



REPUBLIC OF KENYA



**Orogo v Chairman, Board of Directors Kenya Revenue Authority & 2 others
(Petition E004 of 2023) [2023] KEHC 27054 (KLR) (20 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27054 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
PETITION E004 OF 2023
WM MUSYOKA, J
DECEMBER 20, 2023**

BETWEEN

PETER KABINGA OROGO PETITIONER

AND

**THE CHAIRMAN, BOARD OF DIRECTORS KENYA REVENUE
AUTHORITY 1ST RESPONDENT**

**THE COMMISSIONER GENERAL KENYA REVENUE AUTHORITY 2ND
RESPONDENT**

THE ATTORNEY GENERAL 3RD RESPONDENT

RULING

1. On 3rd November 2023, I delivered a ruling on a preliminary objection, that had been raised as to jurisdiction. I dismissed it. The instant ruling is on the merits of the Motion, dated 12th October 2023. I recited, in detail, the factual background to the said Motion, in my ruling of 3rd November 2023, and I shall, therefore, not repeat the said facts in this ruling.
2. In the ruling of 3rd November 2023, I gave directions on the filing of written submissions on the Motion. Both sides have complied, for they both filed their respective written submissions.
3. The submissions by the petitioner are dated 10th November 2023, and were filed herein on even date. It is submitted that the key issue is grant of conservatory orders. *Wilson Kaberia Nkunja v the Magistrate and Judges Vetting Board and Others* [2016] eKLR (Lenaola, J) is cited to set out the principles upon which conservatory orders may be granted. These include demonstration of a prima facie case, whether failure to grant conservatory orders would render the petition nugatory, and consideration of public interest. *Mrao v First Bank of Kenya Limited & 2 others* [2003] KLR 125 [2003] eKLR (Kwach, Bosire & O’Kubasu, JJA), *David Ndiu & others v Attorney-General & others* [2021] eKLR (M. Ngugi, Odunga, Ngaah, J. Mulwa & Mwita, JJ) and *Damour Florian Emmeric v Director of Immigration*



Services [2022] eKLR (Mrima, J) are cited on what constitutes a prima facie case, essentially, that the available material points to an infringement, which calls for a rebuttal, and that the case raises arguable constitutional issues. *Reliance Bank Limited v Nonlake Investment Limited* [2002] 1 EA 227, *Narok County Government v Senate & another* [2016] eKLR (Githinji, Okwengu & Sichale, JJA) are cited, on the aspect of not granting of conservatory orders rendering the petition nugatory. It is argued that the petition is about stopping the proposed recruitment, until there is justification of the previous recruitment, which is said to have not met the constitutional threshold of ethnic diversity and regional balance, and that failure to grant the orders would open doors for a recruitment along similar lines. On public interest, *Katiba Institute v Judicial Service Commission & 2 others; Kenya Magistrates and Judges Association & 2 others* (Interested Parties)[2022] KEHC 438 (KLR)(Mrima, J) is cited, for the point that there must be a matter of constitutional importance, in terms of the recruitments, the subject of the petition, being done within the principles enunciated in the *Constitution of Kenya*.

4. The submissions by the respondents are dated 17th November 2023, and were filed herein on 20th November 2023, and a supplementary set was filed on 23rd November 2023, of even date. On the nature of conservatory orders, the respondents cite *Muslim for Human Rights (Muhuri) & 2 others v Attorney General & 2 others* [2011] eKLR (Ibrahim, J) and *Judicial Service Commission v Speaker of the National Assembly & another* [2013] eKLR (Odunga, J), to caution that the court ought to proceed with caution, to obviate determining the petition finally at the interlocutory stage. On the principles which guide grant of conservatory orders, *Board of Management of Uburu Secondary School v City County Director of Education & 2 others* [2015] eKLR (Onguto, J) and *Wilson Kaberia Nkunja v the Magistrates and Judges Vetting Board and Others* [2016] eKLR (Lenaola, J) are cited. On prima facie, *Re Bivac International SA (Bureau Veritas)* [2005] 2 EA 43, *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another* [2015] eKLR (Nambuye, Musinga & Murgor, JJA) and *David Ndiu & others v Attorney-General & others* [2021] eKLR (M. Ngugi, Odunga, Ngaah, J. Mulwa & Mwita, JJ) are cited, and it is argued that the respondents are developing and deploying an ethnic diversity and regional balance policy. *Kizito Mark Ngaywa v Minister of State for Internal Security and Provincial Administration & Another*[2011] eKLR (Ibrahim, J) is cited to caution that it is a serious legal and constitutional step to suspend the operations of statutes and statutory provisions.
5. From the authorities cited, the parties herein are agreed on the parameters within which conservatory orders are to be granted. I glean 3 principles from those authorities: likelihood of success, possibility of the petition being rendered nugatory should the orders not be granted, and public interest.
6. It is an issue of recruitment of staff for the Kenya Revenue Authority. There are 2 recruitments in contention. One has been conducted, and the other is proposed. In the exercise that has been completed, some 1,406 revenue service assistants were recruited. For the second recruitment, advertisements are said to be out for 600 graduate trainees, and 200 border control assistants, plus a number of more senior positions. The concern is that the recruitment of the 1,406 was skewed in favour of 2 ethnic communities, and some regions, and against the rest of the communities and regions, and it is alleged that that violated or contravened constitutional provisions, and there is fear expressed that the projected recruitment of the 800 is likely to go the same way. Statistics have been given, showing that out of the 1,406 recruited, 788 came from just 2 communities, representing 56.8% of the total; with the rest, that is to say 618, or 43.2%, being shared out amongst the rest of the communities and regions. The response, filed by the 1st respondent, does not deny the figures, or challenge the statistics, but states that the 2 communities, that took the 56.8% of the positions, had presented the highest number of applications, and recruitment focused on high performance. It was asserted that there was a policy on diversity and inclusion, and ethnic and regional balance.



7. So, is there a prima facie case presented in the material filed? The argument is that the recruitment was not balanced. The documents filed appear to suggest so. Whether that is so, or whether that is justifiable, or can be explained, is a matter to be argued and determined at the hearing of the petition. On whether the petition would be rendered nugatory, should conservatory orders be not granted, I will start by stating that interim conservatory orders are already in force. The conservatory order is sought only with respect to the proposed recruitment, and not that which has already been done. The argument is that the recruitment that has already been done was unconstitutional, for it did not take into account ethnic diversity and regional balance, allowing a recruitment of another 800 individuals, where a previous recruitment is being challenged, would have an effect of defeating the purpose for which the petition was filed, that is to call a statutory and parastatal body to account, for the manner in which it has gone about executing its mandate, and to obviate that happening in future, should it be established that there was abuse of mandate.
8. On public interest, the respondents have argued that grant of the orders would hamper collection of taxes. The orders, as prayed for, do not affect the 1,406 who have been recruited, and do not target the staff of Kenya Revenue Authority who are already in office. There would be no disruption of revenue collection, therefore, for there would be no interference with the staff already in place. The conservatory order sought targets a proposed of recruitment of more staff. The order can only delay recruitment. A delay, for a short while, of the recruitment, in order to get an account and audit, would be in public interest, as the court process is geared to considering whether or not the Constitution of Kenya 2010 is being adhered to. The Constitution of Kenya is the supreme law of Kenya, and State agencies are bound by it, and enjoined, in whatever they do, to be faithful to its prescriptions, including observing ethnic diversity and regional balance in recruitment of staff. Constitutional petitions ask questions about the way mandates are executed by public entities, and it would be imprudent for institutions to carry on with the activities under challenge, before the enquiries are completed, for there could be exposure to wastage of public funds, in the event the activities under review are invalidated, upon being found to be unconstitutional.
9. I am persuaded, from the material on record, that a prima facie case has been established, for grant of the conservatory order sought, in prayer 3 of the Motion, dated 12th October 2023. I hereby grant the Motion, accordingly. To move the matter forward, by way of expeditious disposal, I do hereby direct that the petition, dated 12th October 2023, be canvassed by way of written submissions, to be filed and exchanged within 21 days. The matter shall be mentioned, virtually, on 17th January 2023, for compliance, and further directions. It is so ordered.

DATED, SIGNED AND DELIVERED, VIA EMAIL, FROM BUSIA, THIS 20TH DECEMBER 2023

W. MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Ambani, instructed by Lukorito & Company, Advocates for the petitioner.

Mr. Ileri and Mr. Muhoro, instructed by the Attorney General, for the respondents.

