give particulars of the allegations against him.

21. He admitted that he was given an opportunity to respond to the allegations against him. He was also given an opportunity to appear before the disciplinary committee. He however insisted that he needed the information he requested for to enable him defend himself.

22. The Petitioner disagreed when it was put to him that that the petition was pre-mature as he had not exhausted the internal process. He also maintained that his persistent request for particulars should not be interpreted as an indicator that he does not want to undergo the disciplinary process.

23. On re-examination, the Petitioner confirmed that he is yet to receive the particulars he requested for. Further that if given the particulars sought, he will be ready to subject himself to the Respondent's disciplinary process.

24. The Respondents on their part called two witnesses to testify. **RW1, Henry Obino** stated that he is the Acting Chief Executive Officer of EPZA. That he took over from the 1<sup>st</sup> Respondent. He adopted his witness statement dated 29<sup>th</sup> June 2020.

25. On cross examination, RW1 stated that that he was aware that by the time the instant petition was filed he had not joined the 2<sup>nd</sup> Respondent. That after taking over as CEO, he took over all the files and documents and is well versed with the contents of the file pertaining

to this case. Further that he is aware that this instant matter had been fixed for inter-parties hearing on 11<sup>th</sup> July 2019 as the Respondent had been served. That, however, nothing from the Court stopped the internal process. The Respondent only stopped when it was served with stay orders.

26. RW1 further testified that he was certain that upon conclusion of the disciplinary proceedings, they served the Petitioner with its decision to forward its recommendation to the main board. He however had no evidence of service of the letter.

27. RW1 also admitted that the Petitioner was not provided with particulars for the allegation of insubordination. The documents requested by the Petitioner were not supplied. The 2<sup>nd</sup> Respondent did not also respond to the letter requesting for the aforesaid documents. He however maintained that the 2<sup>nd</sup> Respondent was not being repulsive to the Petitioner's request. That the prayers by the Petitioner are unreasonable as the Respondent has articles that provide for resolution of matters before resulting to Court. The Petitioner did not submit to the internal process.

28. The Respondents also called upon **RW2, Miriam Wanjiru Mutuma** to testify. She adopted her statement dated 6<sup>th</sup> November 2019 as her evidence in chief.

29. She testified that she is the acting Human resource Manager of EPZA and has worked for the 2<sup>nd</sup> Respondent for over twenty years. She confirmed that she is in charge of all the Human resource documents and that she is not aware of any misbehaviour by the Petitioner. Further that there were no previous complaints against the Petitioner.

30. PW2 further confirmed that EPZA's employees are given a copy of the appraisal forms and that an employee can always request for another copy if necessary. It was her opinion that the information in the two Notice to Show Cause letters was sufficient to enable the Petitioner to respond to the allegations against him. That he has the information he is seeking and that's why he gave a lengthy response to the allegations. She admitted that the allegations have no dates. That, however, as the security manager, the Petitioner knew the allegations made against him.

31. PW2 also stated that the disciplinary process was complete and the decision sent to the main board for further advise. That if directed by the Court, they are ready and willing to re-start the proceedings afresh.

32. On re-examination, PW2 maintained that the disciplinary process against the Petitioner was fair. That he was given the opportunity to attend the hearing. That in her opinion, it would not be fair to repeat the process. She prayed that EPZA be allowed to conclude the internal process.

33. Parties thereafter filed their submissions.

#### **Petitioner's Submissions**

34. The Petitioner through his Counsel on record submits that on the 28<sup>th</sup> May 2019, the Petitioner was served with a Show Cause letter which contained generalized allegations devoid of particulars in breach of the **EPZA Human Resource Policy and Procedure Manual, 2017** and the Constitution of Kenya, 2010. That the said Show Cause letter contained a generalized claims, far-fetched conclusions and inferences prejudicial to the Petitioner. That the internal process was devoid of the basic ingredients contemplated in Article 47 of the Constitution in regard to fair process.

35. Counsel further submits that on 11<sup>th</sup> June 2019, when the Petitioner presented himself before the Respondents, he requested to be supplied with particulars attendant to the allegations documents and witnesses based on which the disciplinary action was based .but that the request was not answered with the particulars as reasonably envisaged. That following the said request, the Respondent served the Petitioner with another Show Cause letter .The second Show cause letter did not contain the requested particulars as reasonably envisaged. That the Petitioner wrote to the Respondents requesting for the particulars but the Respondents remained obstinate and repulsive and refused to supply the requested information.

36. The Petitioner submits that the sessions convened by the Respondents overlooked the cardinal attributes of Article 47 of the Constitution of Kenya, 2010 as the request of the Petitioner to be supplied with the particulars of the Notice to Show Cause was not heeded.

37. On the witnesses and evidence adduced by the Respondent, Counsel points out that while the list of witnesses dated 6<sup>th</sup> November 2019 contain the names Richard Nyabuti and Miriam Mutuma, the witnesses who turned up were Henry Obino and Miriam Mutuma. That the list is therefore not compatible with the witnesses. Further that the two witnesses never participated in the proceedings rendering their evidence peripheral and incompetent *ab initio*. That their statements are of no evidentiary value or consequence.

38. The Petitioner refutes the allegations by the Respondents that they proceeded with the hearing of 8<sup>th</sup> July 2019 his absence and concluded the disciplinary process. Counsel submits that once the Court was seized of the matter the Respondents could not proceed with the disciplinary process.

39. On the particulars that should be included in a Notice to show Cause letter, Counsel submits that an objective and fair Notice to Show Cause letter should have had the following legal and constitutional ingredients as set out in **Nicholas Muasya Kyula v Farmchem Limited ICN 1992/2001** where **Ongaya J.** held that : -

*(a) be written in a clear and dispassionate manner;*

(b) be issued as soon as practicable;

(c) Identify the workplace issue giving rise to the disciplinary action. This may be a breach of a particular law or code of conduct, or relate to a specific term in an employment contract;

(d) identify any relevant workplace history, including any prior written warning letters;

(e) address with sufficient particularity the factual allegation or allegations being made against the employee requiring a response,

(f) Such-particulars will likely require the times, dates, places and circumstances for each allegation being made. In some instances, names of witnesses or supporting information (such as documents) should be disclosed;

(g) be accurate and not omit or misrepresent any relevant circumstance; and,

(h) Afford a fair' time for the employee to make an effective response.

40. Counsel submits that the Respondents did not follow proper procedure during the disciplinary hearing as the following was never disclosed during the hearing: -

a) Background information leading to the relevant incident;

b) Input from the witness or witnesses;

c) The facts of the allegations;

d) Documentary evidence to support the allegations;

41. Counsel further submits that the rights of the Petitioner were infringed. He cites Section 41 of the Employment Act, which provides that an employer is supposed to specify charges against an employee and give him a reasonable opportunity to present his case at a disciplinary hearing. Counsel also relies on Article 47 of the Constitution that requires that a person likely to be affected by an administrative decision must be given a fair hearing. Further that Article 236 protects a Public Officer from dismissal or removal from office or being subjected to disciplinary action without due process of the law.

42. Accordingly, Counsel submits that the entire internal process; presented/coined as disciplinary hearings is a sham, unjust and same should be set aside and or ordered unnecessary *ab initio*.

### **Respondents' Submissions**

43. The Respondents vide their Answer to Petition dated 6<sup>th</sup> November, 2019 and filed on 13<sup>th</sup> November, 2019 denied that they served the Petitioner with a Notice to Show Cause letter devoid of particulars or in flagrant breach of the Petitioner's right to fair process within the meaning of Articles 3, 10, 22, 25(c) 27, 28, 35(b), 41(1), 43(1)(e), 47 and 232 of the Constitution of Kenya, 2010.

44. Through their Advocates on record they submit that they would rely entirely on their Answer to Petition and List of Documents dated 06<sup>th</sup> November, 2019 and filed in Court on 13<sup>th</sup> November, 2019, the witness statement of Henry Obino (substituted in place of George Makaketo) sworn 29<sup>th</sup> June, 2020 and that of Miriam Mutuma sworn on 06<sup>th</sup> November, 2019 together with further oral testimony of the said witness.

45. The Respondents vide their Answer to Petition dated 06<sup>th</sup> November, 2019 and filed on 13<sup>th</sup> November, 2019 denied that they served the Petitioner with a Notice to Show Cause letter devoid of particulars or in flagrant breach of the Petitioner's right to fair process within the meaning of Articles 3, 10, 22, 25(c) 27, 28, 35(b), 41(1), 43(1)(e), 47 and 232 of the Constitution of Kenya, 2010.

46. Counsel submits that the Petitioner was duly afforded a fair hearing by being invited to attend the disciplinary proceedings which he attended and agreed to submit to the jurisdiction of the disciplinary committee hence he is estopped from accusing the 2<sup>nd</sup> Respondent of flouting the provisions of Articles 10, 25, 35 and 47 of the Constitution of Kenya, 2010. Further that as acknowledged by the Petitioner when citing the case of **Anarita Karimi Njeru v Republic**, the Petitioner must establish the following principles in regard to enforcement of fundamental rights and freedoms:

a) A Petitioner must plead with particularity that of which he complains

b) The provision said to be infringed

c) The manner in which the particular right is violated.

47. That he has however failed to establish the said principles. The Respondents submit further that they complied with the provisions of the Export Processing Zones Authority (EPZA) Human Resource Manual of July 2017 by interdicting the Petitioner pursuant to clause 11.21.1 of the Manual to allow investigations to be conducted. That they also complied with the provisions of Articles 25(c) 35(1)(b), 41(1) and 47 of

the Constitution of Kenya, 2010 and Clause 11.4 of the EPZA Manual by inviting the Petitioner to show cause why disciplinary action should not be taken against him and giving him an opportunity to attend the hearings. As such, the Respondents urge the Court to find that the Petitioner is not deserving of the orders sought.

48. It was further submits that the Petitioner's petition was prematurely filed as other internal processes are yet to be exhausted, hence the Court should allow the internal processes to be completed. Counsel relied on the case of **Maureen K. Imbiakah & Another v Teachers' Service Commission & 2 Others [219]eKLR, Kisumu ELRC Petition No. 20 of 2017**, where the Court observed as follows;

*"The interdictions were not unconstitutional as there was no violation or infringement of the Petitioners' rights or the relevant regulations during the investigations or the hearing....On the final issue whether the Petitioners are entitled to the orders sought, I take note that this is an internal disciplinary process undertaken by the Respondents pursuant to a mandate under both the Constitution and the Act. As has been stated and restated by this Court in several decisions, it is not the Court's duty to take over the disciplinary role of the employer. The Court would only intervene in the rare occasions where it finds that the internal process has been mismanaged to the detriment of the applicant, in this case the Petitioners."*

49. Counsel urges the Court to find that the Petitioner has not proved that he is deserving of the orders sought.

#### **Determination**

50. I have considered the pleadings, evidence and submissions of the parties. The Court has arrived at the following issues for determination;

- (i) Whether the Petitioner's rights have been or are about to be violated and whether the Petition as filed is pre-mature
- (ii) Whether the Petitioner is entitled to the orders sought
- (iii) Who bears the costs of the case.

#### **Whether the Petitioner's rights have been or are about to be violated and whether the Petition as filed is pre-mature**

51. It is common ground that the Petitioner is an employee of the 2<sup>nd</sup> Respondent. On 28<sup>th</sup> May 2019, the Petitioner received a Notice to Show Cause letter from the 2<sup>nd</sup> Respondent. He responded to the show cause letter and attended the scheduled hearing where he sought an adjournment on the basis that he had not been supplied with particulars of the allegations against him. The Disciplinary committee allowed the adjournment and also ceded to his request to have the particulars of the allegations to enable him to defend himself. On 13<sup>th</sup> June 2019, the Respondents sent another show cause letter.

52. While the Petitioner still maintained that he still had insufficient information to defend himself, the Respondents were of the opinion that the information as supplied was sufficient. It is this standoff that led to the filing of the instant petition.

53. It is now trite that employees are entitled to a fair disciplinary process. This right includes the right to be informed of the allegations against them and to be supplied with the necessary information required to prepare their defence.

54. **Sections 3(a) & 3(g) of the Fair Administrative Action Act** states as follows:

**"Where an 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) prior and adequate notice of the nature and reasons for the proposed administrative action;**

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

55. As rightly stated by the Petitioner, Article 47 of the Constitution requires that a person likely to be affected by an administrative decision be given a fair hearing. Further **Article 236** protects a Public Officer from dismissal or removal from office or being subjected to disciplinary action without due process of the law.

56. It is crucial that an employee facing disciplinary process be supplied with the information, material and evidence that will be used against him. This Court must now weigh this against the information provided by the Respondent in order to determine whether the Petitioner's right to information has or is about to be violated.

57. The Notice to Show Cause in question is the one dated 13<sup>th</sup> June, 2019. It read as follows:

*"CONF/EPZA/284/ June 13<sup>th</sup> 2019*

*Jonathan Chepkwony*

*Export Processing Zones Authority*

Dear,

**RE: SHOW CAUSE**

Further to our show cause letter dated 28<sup>th</sup> May, 2019 and the disciplinary hearing that you attended with your legal Council on 11<sup>th</sup> June 2019 on the above mentioned matter, you requested through your legal Counsel that the Board Disciplinary Committee reschedules the hearing to later date in order for you to be provided with specific allegations so that you are able to respond accordingly. Your prayers were granted. Specifically, the allegations are as mentioned hereunder: -

1. Failure to protect loss of authority's and investor's property on several occasions. Amongst the notable incidences was the theft and the loss of property of Hela intimates Africa EPZ Limited sometimes last year. Particulars of the incidence which you are fully aware of and properly informed. As the Head of Security, the theft has not been accounted for to date. You negated your custodial obligation of ensuring that the property

of investors and Authority are well safeguarded.

2. Inability to safeguard safety and security of staff within their working environment which is tantamount to gross incompetence.

At the height of dispute between the Authority and MAVWASCO on the water infrastructure some unknown persons early in the morning barricaded the Headquarters building and forcefully prevented some top management officials from taking over their daily duties which amounted to serious security lapse within the EPZA zone. Your response and action on the said action was wanting.

3. Insubordination

Acting against the interest of top management by colluding with institutions and/or persons advancing the interest against the Authority.

4. Failure to provide proper, adequate security and advisory services in a timely, professional manner.

Note, of serious concern is the numerous illegal water and sewerage connections within EPZA infrastructure which have totally affected the operations and interest of the entire Authority. As the Head of Security, you have totally or deliberately failed to execute your mandate within the parameters of your duties.

5. Threats and intimidation of security staff assigned in your Department

There were several Security staff assigned to your Department who are notably Unionizable Staff Leaders who you intimidated through unnecessary transfers. Consequently, the former Procurement Manager; Beatrice Njenga filed a complaint against you for manhandling her when her services were terminated. EPZA Security daily Occurrence Book which contained the allegations has since vanished mysteriously whilst in your formal custody. This amounts to dishonesty and an act of bad faith against the security and interest of other EPZA employees.

This is to remind you that to respond to the allegations aforementioned by 19<sup>th</sup> June 2019 as was agreed in the meeting on 11<sup>th</sup> June 2019.

George Makateto

Ag. Chief Executive Officer”

58. Notably, the above notice to show cause letter, unlike the one dated 28<sup>th</sup> May 2019 was more detailed and provided certain particulars of the allegations against the Petitioner. It however did not provide the specific particulars sought by the Petitioner.

59. In the case of in **Cause No. 2244 of 2014, Nixon Bugo v The Alliance For A Green Revolution In Africa** the Court stated as follows -

*"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."*

60. In **Rosemary Waitherero Mburu v Kenya Airways Limited (2020)** the Court held;-

***“Courts are reluctant to interfere with an employer’s internal disciplinary process unless it is evidently flawed and in breach of the law and such interference will only be limited to putting the process to the right course.”***

61. In **Anne Wambui Kamuiru v Kenya Airways - Cause No. 1684/2015**, the Court held as follows:-

*“There is a convergence in agreement that an employer who commences disciplinary proceedings must ensure due process, fair*

hearing and due regard to natural justice. The Courts on their part will not interfere with proper internal disciplinary processes unless the Court is satisfied that the process is marred with irregularities or it is stage managed towards dismissal.

*The Court will interfere not to stop the process altogether but to put the correct process on course.”*

62. In the instant case, the manner in which the Respondent commenced disciplinary proceedings against the Petitioner was quite peculiar. The show cause letter attests to this. It is reproduced below –

“CONF/EPZA/078/ May 28, 2019

*Jonathan Chepkwony*

*Export Processing Zones Authority*

*Dear Mr. Chepkwony,*

**RE: SHOW CAUSE**

*The 191<sup>st</sup> EPZA Board meeting on 25<sup>th</sup> April 2019 appointed “Adhoc” Committee of the Board with a view of finding out the discontent of the staff members emanating from disturbing behaviour exhibited by the former Acting Head of Legal Services. The “Adhoc” Committee thereby interviewed several staff members from the top management to junior staff and subsequently presented their report to a Special EPZA Board Meeting held on 21<sup>st</sup> May 2019. From the report of the “Adhoc” Committee to the Board, it noted that you are tardy in performing your duties and special assignments and specifically that you are–*

- 1. Insubordination.*
- 2. Failure to protect loss of authority and investor's property on several occasions.*
- 3. Inability to safeguard safety and security of staff amounting to gross incompetence*
- 4. Failure to provide proper and adequate security advisory services in a timely manner.*
- 5. Threats and intimidation of staff assigned in your Department.*

*Based on the above, you are therefore required to showcase why disciplinary action should not be taken against you on account of not meeting the required standards of performance, timeliness and integrity. Your response should reach the undersigned on or before 7<sup>th</sup> June 2019.*

*In view of the above and in accordance with the EPZA Human Resource Policy and Procedures Manual, you are hereby interdicted pending investigation on the aforementioned matter.*

*During the interdiction period you will be entitled to half (½) basic salary with full allowances and medical benefits. Upon receipt of this letter you are required to handover your duties with immediate effect to Mr. Didious Atyang.*

SIGNED

*George Makateto*

*Ag. Chief Executive Officer”*

63. In the first place, there were no complaints against the Petitioner. The investigations were against “the Acting Head of Legal Services”. The Letter then states: “From the report of the Ad Hoc Committee of the Board, it is noted that you are tardy in performing your duties and special assignments.”

64. Tardy means delaying or delayed beyond the right or expected time; late; sluggish; slow in action or response. None of the listed accusations against the Petitioner relate to tardy performance of his duties.

65. In spite of the fact that the Petitioner was not under any investigations and the alleged charges were, apart from not supporting the charge of tardy performance, bereft of particulars and coming out of the blues, the letter went ahead to interdict the Petitioner at half pay.

66. The nature of the charges are also telling. They are all of a very general nature, to the point of being vague.

67. The manner in which the disciplinary process was conducted is also very questionable. In spite the Petitioner denying the very generalised charges and seeking better particulars in his response dated 4<sup>th</sup> June 2019, he was on 6<sup>th</sup> June 2019 invited for a disciplinary hearing to take place on 11<sup>th</sup> June 2019. He attended the disciplinary hearing in the presence of his Lawyer who again sought particulars of

the charges against the Petitioner.

68. By letter dated 13<sup>th</sup> June 2019, the Respondent wrote to the Petitioner giving better particulars of the charges.

69. In response thereto, the Petitioner by his letter dated 19<sup>th</sup> June 2019 sought the following specific particulars –

(i) A copy of the Ad Hoc Committee report presented to the EPZA Special Board meeting held on the 21<sup>st</sup> May 2019.

(ii) Copies of Witness statements/Complaints attendant to the Adhoc Committee report

(iii) Copies of Minutes of the disciplinary proceedings/session of 11<sup>th</sup> June 2019

(iv) Copies of my appraisal report forms for the period 2015, 2016, 2017 and 2018”

70. On the same date, the Claimant’s Counsel also wrote to the Respondent follows –

MN/EPZA/001 CONF/EPZA/078/HR 19<sup>th</sup> June 2019

The Ag. Chief Executive Officer

Export Processing Zones Authority Nairobi

Dear Sir,

**RE: SHOW CAUSE LETTER**

Your letter dated 13<sup>th</sup> June 2019 refers.

The said letter just like the first one of 4<sup>th</sup> June 2019 did not have cogent particularized and methodically presented allegations. Our client’s response to the same is enclosed herewith for your perusal.

We are conscious of the meeting scheduled for the 24<sup>th</sup> June 2019, and thus request that you kindly avail to us /our client particulars stated hereunder:-

(i) A copy of the Ad Hoc Committee report presented to the EPZA Special Board meeting held on the 21<sup>st</sup> May 2019.

(ii) Copies of Witness statements/Complaints attendant to the Adhoc Committee report

(iii) Copies of Minutes of the disciplinary proceedings/session of 11<sup>th</sup> June 2019

(iv) Copies of my appraisal report forms for the period 2015, 2016, 2017 & 2018

(v) Any other document/exhibit or extract intended to be relied on by your Committee.

We shall appreciate your response by close of business on 21<sup>st</sup> June 2019; so that the anchor and fulcrum of fair administrative action contemplated under Article 47 of the Constitution of Kenya 2010 is observed and upheld.

Yours Faithfully,

SIGNED

MOSES NYAMBEGA AND CO. ADVOCATES

Cc. Paul Gicheru

Chairman Board of Directors EPZA”

Client”

71. Ignoring both the Petitioner’s and his Counsel’s letters, the Respondent by letter dated 20<sup>th</sup> June 2019 invited the Petitioner for a disciplinary hearing on the 24<sup>th</sup> June 2021. The letter warned that should the Petitioner fail to attend the Committee “shall proceed and execute the matter to finality without further indulgence to yourself as per the Human Resource Manual Policy Procedures.”

72. The Petitioner attended the disciplinary hearing on 24<sup>th</sup> June 2019 in the company of his Counsel where they again sought the particulars as per their requests in the letters of 19<sup>th</sup> June 2019.

73. By letter dated 28<sup>th</sup> June 2019, the Petitioner was yet again invited for a disciplinary hearing on 8<sup>th</sup> July. The letter warned the Petitioner thus –

*“Kindly note that failure to attend, the Human Resource and Administration Board Committee shall proceed and execute the matter to finality without further indulgence to yourself as per the Human Resource Policy and Procedures Manual.”*

74. The Petitioner yet again attended the disciplinary hearing on 8<sup>th</sup> July 2019 with his Counsel and yet again sought the particulars which had still not been supplied to him. Minutes 3 and 4 of the minutes of the meeting of 8<sup>th</sup> July 2019 and reproduced below: -

**“MIN/3/24/06/19 REQUEST FROM EMPLOYEE**

*The employee through his legal counsel requested management to provide more particulars of the allegations. The Chair informed members that whatever will be presented to the Board Committee will be authenticated before the Committee makes its recommendations on the matter to the Main Board.*

**MIN/4/24/06/19 WAY FORWARD**

*(a) Within seven (7) days, Mr. Chepkwony to consider other options available to him if he need not want to consider with the disciplinary case.*

*(b) Parties to file written submissions by 3<sup>rd</sup> July 2019 and thereafter hearing to proceed on 8<sup>th</sup> July 2019 at 10 am.”*

75. It is against this background that the Petitioner approached this Court.

76. The Respondent’s Human Resource Policy and Procedures Manual provides for disciplinary process as follows –

**“11.1 Introduction**

*11.1.1 Disciplinary procedures shall be used as a corrective measure to foster improvement of individual conduct. It is expected that no punishment shall be inflicted on an officer if it would be contrary to any provision of the law.*

*11 1.2 In this manual “discipline” means conforming to Service rules and regulations which prescribe expected conduct and behaviour of individual officers. It is intended to contribute to performance improvement and productivity.*

*11 1.3 The purpose of rules and regulations is to ensure compliance and discipline in the Authority and to correct any conduct that may not conform to such rules. The Authority reserves the right to impartially administer discipline and the employee has the right to be granted a fair hearing.*

*11.1.4 This policy applies to all employees and includes remedy for non-compliance of this policy and other Authority policies.*

**11.3 Disciplinary Procedure**

*11.3.1 The disciplinary procedure provides a framework for dealing with instances where employees are alleged not to have met the required standards of conduct. The aim is to ensure prompt, consistent and fair treatment for all staff.*

**11.4 Guiding Principles**

*11.4.1 The Authority shall be guided by the following principles in handling disciplinary matters:*

*a) The rules of natural justice:*

*b) Procedural fairness, where an officer must be allowed adequate opportunity to prepare and present his/her case;*

*c) The deciding authority must be unbiased when hearing and making decisions;*

*d) Decisions must be based upon logical proof or evidential material.*

*e) Fair administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.*

f) Every officer to whom disciplinary action is taken has a right to:

- Written reasons for any disciplinary action that is taken against him;
- Prior and adequate notice of the nature and reasons for the intended disciplinary action;

g) An opportunity to be heard and to make representations in that regard;

h) An opportunity to attend proceedings acceding to provisions of Employment Act 2007 where necessary;

i) Notice of the right to legal representation, where applicable;

j) Notice of a right to an appeal or review against a disciplinary decision;

k) Information, materials and evidence to be relied upon in making a decision or taking a disciplinary action.

77. The Human Resource Manual specifically states that an employee is entitled to “information, materials and evidence to be relied upon in making a decision or taking disciplinary action.”

78. The Respondent was thus bound to supply to the Petitioner the particulars he sought or in the least, to explain to him why any of the particulars could not be supplied.

79. The only inference the Court can make from the conduct of the Respondent, right from the time of issuance of the “show cause” letter to the Petitioner is that either the charges against the Petitioner could not be supported or that the Respondent had already determined that the Petitioner should leave its employment at any cost and the disciplinary process was but a farce.

80. As was stated in the cause of **Nicholas Muasya Kyula v Farmchem Limited ICN (supra)**, a show cause letter ought to have the following ingredients –

(a) be written in a clear and dispassionate manner;

(b) be issued as soon as practicable;

(c) Identify the workplace issue giving rise to the disciplinary action. This may be a breach of a particular law or code of conduct, or relate to a specific term in an employment contract;

(d) identify any relevant workplace history, including any prior written warning letters;

(e) address with sufficient particularity the factual allegation or allegations being made against the employee requiring a response,

(f) Such-particulars will likely require the times, dates, places and circumstances for each allegation being made. In some instances, names of witnesses or supporting information (such as documents) should be disclosed;

(g) be accurate and not omit or misrepresent any relevant circumstance; and,

(h) Afford a fair' time for the employee to make an effective response.

81. The show cause letter dated 28<sup>th</sup> May 2019 issued to the Petitioner did not meet these standards. Even the letter dated 13<sup>th</sup> June 2019 does not meet the threshold.

82. In the case of **Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology [2014] eKLR**, the Court observed thus: -

“35. As held in the case of **Alfred Nyungu Kimungui Vs Bomas of Kenya (Industrial Court Cause No 620 of 2013)** the Industrial Court should not take over and exercise managerial prerogatives at the work place.

36. However, in cases where an employee facing disciplinary action legitimately feels that the process is marred with irregularities or is stage managed towards their dismissal, the Court will intervene not to stop the process altogether but to put things right. When the Claimants came before me, their boss Prof. Francis M. Njeruh had just been dismissed. Further, the Court took notice that since 15th August 2013, the Claimants had been transferred at a frequency that seemed somewhat abnormal.”

83. Like in the case of **Rebecca Ann Maina & Others**, the circumstances under which the Petitioner was issued with the “show cause” letter when there were a lot of changes in the Respondent company. As stated by the Petitioner in his supplementary witness statement dated 8<sup>th</sup> November 2019, he had a clean record and the Adhoc Committee which purportedly made recommendations for his discipline had no terms of reference to investigate him. A new Board of Management had just taken office and several officers had been sent home. He was afraid that the new Board wanted to get rid of him like the other officers, for no valid reason.

84. The report of the Adhoc Committee was never presented to the Court as proof that such report existed or that if it existed, it had any findings against the Petitioner and recommended disciplinary action against him.

85. The averments by the Respondent that the disciplinary process against the Petitioner had been concluded are not correct. This Court countermanded the same in its ruling of 2<sup>nd</sup> August 2019. No minutes of the Board have been produced to show that the Board considered and adopted any recommendations of the Human Resource and Administration Committee of the Board after the meeting of 8<sup>th</sup> July 2019.

86. From the totality of the evidence presented before the Court, the pleadings and the authorities it is my finding that that the Petitioner has demonstrated that his interdiction was not based on valid grounds as set out in Section 43 of the Employment Act and that his right to due process and a fair hearing, as well as the right to fair labour practices were violated by the Respondent who also failed to comply with its own disciplinary process under its Human Resource Policy.

87. It is for the foregoing reasons that I find in favour of the Petitioner and make the following orders: -

**(i) The disciplinary process against the Petitioner be and are hereby terminated and the Petitioner reinstated back to his position as at 28<sup>th</sup> May 2019 without loss of any benefits.**

**(ii) The Respondent is free to institute fresh disciplinary proceedings against the Petitioner should there be valid grounds to do so, provided the same is compliant with the Respondent's Human Resources Policy and the law.**

**(iii) The Respondent shall bear the Petitioner's costs.**

88. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8<sup>TH</sup> DAY OF OCTOBER 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 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 had 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**