



Wanyoike v Human Resource Management Professionals Board Examination Board (Employment and Labour Relations Petition E183 of 2023) [2024] KEELRC 742 (KLR) (9 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 742 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E183 OF 2023**

AN MWAURE, J

APRIL 9, 2024

BETWEEN

JANE WANYOIKE PETITIONER

AND

**HUMAN RESOURCE MANAGEMENT PROFESSIONALS BOARD
EXAMINATION BOARD RESPONDENT**

RULING

1. The petitioner filed an Amended Notice of Motion dated 27th November 2023 seeking the following orders: -
 - A. spent
 - B. the Honourable court be pleased as to issue a conservatory order restraining the Respondent from proceeding with the recruitment for the position of Manager Examinations Administration pending the hearing and determination of this Petition.
 - C. the Honourable court be pleased to issue an order of re-instatement of the Petitioner Applicant to the position of Manager Examination Administration pending the hearing and determination of this petition.
 - D. the Honourable court be pleased as to issue a conservatory order restraining the Respondent from proceeding with the recruitment for the position of Manager Examination Administration as placed in the Daily Newspaper on 21st September 2023 pending the hearing and determination of the Appeal before the Public Service Commission.
 - E. the costs of this Application be borne by the Respondent.



Petitioner/ Applicant's Case

2. The Petitioner/Applicant avers that she was dismissed from employment by the Respondent on 23.05.2023 and she thereafter requested for an Appeal against the decision to dismiss her.
3. The Petitioner/Applicant avers that the Appeal was heard on 01.09.2023 and whilst waiting to hear back on the Appeal, she came across an advertisement in the daily nation on the 12.09.2023 for her position namely Manager Examination.
4. The Petitioner/ Applicant avers that she learnt of the results of the Appeal confirming her dismissal from the newspaper advert with the communication on this decision being sent to her on the same date at 12.59 a.m.
5. The Petitioner/Applicant avers that the position has been re-advertised on 21.11.2023 requiring the applicants to submit applications by 05.12.2023.
6. The Petitioner/Applicant submitted that the advertisement itself is rife with illegalities and irregularities and is a proper case for the court to exercise its power of judicial review over the same for the following reasons: -
 - a. The Advertisement failed to comply with Section B.4 (1) of the Human Resource Policies and Procedures Manual for the Public Service May, 2016 which requires Ministries/State Departments and State Corporations to advertise all vacant posts in a manner that reaches the widest pool of potential applicants and allow for at least twenty-one (21) days before closing the advert. The Petitioner contends that the said Advert was done hurriedly and potential Applicant's granted a mere 13 days to Apply.
 - b. The advertisement further fails to adhere to the requirements of a recruitment advertisement as per Clause 2.17.8 of the manual. The advertisement does not indicate the description and purpose of the job, the experiences, skills and competencies required for the job. The advert further fails to disclose the information needed when applying and also does not indicate a proper address for the mailing of the applications.
 - c. The advertisement does not indicate the salary applicable or the allowances and other benefits as required. The advertisement also fails to indicate the remuneration payable for the position This expressly goes against the provisions of Section 37(4) of the *Public Service Commission Act*.
 - d. The advertisement is not made in good faith. Section 7(2) (h) of the *Fair Administrative Action Act*, 2015 provides that a court can review a decision where the decision is made in bad faith.
7. The Petitioner/Applicant avers that given all the above, the timing of the advertisement and short period granted for applicants to apply for the position, as well as the haste within which the entire recruitment process was conducted, it is clear that the advertisement and the entire recruitment process is not made in good faith.
8. The Petitioner/Applicant avers that Advertisement called for applications by close of business 05.12.2023 and as such the shortlisting and interview process shall be done any day now culminating an appointment for the position. Once an appointment is done, should the Applicant be successful and be re-instated, then the appointed individual will be highly prejudiced as they will be terminated from the position.
9. The Applicant avers that she appealed against her termination and only received a letter with the decision on the appeal on 12.09.2023 at 12.59 a.m, the same day that the advert for her position was



placed in the papers pointing to a malicious orchestrated scheme to have her out of the position at all costs.

10. The Applicant avers that she was issued with a Notice to Show Cause letter on 31.03.2023 and a suspension without the proper procedure being followed in line with the Human Resource Manual.
11. The Applicant avers that the Respondent was represented by a senior legal officer at the Attorney General's office which placed an unfair advantage against her as she was not informed of this in advance to determine if she also needed legal counsel present.
12. The Applicant avers that the information given to her during the hearing that contained matters unfamiliar to her which were not in the Notice to Show Cause. Further, one of the witnesses, Dr. Douglas Ogolla was the former Chief Executive Officer who had been dismissed for incompetence and unfair treatment of staff and yet his witness testimony was deemed credible and the witness used the opportunity to intimidate and harass her.
13. The Applicant avers that Respondent lacked proper grounds to dismiss her as she was dismissed for acts that were not within her control and did not form part of her job description. Further, the officer responsible for the said acts is still employed despite having specifically admitted to the act severally both verbally and in writing to the Respondent.

Respondent's Case

14. In opposition to the Application, the Respondent filed a replying affidavit dated 19th October 2023.
15. The Respondent avers that the Petitioner was dismissed on 23.05.2023 on account of gross negligence in breach of paragraph 10.11,10.14 and 10.17 of the HRMPEB Human Resource Policy and Procedural Manual (2021). She failed to exercise due care and skill in effecting the Board's directive to withhold the results of 14 candidates suspected to be involved in examination malpractice.
16. The Respondent avers that the dismissal was premised on insubordination having breached paragraph 10.11,10.14 and 10.17 of the HRMPEB Human Resource Policy and Procedural Manual (2021).
17. The Respondent avers that being dissatisfied with the Respondent's decision, the Petitioner lodged an appeal vide a letter dated 12.07.2023 and she was invited to present herself physically of oral hearing of her appeal before the Board on 01.09.2023.
18. The Respondent avers that it promptly communicated the Board's decision on her appeal vide their letter dated 08.09.2023.
19. The Respondent avers that the disciplinary process was conducted within the confines of the law in accordance with the *Public Service Commission Act*, Fair Administrative Act and other applicable laws and regulations.
20. The Respondent avers that the Petitioner's actions brought great disrepute from members of the public with reports of exam malpractices by candidates thus calling to question the integrity of the examinations offered by the Respondent.
21. The Respondent avers that the application has been overtaken by events following the lapse of the deadline date 25.09.2023 calling for application for the position of Manager Examination Administration. It has since received applications from numerous qualified Kenyans for the position.
22. The Respondent avers that the impugned advertisement was done within the confines of the law, HRMPEB Human Resource Policy and Procedure Manual (2021).



23. The Respondent avers an appeal to the Public Service Commission is not a bar for an organization to proceed with recruitment of terminated employees.

Petitioner/Applicant's Submissions

24. The Petitioner/Applicant submitted that the Petitioner was issued with a notice to show cause, suspended and eventually dismissed after a sham hearing. This raises a constitutional issue on whether holding an employee responsible for the acts or omissions of another employee constitutes fair labour practices, specifically the right of employees to fair working conditions as envisaged under Article 41 (2) (a) of the Constitution of Kenya 2010.
25. The Petitioner/Applicant submitted that the Respondent claims that they promptly communicated their decision to uphold dismissal via a letter dated 08.09.2023. However, they failed to address the reason why the said letter was withheld until the advertisement for the job was placed in the newspaper. This was a deliberate scheme to impede her rights of appeal to or review by a higher court as prescribed by law, under Article 50 (2) (q) of the Constitution and was procedurally unfair administrative action contrary to Article 47 (1) of the Constitution.
26. It is the Petitioner's submission that she has been unfairly dismissed from work and her constitutional rights trampled upon during and after the entire process of dismissal. If this court does not issue conservatory orders as prayed, then the Petitioner will suffer more depression and hopelessness seeing that her access to justice will have been delayed. Further, with the wrongful record of negligence and insubordination, it will be quite a challenge for the Petitioner to find another job of similar status.
27. The Petitioner/Applicant submitted that the hurried advertisement and the Respondent's claim that this application is overtaken by events because the deadline of 5.12.2023 already lapsed and they have received applicants, is evidence of how far the Respondent is willing to go to cover up their illegalities and abuses against the Petitioner. If the court fails to grant the conservatory orders, the Petition will be rendered nugatory and will be overtaken by events to the detriment of the Petitioner/ Applicant.
28. The Petitioner/Applicant submitted that the circumstances surrounding her termination involve serious violations of constitutional provisions on fair hearing, fair administrative actions and fair labour practices. This court ought to take a stand in defence of the Constitution.

Respondent's Submissions

29. The Respondent submitted that the Applicant has not demonstrated the merits of the case and how it is going to impact on public interest, constitutional values and proportionate magnitudes and priority levels attributable to the relevant causes.
30. It is the Respondent's submission that public interest supersedes the private claims of an individual as held in *Kenya Guards & Allied Workers Union vs Security Guards Services and 38 Others and Another (IP)* HC. Misc. 1159 of 2003. The position of Manager Examinations Administration needs to be substantively filed urgently to supervise the administration of examinations by the Respondent and this cannot be held at ransom by the Applicant's action.
31. The Respondent submitted that the Applicant has not demonstrated that she has a *prima facie case* with a high probability of success since the employment contract was legally terminated and the disciplinary process was conducted within the confines of the law and the impugned re-advertisement was done within the confines of the law, regulations HRMPEB Human Resource Policy and Procedure Manual (2021).



32. The Respondent submitted that the instant application is final in nature i.e. reinstatement and can only be issued upon hearing and determination of the main petition.
33. It is the Respondent's submission that the application offends the doctrine of ripeness and the statutory provisions of Section 9(2)(3) of the Fair Administrative Actions Act on principle of exhaustion of alternative dispute resolution or internal mechanism for appeal or review which is still pending at the Public Service Commission.
34. The Respondent submitted that the instant application is overtaken by events following the lapse of the deadline date of 05.12.2023 calling for applications for the position of Manager Examinations Administration. The Respondent has received numerous applications and as such the recruitment is well underway.

Analysis and Determination

35. Having considered the application, affidavits and submissions on record, the court is tasked to determine whether the Petitioner/Applicant is entitled to conservatory orders sought.
36. Justice A.C Mrima in Katiba Institute v Judicial Service Commission & 2 others; Kenya Magistrates and Judges Association & 2 others (Interested Parties) (Constitutional Petition E128 of 2022) [2022] KEHC 438 (KLR) (Constitutional and Human Rights) (3 June 2022) (Ruling) held: -

“the principles for consideration by a court in exercising its discretion on whether to grant conservatory orders have been developed by courts over time. They are now well settled.

The *locus classicus* is the Supreme Court in Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others case (supra) where at paragraph 86 the court stated as follows: -

..... Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.

In Board of Management of Uburu Secondary School v City County Director of Education & 2 others [2015] eKLR, the court summarized the principles for grant of conservatory orders as: -

- i. The need for the applicant to demonstrate an arguable *prima facie case* with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
- ii. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
- iii. Thirdly, the court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
- iv. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.

In Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board & others Nairobi High Court Constitutional Petition No 154 of 2016 (2016) eKLR the court summarized three main principles for consideration on whether to grant conservatory orders as follows: -



- a. An applicant must demonstrate that he has a *prima facie case* with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.
- b. Whether, if a conservatory order is not granted, the petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
- c. The public interest must be considered before grant of a conservatory order.

37 The above principles are, however, not exhaustive. Depending on the nature of the matter under consideration, there may be other parameters which a court ought to look into. Such may include the effect of the orders on the determination of the case, whether there is eminent danger to infringement of the human rights and fundamental freedoms under the Bill of Rights, the applicability of the doctrine of presumption of constitutionality and legality of statutes, whether the applicant is guilty of laches, the doctrine of proportionality, among many others.”

Prima Facie Case

38. The Petitioner/Applicant has raised a *prima facie* arguable case as she has raised issues on the alleged unfair and unlawful disciplinary process and appeal; whether the Respondent had valid reasons to dismiss her and whether the impugned advertisement of her previous position was in breach of the law and the Respondent’s HR Manual. These are issues that need to be deeply interrogated and many more questions to be addressed during the hearing and determination of the main petition. The same cannot be interrogated with the required intensity at this interlocutory stage. This however to the courts best observation was more of a normal claim not petition.

Whether the Petitioners Will Suffer Prejudice and the Cases Rendered Nugatory Unless the Conservatory Orders are Granted

39. The court in Judith Karigu Kiragu & 2 others v County Government of Nairobi; Attorney General & another (Interested Parties) [2021] eKLR held:

“The Black’s Law Dictionary 10th Edition Thomson Reuters at page 1370 defines ‘prejudice’ as follows: -

Damage or detriment to one’s legal rights or claims.

Will the Respondents, therefore, suffer any damage or detriment if the conservatory orders are not granted? Generally, any contravention or threat to contravention of the Constitution or any infringement or threatened infringement of human rights and fundamental freedoms in the Bill of Rights is an affront to the people of Kenya. That is the clear purport of the Preamble and Chapter 1 of the Constitution.

Courts must, in dealing with Petitions brought under the various provisions of the Constitution, be careful in determining the prejudice at least at the preliminary stages. I say so because, at such stages of the proceedings, the provisions of the Constitution alleged to have been infringed or threatened with infringement are yet to be subjected to legal scrutiny.

Therefore, the damage or threat thereof to the rights and fundamental freedoms or to the Constitution must be so real that the Court can unmistakably arrive at such an interim finding. Such a breach or threat should not be illusory or presumptive. It must be eminent.”



40. Against this background, the Petitioner/Applicant has not demonstrated any imminent violation of her constitutional rights if she is denied the conservatory orders sought.
41. The petitioner was already dismissed from employment by 23rd May 2023 and so the prayers sought in the notice of motion dated 27th November 2023 seem to be overtaken by events. It is several months since the petitioner was dismissed and there would be prejudice to expect the respondent not to recruit at least an acting manager examination administrator.
42. There is no demonstration by the petitioner that she would suffer irreparable damages if she is denied the conservatory orders sought. Indeed the reverse would be the case that the respondent would suffer irreparable harm if court granted the conservatory orders for such a sensitive position to remain unmanned.
43. The application is not merited and is denied.
Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF APRIL, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159 (2) (d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

