



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

PETITION NO. 1 OF 2016

OMAR HASSAN ELMI.....PETITIONER

VERSUS

1. COUNTY GOVERNMENT OF WAJIR

2. WAJIR PUBLIC SERVICE BOARD..... RESPONDENTS

RULING

Before me is an application brought by way of Notice of Motion dated 23rd March 2016 filed under Article 23 and 165 of the Constitution of Kenya 2010 by the petitioner herein Omar Hassan Elmi against the County Government of Wajir and the Wajir County Public Service Board. The prayers in the application are as follows:-

- 1. That the application be certified as urgent and be heard forthwith and exparte in the first instance in order to meet the interests of substantive justice.**
- 2. That this Honourable court be pleased to grant the petitioner conservatory orders by way of injunction restraining the respondents whether by themselves or their agents, servants and or employees from proceeding and or making any appointments for the position of town administrators Wajir County until the interpartes hearing and final determination of this application and or until further orders of this Honourable court.**
- 3. That this Honourable court be pleased to grant the petitioner conservatory orders by way of injunction restraining the respondents whether by themselves or their agents, servants and or employees from proceeding and or making any appointments for the position of town administrators until the final determination of the petition herein.**
- 4. That the petitioner be at liberty to apply for further orders and or directions as this honorable may deem fit and just to grant.**
- 5. Costs of this application be provided for.**

The application has several grounds on the face of the Notice of Motion. The grounds are in summary that the process of recruitment of town administrators was unconstitutional, not fair and not transparent and that the 2nd respondent had already illegally hired 18 town administrators on 3 months contract who were in office drawing tax payers money.

The application is also supported by an affidavit sworn by the petitioner on 23rd March 2016 amplifying the above grounds. A number of documents were annexed to the said affidavit.

The respondent through their counsel filed a replying affidavit sworn by Shukri Mohamed the Secretary and Chief Executive of the Wajir County Public Service Board.

The hearing of the application proceeded by way the filing written submissions. Counsel on both parties did not make oral submissions in court. Several authorities were relied upon by counsel on both sides.

It is clear from the prayers in the application that prayers 1 and 2 have already been spent. This court will thus only consider the other prayers, that is prayer 3, 4 and 5. I should state however that the substantive prayer is prayer 3, which seeks grant of conservatory injunctive orders, pending the hearing and determination of the main petition.

The considerations to be taken by a court in determining an application for grant of conservatory orders are similar to those that apply to applications for grant of interlocutory injunctions. The only difference is that conservatory orders have a public law connotation, while interlocutory injunctive orders are strictly in the province of private law. This distinction was brought out in the observation by the Supreme Court in case of *Gatirau Peter Munya Vs. Dickson Mwenda Kithinji & 2 others [2014] eKLR* where it was stated as follows:- ***“conservatory orders bear a more decided public law connotation. For these are orders to facilitate ordered functioning within public agencies, as well as uphold adjudicatory authority of the court, in the public interest. Conservatory orders, therefore are not, unlike interlocutory injunctions linked to such private party issues as the prospects of irreparable harm occurring during the pendency of a case; or high probability of success in the applicant’s case for orders of stay. Conservatory orders consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values and the proportionate magnitudes, and priority levels attributed to the relevant causes.”***

An applicant for conservatory orders must demonstrate a prima facie case with probability of success. Secondly an applicant has to demonstrate that he and the broader public might suffer irreparable or substantial loss or damage if the temporary conservatory orders are not granted. Thirdly if the court is in doubt it will determine the matter or application on the balance of convenience.

The petitioner herein has come to court through a petition dated 23rd March 2016. On the same date he filed the present application. In the petition he asked the court to issue a declaration of contravention of the Constitution against the respondents. He asked for an order that the recruitment of 18 town administrators be quashed. He also asked for an order that the secretary Wajir County Government be surcharged for money illegally earned by the 18 administrators. He further asked for an order prohibiting recruitment of the 18 town administrators, and, lastly asked for costs of the petition.

From the prayers in the petition, it is clear that the main complaint of the petitioner relates to the recruitment of 18 administrators by the respondents. The affidavit of the petitioner and the grounds of the application show that the 18 town administrators had already been recruited on 3 months basis. It is a case where an event has already occurred and a litigant wants to prohibit the same. But is also a case where the same litigant wants an order to quash the said recruitment. The prayer against the Secretary of County Government is not tenable, as the said secretary is not a party.

The prayers are to some extent contradictory. However because the prayers in the petition are various, in my view this is an arguable case, and as such the petitioner has demonstrated that he has a prima facie case with probability of success, at least with regard to some of the prayers sought.

The second consideration is whether if the conservatory orders sought are not granted the applicant and the broader public will suffer substantial loss or damage. The issue of recruitment of 18 town administrators that has been raised herein merely relates to the interest of the petitioner who said that he was an applicant for the positions and submitted his application for consideration. It has got nothing to do with the public.

The issue of money being spent from public funds being used to pay 18 employees allegedly illegally recruited, can be determined by the court without necessity the need to stop the said recruitment. It has to be appreciated that institutions have to operate and they operate through employees. In the circumstances of this case, I find that there is no advantage to the applicant in stopping the recruitment. It will only paralyze the operations of the County Government of Wajir. In my view the petitioner and broader public will not suffer substantial or irreparable loss or damage if the orders sought are not granted. I thus find that the petitioner has not established that he will suffer irreparable or substantial loss or damage if the interlocutory conservatory orders in prayer 3 is not granted. On that account the application for conservatory orders herein will fail. I decline to grant prayer 3 of the application.

The balance of convenience is also not in favour of the petitioner. His claim is merely of self interest, as he is an applicant who thinks that he was unfairly excluded from employment. Wajir County Government on the other hand is a public institution which is required to render services to the public through employees. Stopping recruitment of those employees will mean that the public will not receive the required services from the County Government as expected under the law and the Constitution. Balancing the two interests, the pendulum is in favour of the County Government and County Public Service Board rather than the petitioner with regard to employment of town administrators. On that account also the application for conservatory orders will also fail.

Prayer 4 is for liberty of the petitioner to apply. I have not been informed that the petitioner has made any other related application. I will thus make no orders on same. Prayer 5 is for costs. In my view, costs will follow the event.

To conclude, I find no merits in the application for conservatory orders dated 23rd March 2016. The same is dismissed with costs to the respondents.

Dated and delivered at Garissa this 11th day of January, 2017

GEORGE DULU

JUDGE