



Kenya National Union of Medical Laboratory Officers & another v Attorney General & 2 others; Kiiru & 4 others (Interested Parties) (Employment and Labour Relations Petition E239 of 2023) [2024] KEELRC 1294 (KLR) (28 May 2024) (Ruling)

Neutral citation: [2024] KEELRC 1294 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS PETITION E239 OF 2023

AN MWAURE, J

MAY 28, 2024

BETWEEN

KENYA NATIONAL UNION OF MEDICAL LABORATORY OFFICERS 1ST PETITIONER
ASSOCIATION OF KENYA MEDICAL LABORATORY SCIENTIFIC OFFICERS 2ND PETITIONER

AND

THE HONOURABLE ATTORNEY GENERAL 1ST RESPONDENT
THE CABINET SECRETARY, MINISTRY OF HEALTH 2ND RESPONDENT
THE PRINCIPAL SECRETARY, MINISTRY OF HEALTH 3RD RESPONDENT

AND

DR JOHN NDEMI KIIRU INTERESTED PARTY
DR LEONARD KINGW'ARA INTERESTED PARTY
KENYA MEDICAL RESEARCH INSTITUTE (KEMRI) INTERESTED PARTY
NATIONAL AIDS AND STI CONTROL PROGRAMME (NASCOP) INTERESTED PARTY
KENYA MEDICAL LABORATORY TECHNICIANS AND TECHNOLOGISTS BOARD INTERESTED PARTY

RULING

1. The Petitioner filed a Notice of Motion dated 18th December 2023 seeking the following orders that: -



- a. spent
- b. pending hearing and determination of this Application inter-parties, the Honourable Court be pleased to issue an order of temporary injunction restraining the 1st and 2nd Interested Parties from taking over and occupying the positions they have been appointed and deployed to being; Head of Division of National Laboratory Services, and National Public Health Institute respectively as signified in the Deployment Order Reference No. MOH/ADM/1/2/52 dated 5th December 2023.
- c. pending hearing and determination of the main Petition herein, the Honourable Court be pleased to issue an order of temporary injunction restraining the 1st and 2nd Interested Parties from taking over and occupying the positions they have been appointed and deployed to being; Head of Division of National Laboratory Services, and National Public Health Institute respectively as signified in the Deployment Order Reference No. MOH/ADM/1/2/52 dated 5th December 2023.
- d. an order be issued staying implementation of the Deployment Order Reference No. MOH/ADM/1/2/52 dated 5th December 2023 pending determination of this application and Petition.
- e. the Honourable Court be pleased to issue an Order directing the Kenya Medical Laboratory Technicians and Technologist Board, the 5th Interested Party herein, to file a report detailing whether the 1st and 2nd Interested Parties are registered members pending hearing of this application and Petition.
- f. the Honourable Court be pleased to issue any other directions that it deems for the interest of justice to meet.
- g. costs

Petitioners/Applicants' Case

2. The Petitioners aver that the 2nd Respondent directed the 3rd Respondent to appoint the 1st and 2nd Interested Parties to head the Ministry of Health Deployment Order Reference No. MOH/ADM/1/2/52 dated 5/12/2023.
3. The Petitioners say that the 1st Interested Party is an employee of KEMRI seconded to the Ministry of Health to assist with covid 19. He has then been appointed and deployed to head Division of National Laboratory Services to support Laboratory Sciences and Safety; Public Health Research in National Public Health Institute (NPHI)
4. The Petitioners say that the 2nd Interested Party is an employee of GLOBALFUND seconded to NASCOP and further seconded to the Ministry of Health contract ending on 31/12/2023. He was appointed by the 3rd Respondent to the National Public Health Institute to support Genomic Surveillance.
5. The Petitioners assert that the Interested Parties are not the Ministry of Health employees and the personal numbers are not legitimate as they have 9 digits whereas personal numbers have 10 digits.
6. The Petitioners aver that the Interested Parties lack requisite qualifications in contravention of Section 15(1)(a) of the Medical Laboratory Technicians and Technology Act as they are not trained, registered or licenced to practice medical laboratory science.



7. The Petitioners further aver that the appointment of the Interested Parties contravened the Revised Scheme of Service for Medical Laboratory Personnel, 2015, as they did not satisfy the requirements for one to be appointed as director, as follows, he/she must: Bachelors degree in medical laboratory sciences in an institution recognised by Kenya Medical Laboratory Technicians and Technologist Board; Masters of science degree in medical discipline; Registration certificate issued by the Kenya Medical Laboratory Technicians and Technologist Board; Demonstrated competence, administrative capabilities and initiatives in organizing work as well as broad working experience in formulation of medical laboratory policies and programmes in the general development of laboratory services; Certificate in computer application skills from a recognised institution; and Certificate in strategic leadership development programme lasting not less than 6 weeks from a recognised institution.
8. The Petitioners say that the appointment and deployment of the Interested Parties was in bad faith and meant to exclude medical laboratory leadership strategic policy and financing scheme for their functions in violation of Article 27 of *the Constitution*.
9. The Petitioners say that the appointment of the Interested Parties knowing they were unqualified to occupy the positions was in violation of section 14 of the Medical Laboratory Technicians and Technologist Act.

Respondents' Case

10. In opposition to the Application, the Respondents filed a replying affidavit dated 27th December 2023.
11. The Respondents aver that Delegation Instrument on the Exercise of Human Resource Powers and Functions in the Public Service holds the 3rd Respondent is responsible for the administration and management of human resources functions within the Ministry of Health hence the 3rd Respondent was within his mandate to effect the deployment of the Interested Parties.
12. The Respondents aver that the Revised Scheme of Service for Medical Laboratory Personnel, 2015 ('Scheme') is simply a policy document meant to offer guidance in recruitment, deployment, retention and general development of laboratory service personnel. The same is not legally binding,
13. The Respondents aver that the Interested Parties are not governed by the Scheme as they are not medical technologist and technicians but hold PhD degrees on their respective scientific disciplines.
14. The Respondents say that the positions in question are administrative positions and there are no statutory qualifications that exist for persons to be deployed to these positions.
15. The Respondents say that there are no laws that bar non-members of Kenya Medical Laboratory Technicians and Technologist Board (KMLTTB) to be deployed as head of divisions or departments, which are administrative positions.
16. The Respondents aver that the Ministry deploys competent technicians and technologist who are duly registered by the Board where the KMLTTB Act applies. The Interested Parties need not be registered as laboratory technicians and technologist prior to their deployment.
17. The Respondents aver that the Petitioners have not demonstrated how the Interested Parties' deployment marginalised technicians and technologists working in the medical ecosystem.
18. The Respondents aver that there isn't any statutory duty on the 3rd Respondent to consult stakeholders before effecting deployment of officers within the Ministry of Health.



1st Interested Party Case

19. The 1st Interested Party avers that he has been a board member of KMLT²TB and is currently a member of its disciplinary committee.
20. The 1st Interested Party avers that vide the impugned Circular dated 05/12/2023, the 3rd Respondent deployed him to head the Division of Laboratory Service. He took up the responsibilities and has been performing and discharging the said duties since then
21. The 1st Interested Party avers that prior to his deployment he headed the same department/unit within laboratory services at the Ministry of Health for 3 years.
22. The 1st Interested Party avers that the Ministry of Health was split to 1 State Department for Public Health and Professional Standards and State Department for Health which were dropped and renamed as divisions. Therefore, the Department of Laboratory Services that he headed since 2020 changed to Division of Laboratory Service hence his redeployment.
23. The 1st Interested Party avers that the Head of Division of Laboratory Services is an administrative position with close to 10 units headed by Unit Managers some of whom are registered members of the Board while others are not.
24. The 1st Interested Party avers that he was deployed to the current position to a PSC approved Scheme of Service in their respective disciplines and designation as researchers which he is compliant with.
25. The 1st Interested Party avers that Schemes of Service for scientists and technicians are both ratified by PSC and does not recognise a hierarchy for deployed staff among different schemes of service.
26. The 1st Interested Party avers that the impugned circular did not appoint him to a new position but merely redeployed him to the Division of Laboratory Services in the same capacity due to change of name.

2nd Interested Party's Case

27. The 2nd Interested Party avers that vide the impugned circular dated 05/12/2023 he was deployed by the 3rd Respondent to head Genomic and Molecular Surveillance within the National Laboratory Services Division.
28. The 2nd Interested Party says that prior to his deployment, he was appointed as the Head of Genomic and Biobanking Unit on 28/09/2022. The Genomic and Molecular Surveillance and Genomic and Biobanking Unit are one and the same unit performing the same functions, therefore, the impugned redeployment is not an appointment.
29. The 2nd Interested Party says vide the Delegation Instrument on the Exercise of Human Resource Powers and Functions in the Public Service, the 3rd Respondent is responsible for administration and management of human resource functions within the ministry. This power does not mean that the 3rd Respondent deploys or appoints from the [Medical Laboratory Technicians and Technologists Act](#).
30. The 2nd Interested Party avers that the Interested Parties are neither technicians nor technologist contemplated under the Act and are therefore not subject to it.
31. The 2nd Interested Party avers that the Petitioners have not demonstrated how [the Constitution](#) and statutory provisions have been violated. In contrast, denial of the Interested Party to serve this



country based on accumulated knowledge and experience amounts to discrimination contrary to *the Constitution*.

32. The 2nd Interested Party avers that the Interested Parties have not been deployed as technicians or technologist but as heads of a divisions that have wider mandate than testing.
33. The 2nd Interested Party avers that the Petition and application are anchored on the false premise that only persons registered with the Board can be appointed to the positions they hold.

Analysis and Determination

34. Having considered the application, affidavits and submissions on record, the first issue for determination is whether the Applicant is entitled to the temporary injunction.
35. The threshold for grant of temporary injunction was aptly dealt with by Justice G.V Odunga in JM v SMK & 4 others [2022] eKLR as follows:

“The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in East African Industries vs. Trufoods [1972] EA 420 and Giella vs. Cassman Brown & Co. Ltd [1973] EA 358. In Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR the Court restated the law as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the

balance of convenience is in his favour.

36. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”
37. The Court of Appeal in the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR further opined that:

“...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages



are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."

38. While reiterating the said principles, Ringera, J (as he then was) in *Airland Tours & Travel Limited vs. National Industrial Credit Bank Nairobi (Milimani)* HCCC No. 1234 of 2002 stated that in an interlocutory application the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed propositions of law. That was the same position adopted in the dicta in *Nairobi High Court Civil Case No. 517 of 2014 – Lucy Nungari Ngigi & 4 Others -vs- National Bank of Kenya Limited & Anor (eKLR)* where it was stated:

"...I am also aware that the 1st Defendant has raised issues in respect of the mortgage herein, their right to exercise the statutory power of sale, breach of the addendum, default of repayment of the loan etc. They have also raised some accountability issues from the 2nd Defendant on the purchase price. But even these queries should be reserved for and determined at the trial. These issues are in direct conflict with issues raised by the Plaintiffs and the 2nd Defendant. At this stage I should not make any comments or findings, or express opinions on the substantive issues in controversy in order to avoid hurting the trial herein..."

39. In view of the foregoing, the Applicants herein have indeed raised a prima facie case, as they raise issue to do with the qualifications of the Interested Parties and whether they are duly qualified to hold these positions they are appointed and further raises the criteria used by the Respondents to appoint the Interested Parties. These are issues that should be interrogated in details at the main hearing of the petition.
40. In respect to whether the Applicants will suffer irreparable damage if not granted the interlocutory injunction, the Applicants have failed to prove to this Court the damage it may incur and that the same cannot be compensated monetarily and especially considering that the 1st and 2nd interested parties were deployed not appointed to these positions and served in similar positions even before the deployment.
41. The 1st and 2nd interested parties were deployed to the division of National laboratory services in December 2023 for Dr John N. Kiiru and genomic surveillance at the National Public Health Institute respectively Dr Leonard Kingwa'ra.
42. The second issue for determination is whether an order should issue staying implementation of the Deployment Order Reference No. MOH/ADM/1/2/52 dated 5th December 2023.
43. The Supreme Court of Kenya in *Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others (2014) eKLR* expounded on the public interest nature and requirement for grant of conservatory orders 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 to uphold the 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 applicants' case for orders of stay. 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 causes."

44. The court finds no valid grounds to restrain the 1st and 2nd interested parties from occupying the positions they have been appointed or to stay the implementation of the deployment order as the petitioners have not proved also what irreparable harm they are going to suffer that cannot be compensated if the reliefs prayed in prayers Nos 2, 3 4 and 5 are not granted.
45. The application vide notice of motion is premature and is not merited and is therefore dismissed.
46. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 28TH DAY OF MAY, 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.

ANNA NGIBUINI MWAURE

JUDGE

