



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**PETITION NO. 23 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF  
FUNDAMENTAL RIGHTS) IN THE BILL OF**

**RIGHTS CHAPTER 4, ARTICLES**

**2(1), 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 35, 41, 47, 48, 50, 159**

**AND**

**THE CONSTITUTION**

**OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)**

**PRACTICE AND PROCEDURE RULES, 2013)**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE FUNDAMENTAL  
RIGHTS AND FREEDOMS UNDER ARTICLES 25(c), 27(1), 28, 29(d) & (f), 35(1) & (2), 41(1), 47(1) & (2), 48, 50(1) & (2) OF  
THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE PRINCIPLES OF FAIR ADMINISTRATIVE ACTION, NATURAL JUSTICE,  
PROPORTIONALITY, REASONABLENESS AND LEGITIMATE EXPECTATION**

**AND**

**IN THE MATTER OF THE SECTION 56 OF THE BASIC EDUCATION ACT NO. 20 OF 2013**

**AND**

**IN THE MATTER OF CHAPTER FIFTEEN OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE TEACHERS SERVICE COMMISSION, CAP 212 AND ARTICLE**

**237(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF REGULATIONS NO. 5, 6, 7, 18, 36, 66, 67, AND 68 OF THE CODE**

**OF REGULATIONS FOR TEACHERS (REVISED 2005)**

AND

IN THE MATTER OF THE INTERDICTION LETTER DATED 3<sup>RD</sup> AUGUST 2015

BETWEEN

PATRICK WANYONYI KHAEMBA.....PETITIONER

VERSUS

TEACHERS SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT

THE CHAIRMAN, BOARD OF MANAGEMENT,

KAPLETINGI MIXED DAY SECONDARY SCHOOL.....2<sup>ND</sup> RESPONDENT

FRANCIS TANUI.....3<sup>RD</sup> RESPONDENT

**JUDGMENT**

The Petitioner Patrick Wanyonyi Khaemba filed this petition against the Teachers Service Commission, the 1<sup>st</sup> Respondent; The Chairman, Board of Management, Kapletingi Mixed Day Secondary School, the 2<sup>nd</sup> Respondent and Francis Tanui, the Head Teacher, Kapletingi Mixed Day Secondary School. He avers that the Respondents violated his rights and fundamental freedoms under articles 19(2) and (3), 22(1), 25(a) and (c), 27(1), 28, 29(d), 31, 35(1) and (2), 41 and (2), 47(1) and (2), 50(i) and (j), 53, 159(1), (d), and (e), 165(3) and 259. He prays for the following orders:-

1. A declaration that the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondents' failure to reveal to the Petitioner their witnesses, the particulars and evidence that they had against him before the hearing of disciplinary case on 29<sup>th</sup> July 2015 was a breach of his right under Article 47 to a fair administrative action as the Respondents were adopting the method of ambushing the Petitioner with charges and denying him adequate time to prepare to defend himself and therefore all consequential decisions and measures made arising therefrom are null and void.
2. A declaration that the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondents did not comply with the law and regulations that regulated the matter of hearing of disciplinary case on 29<sup>th</sup> July 2015, as a consequence of which the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondents' fell into error and violated/ infringed on the Petitioner's right to a fair hearing as envisaged in Article 47(1) and therefore all consequential decisions and measures made arising therefrom are null and void.
3. A declaration that the 1<sup>st</sup> Respondent as a Constitutional commission is not subject to the control or direction of the School Board of Management or any of the Ministry of Education, Science, and Technology departments or 'committees established under the Basic Education Regulations of 2015 in the lawful discharge of its Constitutional mandate under Article 237 of the constitution and therefore the letter dated 3<sup>rd</sup> August 2015 purporting to direct the 1<sup>st</sup> respondent to investigate, consider, and determine the allegations made against the petitioner was unconstitutional and therefore null and void.
4. A declaration that the case presented/forwarded to the 1<sup>st</sup> respondent by the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondents was aimed to achieve a collateral purpose of forestalling any investigations into the illegal sanctions that have befallen several girl-students in the school perpetuated by the 3<sup>rd</sup> Respondent with tacit support of the 2<sup>nd</sup> respondent and is therefore illegal.
5. An order of Certiorari be and is hereby issued bringing into this honourable court for purposes of being quashed the letter of interdiction dated 3<sup>rd</sup> August 2015 presented/forwarded to the 1<sup>st</sup> respondent by the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondents seeking to remove the name of the petitioner from the Register of Teachers.
6. Judicial Review Order removing the proceedings arising out of the letter of interdiction dated 3<sup>rd</sup> August 2015 presented/forwarded to the 1<sup>st</sup> respondent by the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondents and all consequential decisions and measures made arising therefrom to this court for the purposes of quashing the same as the said proceedings were undertaken and determination made contrary to the law and the rules of natural justice.
7. Judicial Review order of prohibition directed at the 1<sup>st</sup> Respondent restraining/prohibiting it by itself, its servants, from making any further decisions, resolutions, and measures aimed at implementing of the decisions arising out of the letter of interdiction dated 3<sup>rd</sup> August 2015 presented/forwarded to the 1<sup>st</sup> respondent by the 2<sup>nd</sup> Respondent and 3<sup>rd</sup> Respondents seeking to remove the name of the petitioner from the Register of Teachers.
8. Judicial Review order of mandamus be and is hereby directed at the 1<sup>st</sup> Respondent to halt forthwith implementation of any decisions arising out the letter of interdiction dated 3<sup>rd</sup> August 2015 and ensure that the petitioner herein receives his full salary and other allowances and benefits that he is entitled to as a teacher withheld by the 1<sup>st</sup> Respondent from the 1<sup>st</sup> August 2015 to date.

9. An order that the Respondents are individually, jointly, and/or severally liable to compensate the petitioner for their unconstitutional actions

10. That, an order of costs does issue payable to the petitioner by the 1<sup>st</sup> respondent.

11. That, such further orders or relief do issue

### **Petitioner's Case**

The petitioner filed the petition on 8<sup>th</sup> October 2015. His case is that the decision to investigate and interdict him by the respondents was illegal, unreasonable, malicious and calculated to harm him professionally. The petitioner contends that the actions of the BOM are in contravention of the constitution and other laws. Under the Basic Education Regulations the 2<sup>nd</sup> respondent is not authorised in law to discipline a teachers and it did not meet the requisite requirement to participate in the committee as provided by section 56 of the Basic Education Act and Basic Education Regulations 2015 on composition of BOM.

The petitioner avers that the girl Faith was not a student at Kapletingi Secondary School as she was excluded from the school and an announcement on the same was made at the school parade on 10<sup>th</sup> July 2015. The BOM based its interdiction on Faith who was no longer a student and therefore the 2<sup>nd</sup> respondent cannot purport to exercise power to discuss issues pertaining a girl who is not a student and any exercise of such powers is ultra vires to the Basic Education Act.

The petitioner further contends that sanctions imposed on him and Miss Costa Chemeli Sawe are disproportionate. Miss Costa Sawe was served with a warning letter while the petitioner was given an interdiction. The letter to Miss Sawe accused her of obstructing the course of justice by hiding information that she had on the petitioner because she had on 29<sup>th</sup> July 2015 refused to incriminate the petitioner in any wrongdoing.

The petitioner avers that the 2<sup>nd</sup> respondent and 3<sup>rd</sup> respondent came up with the charges to cover up the illegal acts of the 3<sup>rd</sup> respondent to publicly force girls to undergo pregnancy tests and announcing the results publicly, expelling alleged pregnant girls without any written letter and also avoiding responsibility for over 30 girls who had left the school since 2013 because of the humiliation and indignity perpetuated by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

The petitioner pleads bias and impartiality which led to the outcome of the BOM meeting on 29<sup>th</sup> July 2015. The petitioner had in 2014 wondered why the 3<sup>rd</sup> respondent had instigated the transfer of an English teacher. The petitioner was also a potential witness for the defence in a criminal case in which the 3<sup>rd</sup> respondent was the complainant and the petitioner declined to be the prosecution witness. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents failed and/or refused to read the allegations against the petitioner and also failed to disclose who the complainants and witnesses were in the matter. The BOM and the 3<sup>rd</sup> respondent invited the petitioner to the meeting on 29<sup>th</sup> July 2015 without disclosing the agenda and/or the charges.

The petitioner pleads that he was denied fair administrative action as provided under Article 47 of the Constitution and under the Fair Administration Act No. 4 of 2015. He was denied an opportunity to state his case. The actions of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are unconstitutional. He invokes this court to use its inherent power and duty to secure the rights of all persons as enshrined under Articles 165 and 159 of the Constitution. The petitioner prays that the court be pleased to issue the declarations, orders, directions and writs as may be necessary to safeguard and prevent the violation and/ or infringement of the petitioner's rights and freedoms guaranteed under the constitution of Kenya.

### **Respondent's Case**

The 3<sup>rd</sup> respondent was employed by the 1<sup>st</sup> respondent on 28<sup>th</sup> January 1993 and deployed as the Principal of Kapletingi Secondary School on January 2012. The petitioner reported to the school on 14<sup>th</sup> November 2012.

The 3<sup>rd</sup> respondent contends that he received information on 21<sup>st</sup> July 2015 that his student Faith who had been confirmed pregnant and released to go home had been staying in the petitioner's residential house. On the same day he also received further information that the petitioner had sent two other female students to deliver books to Faith in his house. The acts are a fundamental breach of the provisions of the Code of Regulations for Teachers.

The 3<sup>rd</sup> respondent launched preliminary investigations which involved calling ten witnesses namely;

1. Gaudencia Chebet- Form 2
2. Sharon Chebichii- Form 2
3. Nicholas Kimaiyo- Form 2
4. Faith - Form 2
5. Wilson Saitimu- Petitioner's Landlord

6. Mary Kipserem- Petitioner's Neighbour
7. Patrick Khaemba- The Petitioner
8. Costa Sawe- Petitioner's Colleague and Friend
9. Grace Kimitei- Costa's Neighbour
10. A. K Tireito- Area Chief

The 3<sup>rd</sup> respondent compiled a report and handed over the matter to the BOM for deliberations and further action. The BOM set a meeting for 29<sup>th</sup> July 2015 and invited the petitioner, Faith and all other relevant persons in the matter. The 3<sup>rd</sup> respondent served the petitioner with a letter to attend the meeting on 27<sup>th</sup> July 2015 and the petitioner refused to receive the letter. The claim that he was not informed about the meeting is dishonest. The petitioner was not fished out of the classroom to attend the meeting as he claimed because the students were undertaking mid-term exams. The petitioner attended the meeting and admitted sending the students and having Faith in his house and pleaded with the BOM not to interdict him as this would lead to dismissal as he had other cases with the 1<sup>st</sup> respondent.

The 3<sup>rd</sup> respondent further contends that the board resolved to interdict him and the 3<sup>rd</sup> respondent gave the petitioner the letter on 3<sup>rd</sup> August 2015 and informed him that he had 21 days to write a defence as he prepared for disciplinary hearing before the 1<sup>st</sup> respondent.

The 3<sup>rd</sup> respondent avers that the proceedings before the BOM are valid as the board is duly appointed pursuant to sec 101 of the education act as read together with the interpretation and general provisions act and are validly in office till new members are appointed. The petitioner never objected to the manner in which the BOM proceedings were conducted.

The 3<sup>rd</sup> respondent deposes that the parents of the school passed a resolution authorising the school administration to carry out pregnancy tests and the tests were conducted in a dignified, professional and confidential manner at Kapalwat Dispensary. The 3<sup>rd</sup> respondent never publicly announced the results and never discriminated any student on the basis of the results. On 9<sup>th</sup> July 2015, Faith tested positive for pregnancy and it was agreed that the student together with the mother were to come back to school on 20<sup>th</sup> July 2015 to allow for discussions but the girl instead reported the matter to the sub-county education office.

The 3<sup>rd</sup> respondent avers that he has a cordial working relationship with the petitioner and has no personal grudge against him, that he noted some unbecoming behaviour from Miss Costa Sawe and that the behaviour was not as serious as that of the petitioner, that is why he issued her with a warning letter which he copied to the 1<sup>st</sup> respondent. Further that he is a total stranger to the alleged criminal case.

The 3<sup>rd</sup> respondent further avers that he is an employee of the 1<sup>st</sup> respondent and therefore has no legal power or mandate to transfer a teacher which is the exclusive mandate of the 1<sup>st</sup> respondent and that whichever action he took was in his official capacity as the principal and on the instructions of both the employer and the BOM, thus he cannot be held personally liable.

The 3<sup>rd</sup> respondent opposes the petition and prays that the same is dismissed with costs.

The 1<sup>st</sup> respondent, the Teachers Service Commission (TSC) of [Kenya](#) is an Independent government Commission established under article 237 of the [Constitution of Kenya](#) to manage human resource within the education sector. The role of the commission as defined in the constitution is to:

- a) Register trained teachers
- b) Recruit and employ registered teachers
- c) Assign teachers employed by the Commission for service in any public school or institution
- d) Promote and transfer teachers
- e) Exercise disciplinary control over teachers
- f) Terminate the employment of teachers

The 1<sup>st</sup> respondent avers that the 3<sup>rd</sup> respondent in his capacity as principal of Kapletingi Secondary School received allegations that the petitioner engaged in acts of immoral behaviour. The allegations constituted a clear breach of the rules of conduct guiding the teaching profession. The 1<sup>st</sup> respondent in exercise of its constitutional and administrative mandate through its agents conducted investigations into the allegations.

The 1<sup>st</sup> respondent contends that the BOM convened a meeting in compliance of Regulation 66 of code of regulations for teachers and the petitioner together with other people were invited to the meeting. The petitioner was given an opportunity to respond to the allegations and after evaluating the evidence presented before it, the BOM made a decision to interdict the petitioner. The 3<sup>rd</sup> respondent acted on the instructions of the BOM and issued the petitioner with the interdiction letter and it informed the petitioner that he had 21 days to write a

defence awaiting the formal hearing.

The 1<sup>st</sup> respondent further contends that a careful analysis of the evidence against the petitioner raised grounds to believe that the petitioner was involved in acts amounting to professional misconduct that called for an action of interdiction. The 1<sup>st</sup> respondent maintains that the interdiction is the initial process to the determination of the case and therefore the action of the 1<sup>st</sup> respondent was justified, fair and lawful. The process adhered to the provisions of the act, the code of conduct and ethics and hence lawful.

### **Issues for Determination.**

This court has considered the pleadings, affidavits, documents annexed, written submissions and authorities cited by all the parties and has identified the issues for determination as follows;

### **Whether the provisions of the constitution are applicable to the petitioner.**

The petitioner refers the following articles in the Constitution as the legal foundations of the petition: Articles 19(2)(3), 22(1), 25 (a)(c), 27(1), 28,29(d), 31, 35(1)(2), 41(1)(2), 47(1)(2), 50(i)(j), 53, 159(1)(d)(e), 165(3) and 259. Kenya has a robust [Bill of Rights](#) that guarantees the human rights and fundamental freedoms of all Kenyans. Article 22 emphasises the right of every person to enforce the rights and fundamental freedoms. While an individual can go to court to enforce a right or when they feel that a fundamental right is or there is a risk of it being abused, an individual is required to demonstrate to court how those rights have been breached.

The petitioner herein pleaded that the petition is legally anchored on the Constitution but has not demonstrated how his rights as enshrined have been abused or threatened. In the case of *Anarita Karimi Njeru V Republic* the court established the following principles in matters concerning enforcement of fundamental rights and freedoms:

1. A petitioner must plead with particularity that of which he complains
2. The provision said to be infringed
3. The manner in which the particular right is violated

Majanja J. in *Mathew Okwanda V Minister of Health and Medical Services & 3 Others [2013] eKLR* held that,

*‘the fact that the case is one that involves enforcement of economic and social rights does not relieve the petitioner of the responsibility to plead a case that discloses a violation of fundamental rights and freedoms with due particularity.’*

Where a petitioner alleges violation of constitutional rights, it is incumbent upon the petitioner, in order to succeed, to demonstrate, with a reasonable degree of precision, the provisions of the Constitution which have been violated, and the manner of such violation.

The petitioner alleges that he was discriminated Costa Chemeli Sawe was issued with a warning letter for incitement, insubordination and infamous conduct while he was interdicted for inviting Faith to his house, on 21<sup>st</sup> July 2015, sending 2 girls to his house to carry books for Faith. He contends that the punishment imposed against him was disproportionate with the alleged infringement.

The petitioner further avers that he was denied fair administrative action natural justice as he was summoned from class through word of mouth by the Deputy Principal Mr. Thomas Kirwa at about 14:08pm on 29<sup>th</sup> July 2015 to go to the Board of Management meeting which was going on in the staffroom without being informed why he was summoned with such urgency. That he was asked by Mr. Talaam to make a statement regarding the two girls who were allegedly found in his house. That at the meeting he stated that if this indeed happened then it is regretted. That he was surprised when he was served with an interdiction letter dated 3<sup>rd</sup> August 2015. He further avers that the Respondents turned themselves into a quasi-judicial body, that he was denied a hearing as provided under Article 47 and section 4 of Fair Administrative Actions Act and denied reasonable opportunity to state his case as the petitioners failed to inter alia: -

- a) To identify themselves and introduce names of the persons forming the committee or panel.
- b) To provide the names of the persons who wrote the contents of items.
- c) To frame and read the charges to the petitioner.
- d) To declare the source of the accusations, information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- e) To issue prior and adequate notice of the nature and reasons for the proposed administrative action;
- f) To give an opportunity to be heard and to make representations in defence of himself.
- g) To notify the petitioner of the right to legal representation.
- h) To notify the petitioner of the right to cross-examine the witnesses.

He states that the Respondents were hell bent on frustrating him by acting illegally, out of bad faith and ulterior motive, arbitrarily and contrary to principles of natural justice and equity.

However in the same petition and in his affidavit supporting the petition and the annexures thereto the petitioner admits that the students were in his house on 21<sup>st</sup> July 2015. He further admits that the 3<sup>rd</sup> Respondent invited him and Madam Costa Chemeli Sawe to discuss the issue of the girls. In the supplementary affidavit the petitioner admits that there were three meetings on 13<sup>th</sup>, 27<sup>th</sup> and 29<sup>th</sup> July 2015.

The statements by Faith, Gaudencia, Sharon and Kimaiyo Nicholas, the students found in the petitioner's house all admitted being there. Specifically, Sharon and Gaudencia stated that they were sent by the Petitioner to his house to deliver books to Faith.

#### **Whether respondents had mandate to interdict.**

The petitioner is an employee of the 1<sup>st</sup> respondent and is under the 3<sup>rd</sup> respondent who is an agent of the TSC in the school. Teaching is a profession and conduct of teachers is governed by the code of conduct and ethics, the code of regulation for teachers and circular no. 3 on protection of students from sexual abuse. Interdiction is provided for in the regulations. A teacher who violates the provisions of the Code of Regulations for Teachers and the TSC Code of Conduct and Ethics will face disciplinary action which may include warning or interdiction. The disciplinary process as provided begins when a head teacher receives information about the conduct of any teacher. The head teacher may at first issue a verbal warning or caution the teacher in writing on minor breaches. Where there is persistent misbehaviour, the teacher may be required to show cause why disciplinary action should not be taken against him/her. From the teacher's response, the head of institution may serve the teacher with a warning or present the case before the BOM. The head teacher is a member of the BOM. After presenting the report on the teacher to the BOM, the BOM;

1. Investigate and assemble relevant evidence.
2. Invite the accused teacher in writing to defend himself/herself against specified allegation.
3. Call witnesses to give evidence in the presence of the accused teacher.
4. Allow the teacher to cross-examine each witness.

After the preliminary hearing the BOM may reach any of the following decisions;

1. No case to answer.
2. Warn the teacher administratively.
3. Interdict the teacher

An interdicted teacher should write a defence statement within 21 days from the date of interdiction and provide contact address.

It was submitted that the head teacher received information about a student who had been sent home but was apparently living in the residential house of the petitioner. The CORT in paragraph 7 prohibits the sending/invitation of students to teacher's houses for whatever reason. The petitioner feigns ignorance of the said circular. It is the duty of an employee to know the provisions that govern his employment. If ignorance were an excuse, all employees caught doing contrary to the laws governing them would merely claim that one was unaware of the law in question to avoid liability, even if that person really does know what the law in question is. The petitioner as a teacher is subject to the provisions of the code published by the employer and this court reads dishonesty in the claim by the petitioner that he was unaware of the same. The petitioner admitted to the fact that the student, Faith Kiu was residing in his house and pleaded with the BOM not to interdict him for the same. By his own confession, the petitioner understood that the BOM in **Judith Mbayah Tsisiga v Teachers Service Commission [2017] eKLR** the court stated,

*“In this case there is no doubt that the Respondent has both constitutional and statutory power to exercise disciplinary control over the claimant. There is also no doubt that interdiction is part of the prescribed disciplinary process in the Code of Regulations for Teachers. In the written submissions filed on behalf of the Claimant, it is admitted that Regulation 146(6) of the Teachers Service Commission Code of Conduct mandatorily provides that a teacher accused of any misconduct is entitled to appear in person and be present when witnesses are being interviewed and further be given an opportunity to adduce and challenge any evidence. This is precisely what the Claimant has been notified about in the letter of interdiction.*

*The Claimant has not complained that the Respondent has no right to interdict her, she has further not complained that the prescribed procedure for interdiction has not been complied with, she only complains about a hearing which the interdiction assures her that she will be given an opportunity to do at the appropriate juncture.”*

In **Marion Caroline Kanuri V Teachers Service Commission [2018] eKLR**, the court held,

*“I find that the claimant has not proved that either the interdiction before the hearing or the suspension of four months which was the punishment meted out against her were unlawful or unjustified. I also do not find any proof of malice alleged by the claimant.*

*I find that the delay in reinstating the claimant was her own making and as such, she cannot claim the same from the respondent as*

she was not entitled to pay for the period she did not work.

*In conclusion, I find that the claimant's interdiction and subsequent suspension were not unlawful, and that she is not entitled to salary for the period before she resumed duty after suspension. The result is that the entire claim fails and is dismissed."*

This petitioner took part in the preliminary disciplinary process and did not raise any issue about how the process was being carried out. The interdiction forms part of the disciplinary process and the petitioner would have been availed an opportunity to present his case at a later date.

On the Petitioner's allegation that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had no powers to interdict him I am satisfied from the documents filed in the replying affidavit of Mary Rotich that the Board of Governors was properly constituted and appointed as an agent of the 1<sup>st</sup> Respondent under sections 4, 10, 11 and 12 the Education Act. I further find that the Respondents complied with the provisions of the Code of Regulations for Teachers in the interdiction of the Petitioner.

The petitioner filed this petition before the disciplinary process was concluded. The courts will tread with caution when the petitioner invites it to stop the process seeing that the petitioner has not raised grounds that the court finds need intervention.

In **Daniel Nyongesa & Others V Egerton University College, Civil Appeal No. 90 of 1989, [1990] eKLR**, the court laid down the principle of judicial review of administrative action by school, colleges and universities as follows:

*"Courts are very loath to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run universities or indeed any other bodies. However, courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side. It does not assist for anyone to question or criticise the particular posture of courts. It is the duty of courts to curb excesses of officials and bodies who exercise administrative or disciplinary measures. Courts are the ultimate custodians of the rights and liberties of people whatever the status and there is no rule of law that courts will abdicate jurisdiction merely because the proceedings or enquiry are of an internal disciplinary character."*

In **Industrial Court Cause Number 1200 of 2012** between **Professor Gitile Naituli v. University Council Multimedia University College and Another**, the Court refused to issue a temporary injunction restraining the employer from interference with the employee's peaceful performance of his duties (read initiation of a disciplinary process), pending the hearing of the main claim. The Court stated this of interlocutory orders:-

*"The Employment Act does not intend that Courts take away managerial prerogatives from employers. To give the interim order would have the effect of stifling the management prerogative in staff administration. It would mean the employer does not have any more say in the contract of employment it has authored. This would be contrary to the intention of the Employment Act, which seeks to merely protect the weaker of the bargaining partners, not deprive the employer the power to run its business altogether."*

**Alfred Nyungu Kimungui V Bomas of Kenya [2013] eKLR** the court held,

*"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.*

*The protections given under the Employment Act are to be taken by employees as a shield, not a sword placed in their hands to impose themselves, with the aid of the Court, at the workplace. The Court has witnessed a large inflow of interlocutory applications where employees wish to be protected against disciplinary processes. Some of the employees have approached the Court seeking ex parte orders of reinstatement. Rule 16(8)(a) of the Industrial Court (Procedure) Rules 2010, states that the Court shall not grant an ex parte order which reinstates an employee whose service has been terminated. Interim reinstatement should not be granted ex parte."*

In **David Kimolo Kingoo v Teachers Service Commission Machakos County Director & another [2017] eKLR**, the court stated,

*'The petitioner was accorded opportunity to be heard before the decision to interdict him was made. The petitioner is in accordance with the 1<sup>st</sup> Respondent's Code of Conduct Regulations entitled to further hearing in person before the Teacher's Service Commission. As this further hearing has not been held and there is no indication that it shall not be held or that it shall be in violation of the petitioner's right of fair hearing, the present Petition is premature.*

*With respect, the constitutional or judicial review court is not trying the disciplinary case against the petitioner and it, therefore, cannot go into a determination of the veracity of the allegations against the petitioner. That is a matter of the disciplinary mechanism of the particular administrative tribunal. In other words, the constitutional and judicial review court is not a finder of fact on the truth or otherwise of allegations levelled against the person undergoing disciplinary process, and, therefore, such contentions taken by the petitioner herein as to the incredulity of the allegations against him and the mental state of the accuser must be determined by the administrative tribunal conducting the disciplinary procedure.*

*The concern of the Court is to see that the petitioner receives a fair hearing in accordance with the right to fair administrative action of Article 47, which must now be taken to encompass the common law judicial review principles of the rules of natural*

*justice.”*

Initiation of disciplinary processes at the workplace, are presumed to be management prerogatives. The Court will be slow in intervening, particularly at interlocutory stages, otherwise the Court would be deemed to be directing the employers in regulation of their employees. Although this Court has jurisdiction as argued by the Claimant to grant a wide range on interim reliefs and remedies in employment and labour disputes, the jurisdiction must be exercised with caution. Courts have been able to draw a distinction between workplace disciplinary process, and the judicial process. Courts have held that courts should avoid being dragged into internal affairs of organisations especially the disciplinary process, determining how termination letters should be written or nullifying termination letters. The court can only interfere in exceptional circumstances where great injustice might result or where justice might not by any other means be attained.

For the foregoing reasons, I find that the petition has no merit and should therefor fail.

**DATED AND SIGNED AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF JUNE 2019**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 16<sup>TH</sup> DAY OF JULY 2019**

**MATHEWS NDERI NDUMA**

**JUDGE**