Mweresa v County Government of Vihiga & another (Constitutional Petition E003 of 2025) [2025] KEHC 12847 (KLR) (18 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12847 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CONSTITUTIONAL PETITION E003 OF 2025

JN KAMAU, J

SEPTEMBER 18, 2025

IN THE MATTER OF DEVOLVED GOVERNMENT AND THE COUNTY EXECUTIVE COMMITTEE

AND IN THE MATTER OF THE PRINCIPLES OF PUBLIC SERVICE & STAFFING OF COUNTY PUBLIC SERVICE UNDER ARTICLE 232 & 235

AND

IN THE MATTER OF THE COUNTY PUBLIC SERVICE UNDER THE COUNTY GOVERNMENTS ACT

AND

IN THE MATTER OF THE STATUTORY POWER OF THE COUNTY PUBLIC SERVICE BOARD TO ESTABLISH AND ABOLISH AN OFFICE UNDER SECTION 60 OF THE COUNTY GOVERNMENTS ACT

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF ARTICLES 177, 232, 235 OF THE CONSTITUTION OF KENYA AND CONTRAVENTION OF SECTIONS 36, 46, 59, 59A, 60, 61 AND 62 OF THE COUNTY GOVERNMENTS ACT AND SECTION 19 OF THE HEALTH ACT

AND

IN THE MATTER OF THREATENED VIOLATION OF THE RIGHT TO HEALTH; THE PRINCIPLES OF PUBLIC FINANCE; SECTION 14, 20 AND 21 OF THE FACILITY IMPROVEMENT FINANCING ACT; SECTION 14 OF VIHIGA COUNTY HEALTH SERVICES ACT

BETWEEN

DR CLARENCE EBOSO MWERESA ..... PETITIONER

AND

COUNTY GOVERNMENT OF VIHIGA ..... 1ST RESPONDENT

VIHIGA COUNTY PUBLIC SERVICE BOARD ..... 2ND RESPONDENT

RULING

Introduction

1. In his Notice of Motion dated 24th February 2025 and filed on 25th February 2025, the Petitioner herein sought that pending the determination of the Petition herein, the court be pleased to issue a temporary injunction stopping the 2nd Respondent from filling the vacancy of Chief Executive Officer (CEO) of Vihiga County Referral Hospital. He also prayed for an order quashing the advertisement issued by the 2nd Respondent and a permanent injunction barring it from filling the advertised position of CEO of Vihiga County Referral Hospital.

2. He swore an affidavit in support of the said application on 24th February 2025. He averred that in January 2025, the 2nd Respondent published an advertisement in the local dailies announcing a vacancy in the office of CEO of Vihiga County Referral Hospital but that up until the said advertisement, there was no such position in the departmental staff establishment. He asserted that based on the job description provided on the website, the Medical Superintendent performed the duties expected of the CEO Vihiga County Referral Hospital.

3. He stated that no public participation or stakeholder engagement had been done up to the point of the advertisement to explain the necessity or reason for establishment of that new office. He added that at the moment, there was a substantive holder of the office of Medical Superintendent.

4. He contended that upon reading the advertisement, he sought to find out the reasons for the establishment of the new office from various administrative offices of the 1st Respondent. He said that he visited the Office of the County Director of Health as the statutory advisor to the county on health matters, who informed him that he was not consulted by either the Cabinet or the 2nd Respondent and was, therefore, not privy to the rationale.

5. He further contended that he also visited the office of the County Executive Committee (CEC) member in charge of health services to inquire about the basis for the decision to create the new office and he was informed that it was a Cabinet decision that was yet to be implemented. He added that the said CEC member did not confirm that there was any departmental proposal or formal advisory prior to the said Cabinet decision.

6. He further averred that no proposal was submitted to or approval obtained from the County Assembly for the creation of the said office. He pointed out that the current holder of the office of Medical Superintendent was employed in 2023 on permanent and pensionable basis but was currently on sick leave after he was attacked and injured by unknown persons in a case that was under police investigation.

7. He asserted that currently, the hospital was being run by a Medical Superintendent in acting capacity who was properly qualified for the position. He added that the period for submission of applications ended on 21st February 2025 giving way for the 2nd Respondent to begin shortlisting and conducting interviews.

8. He was categorical that he had lodged this Petition and application to seek redress and justice before the court and to avert future transgressions and similar abuse of power and the law.

9. In response to the said application, the 1st and 2nd Respondents lodged a Notice of Preliminary Objection dated and filed on 27th February 2025 which was addressed in Ruling (1) therein.

10. The Petitioner's Written Submissions were dated and filed on 13th April 2025 while those of the Respondents were dated 7th July 2025 and filed on 8th July 2025. The Ruling herein is based on the said Written Submissions that parties relied upon in their entirety.

Legal Analysis

11. The Petitioner submitted that the facts he had pleaded were uncontested as the Respondents did not file any substantive response to his application. He asserted that the grant of interlocutory injunction required an applicant to demonstrate a prima facie case, irreversible harm not compensable and that the court would also consider the balance of convenience. He added that where matters related to issues governed by public law, then a conservatory order was a constitutional remedy which required that the public interest be put into consideration as was held in the case of Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others[2014]eKLR.

12. He asserted that a prima facie case was not one which had to succeed but that it was one if left undefended and the court found merit to allow the suit, irreversible harm would not be adequately compensated monetarily. He added that the duty of the court to grant conservatory orders was to preserve the issues in dispute to ensure that the dispute was not rendered an academic exercise or that the dispute did not change its character so as to deny the court jurisdiction to hear the matter as was held in the case of Board of Governors, Moi High School, Kabarak & Another vs Malcom Bell, SC Applications Nos 12 and 13 of 2012 (eKLR citation not given).

13. He argued that in order to relate the law to the facts in the present case, one had to first consider what would happen if a conservatory order was not issued and events were allowed to take their natural course.

14. He asserted that it was not in dispute that the 2nd Respondent had advertised the position of CEO Vihiga County Hospital and was expected to shortlist candidates and conduct interviews upon which a successful candidate would be selected and recruited.

15. He pointed out that the newly appointed person would have employment rights which included the right to remuneration, payable from public resources and thus monies that would not be refundable even if the new office was found to have been established unconstitutionally. He added that the public were likely to lose more in compensating the individual if the appointment was reversed way into his tenure and which would be against public interest on the basis of the principles of public finance as contained in Article 201 of *the Constitution* of Kenya, 2010.

16. He further argued that the establishment of the new office while another office was in existence would bring administrative confusion that would impede service delivery and compromise the public health and the rights of citizens to the highest attainable standards of health. He added that the new office was not accountable to the Medical Practitioners and Dentists Council as the qualifications of the holder excluded a medical professional from holding the office as a result of which unregulated medical management decisions would be made to the detriment of the citizens of Vihiga.

17. He further contended that reversing the appointment later would have the effect of terminating a person's employment which would have far reaching consequences on the person and their families, especially if such a person were to terminate other employment relationships to take up this new position.

18. He was emphatic that the court must satisfy itself that it was in the public interest to grant the conservatory order and that the Respondents had not given to the court any negative effect to be suffered if the conservatory orders are given. To buttress his point, he relied on the case of Kenya Anti-Corruption Commission vs Deepak Chamanlal Kamani & 4 Others[2014]eKLR where it was held that in defining and applying doctrine of public interest, the binding precedent was that a public interest that enjoyed judicial cognizance must be founded expressly or implicitly on the law.

19. He argued that the Respondents had not demonstrated any crisis of health management at the moment that filling the new position was intended to solve or whose resolution the issuing of the orders would stall. He pointed out that the balance of convenience tilted in the court exercising its discretion in issuing the orders sought. He added that the limitations on the court's discretion in the grant of conservatory orders and the inner constraints of the effect of conservatory orders were contained in a plethora of authorities including Karua vs IEBC & 3 Others [2019] KESC 26 (KLR) and Mate & Another vs Wambora & Another [2017] KESC 1 (KLR).

20. He placed reliance on the case of Ramanlal Trambaklal Bhatt vs R[1957]EA and Republic vs Abdi Inrahim Owl [2013] where prima facie was defined as the establishment of a legally required rebuttable presumption. He further relied on the case of Gatirau Peter Munya Case (Supra) where the Supreme Court defined conservatory orders as orders that bear a more decided public law connotation as they were orders to facilitate ordered functioning within public agencies, as well as to uphold adjudicatory authority of the court in public interest.

21. He submitted that the Petition herein was not a civil suit of a personal nature but was a public interest suit wherein the interests that were at stake were the rule of law, the integrity of the county public service, the proper management of the county health system and the application of public resources.

22. He argued that the Respondents had contravened the law on the establishment of an office in the county public service and had violated Articles 60, 61 and 62 of the County Government Act Cap 265 (Laws of Kenya).

23. He asserted that the merits of this application for injunctive relief or conservatory orders should, therefore, not turn on the reversibility of the action but on the constitutional values at stake, the public interest, the balance of convenience and the adjudicatory authority of the court. He added that a conservatory order would not be issued against a clear constitutional or statutory principle or directive and that the Respondents had not pleaded any statutory or constitutional timelines or other imperatives that stop this court from issuing conservatory orders in this matter.

24. He was emphatic that as there was no rebuttal by the Respondents, he had demonstrated a prima facie case. He thus urged this court to find in favour of securing the constitutional values at stake.

25. On their part, the Respondents cited Section 62 (2) of the *County Governments Act* and submitted that the said provision had been rendered inoperative or superseded by the amendment to the Act in the year 2020 which introduced a new Section 59A (sic) making the 2nd Respondent independent when discharging its functions and in executing its powers.

26. They were categorical that the power to establish and abolish offices in the county public service vested in the 2nd Respondent under Section 59(a) of the *County Governments Act* and could not be subjected to the control of the CEC member for public service of the County Assembly as had been advanced by the Petitioner herein.

27. They argued that if the legislators wanted that arrangement to remain, then the new section 59A (sic) would have started with the word "subject to Section 62(2) of this Act" which was not the case. They

added that if the court found that there was a contraction between the two (2) provisions of the law, then the latter amendment had to prevail.

28. They further cited Article 186(2) and the Fourth Schedule of *the Constitution* of Kenya and argued that the said provisions defined the functions and powers of the two (2) levels of governments being the national and county and that Vihiga County Referral Hospital was Level 4 Hospital that fell exclusively under the 1st Respondent as provided in Part 2 Paragraph 2(a) of the Fourth Schedule to *the Constitution*. They asserted that the said hospital was not a national referral health facility within the meaning of Part I Section 23 of the Fourth Schedule which fell under the national government.

29. They further submitted that the organisation of the administrative structure of the said hospital, therefore, fell under the CEC arm of the County Government as provided in Section of the *County Governments Act* and to interpret it otherwise would be to violate the very Constitution the Petitioner purports to be protecting through this Petition.

30. They asserted that the 1st Respondent was, therefore, not bound by the provisions of the *Health Act* but could use the legislation as a guide and that the functions of the County Director of Health were not to administer a health facility which functions were devised for the new CEO. They added that as for the Facility Improvement Financing Act, there was no violation as that allowed the counties under Section 29 of the *County Governments Act* to come up with legislation to implement the object of the *County Governments Act* within the County.

31. Notably, a conservatory order was a remedy that was issued to preserve a subject matter until a suit and/or petition was heard and determined. It was an order of status quo ante meant to preserve the substratum of the suit so as to not render the substantive matter an academic exercise.

32. The nature and the principles guiding the grant of conservatory orders were now well settled. In the case of Gatarau Peter Munya vs Dickson Mwenda Kithinji & 2 Others (Supra), the Supreme Court held that conservatory orders should be granted on the merit of a case and bearing in mind the public interest, the constitutional values, the proportionate magnitudes and priority levels attributable to the relevant courses.

33. Having said so, in its Ruling of 18th September 2025, this court allowed the Respondents' Notice of Preliminary Objection dated and filed 27th February 2025 and found that it had no jurisdiction to hear the Petition herein. It, therefore, followed that it had no jurisdiction to issue any orders herein.

Disposition

34. For the foregoing reasons, the upshot of this court's decision was that the Petitioner's Notice of Motion application dated 24th February 2025 and filed on 25th February 2025 was not merited and the same be and is hereby dismissed.

35. As this was a public interest litigation and it would be unconscionable to award costs to a government against its citizen, this court hereby directs that each party will bear its own costs of this application.

36. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 18TH DAY OF SEPTEMBER 2025

J. KAMAU

JUDGE