



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

MISC APPLICATION NO. E005 OF 2021

ALEXANDER ONYANGO & 22 OTHERS.....APPLICANTS

VERSUS

NAKURU COUNTY GOVERNMENT.....1ST RESPONDENT

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

CECM PUBLIC SERVICE TRAINING AND DEVOLUTION.....3RD RESPONDENT

RULING

1. This ruling is in respect of the applicant's application dated 10th March, 2021 filed under certificate of urgency on even date pursuant to Article 27, 41(1) and 47 of the Constitution of Kenya 2010, Section 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, seeking the following orders That;

1) The application herein be certified urgent and service thereof dispensed with at first instance.

2) A restraining order do issue against the Respondents, their agents and or servants from proceeding with recruitment titled "VACANCY NO. 01/2021/02" within the department of public Service Training and Devolution and suitability test notice vide letter dated 1st March, 2021 by secretary, Nakuru County Public Service Board pending the hearing and determination of this Application inter-partes.

3) A Restraining Orders do issue against the Respondents, their agents and or servants from proceeding with recruitment titled "VACANCY NO. 01/2021/02" within the department of public Service Training and Devolution and suitability test notice vide letter dated 1st March, 2021 by secretary, Nakuru County Public service Board pending the hearing and determination of the claims in Employment and Labour Relations Court, claim No. 12 of 2018 and 13 of 2017.

4) Costs of the Application.

2. The application is supported by the grounds on the face of the application and the affidavit sworn on 10th March, 2021 by **Alexander Onyango**, the 1st Applicant herein, on his behalf and on behalf of the other 22 Applicants and based on the following grounds: -

(a) That, the Applicants are employees of the 1st Respondent who have filed claims number 13 of 2017 and 12 of 2018 which are still pending for determination. they attached the said suits as annexure AO1(a) &(b).

(b) That the Respondent have now advertised their various positions, which are subject of the suit above and further conducted a suitability test to their detriment, the advertisement except is marked as annexure AO2 while the suitability tests sheet is marked as annexure AO3.

(c) That unless the said recruitment is stopped their claims will be rendered an academic exercise.

3. In opposing the application, the Respondents filed a joint replying affidavit deposed upon on 8th April, 2021 by **Benjamin Njoroge**, the county secretary of the 1st Respondent and the head of the 2nd Respondent, based on the following grounds;

- a) That the Application herein is bad in law since the applicants have invoked constitutional provisions when they filed a miscellaneous application instead of a petition.
- b) That application herein offends the sacrosanct principles under section 2 and 19 of the Civil Procedure Act because the present application has been brought in an un-prescribed manner. Further that the Notice of motion has no suit emanating from therefore is defective.
- c) It was averred that there was no justification of filing this Application separate from the suit that are alive in Court.
- d) That some of the Applicants lack locus standi as their employment relationship with the Respondent is in dispute a fact which was also raised in the main suits.
- e) The Respondents want this Application dismissed with costs to them.

4. The parties herein disposed of the application by way of written submissions.

Applicant submissions

5. The applicant's Advocate submitted that the application herein has been properly brought before this Court with its basis on the main claims being ELRC cause number 12 of 2018 and 13 of 2017. It was then argued that this Court ought to overlook the technicality of form as envisaged under Article 159(2)(d) of the Constitution of Kenya and proceed to determine the application on merit.

6. Whether the Applicants have a prima facie case, it was submitted that the advertised positions are positions which are currently held by the Applicants which are also the subject of ELRC 13 of 2017 and ELRC 13 of 2018 therefore the Applicant have a prima facie case with high chances of success which warrant the issuance of the orders sought.

7. It was then argued that the Respondents are proceeding to recruit and fill positions which are subject of a court case in a manner that will prejudice the claimants case. They supported their argument by citing the case of **Geoffrey Mworira V Water Resource Management Authority & 2 others [2015] eKLR** where the Court gave principles to follow when interfering with the employer's recruitment process.

8. They also argued that the claim in ELRC 12 of 2018 and ELRC 13 of 2017 is on the issue that the Respondents did not consult then before changing their terms of employment therefore their claim had high chances of success and in this they cited the case of **Elizabeth Kwamboka Khaemba V Cardinal Otunga High School Mosochi & 2 others [2014] eKLR** and urged this Court to allow the Application as prayed.

Respondents' Submissions.

9. The Respondents on the other hand submitted from the onset that Order 3 Rule 1 of the Civil Procedure Rules directs on the manner in which a suit can be instituted and a Notice of Motion is not one of the ways a suit can be instituted. In this he cited the case of **Peter Kwema Kahoro V Benson Maina Githethuki [2005] eKLR**. It was further argued that there are already live suit in court by the Applicants and the Applicants would have raised this application in those suit and not this application, also that no reason was given by the Applicant on the reason of raising the issues herein in this Application.

10. It was also submitted that there is a dispute as to employment relationship between the Applicants and the Respondents and that their locus standi had been questioned in the main suit which issue goes to the root of a suit therefore to allow the application herein while the issue of locus standi is still pending would prejudice the Respondents' case. The Respondents then cited the case of **Alfred Njau & 5 others Vs City Council of Nairobi [1983] eKLR**

11. The Respondent then concluded that the application herein and the orders sought cannot be granted without first determining the Applicants locus standi. They then prayed for the application to be dismissed with costs.

12. I have examined the averments of the parties herein. The applicants have rightly indicated that there are two suits pending on the subject matter being ELRC 13 of 2017 and ELRC 12 of 2018.

13. In that case, the application is not rightly before court as it is a duplication of this court's effort. The right forum for filing this application would have been within the two pending suits which the applicants failed to do.

14. In any case this application as filed lacks a claim upon which it is filed.

15. I therefore find no merit in considering this Misc. Application.

16. I therefore dismiss it accordingly.

RULING DELIVERED VIRTUALLY THIS 30TH DAY OF NOVEMBER, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

IN THE PRESENCE OF:-

BITOK FOR APPLICANT – PRESENT

MURIITHI FOR RESPONDENT – PRESENT

COURT ASSISTANT - FRED