



**Vuligwa v Kenya Railways Corporation (Employment and Labour Relations
Petition E026 of 2024) [2024] KEELRC 1281 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1281 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E026 OF 2024**

MN NDUMA, J

MAY 23, 2024

BETWEEN

JANE VULIGWA PETITIONER

AND

KENYA RAILWAYS CORPORATION RESPONDENT

RULING

1. The applicant in the notice of motion dated 18/3/2024 prays for an order in the following terms:
 1. Spent
 2. Spent
 3. That pending hearing of the application dated 29th February 2024 and the petition, this court be pleased to issue a CONSERVATORY ORDER, maintaining the status quo and preserving the petitioner's employment by restraining the respondent from harassing, intimidating, disciplining, transferring, sacking or in any other way interfering with the petitioner's position and employment at Kenya Railways Corporation.
2. The application is premised on grounds (a) to (h) set out on the face of the application the sum of which is that the petitioner filed this petition on 29/2/2024 challenging a decision by the respondent not to confirm her appointment but instead withdrawing the appointment as general manager supply chain management.
3. That on 5/3/2024, the respondent reacted to the filing of the petition by initiating disciplinary proceedings against the petitioner for documents used to her in the proceedings.
4. The petitioner had hitherto been threatened by the respondent to either withdraw the suit or be dismissed from employment.



5. The respondent withdrew the petitioner's laptop and has without any search warrants required the invasion of the petitioner's house to forcefully obtain documents.
6. On 15/3/2024, the respondent issued a show cause letter to the petitioner in relation to use of documents in litigation in this matter.
7. The disciplinary proceedings have a pre-determined outcome hence the need for the court to protect the petitioner from unlawful harassment and intimidation. The application is buttressed by the supporting affidavit of the petitioner's applicant.
8. That the prayers be granted.
9. The respondent filed replying affidavit to the application dated 18th March 2024 in which is deposed that the respondent appointed the petitioner pursuant to interviews conducted for the position of general manager supply chain management which were non-responsive, however the petitioner was the best candidate out of those interviewed albeit on a low score of (57%).
10. The applicant was placed in a special duty capacity which in fact was of temporary nature for reasons that she was not successful in the interviews.
11. That the special assignment was to await substantive recruitment.
12. That under clause 4.5.12 and 4.6.1 of the respondent's Human Resource Policy and Procedure Manual 2023 (HR Policy), the managing Director was mandated to administratively appoint an employee to perform special duty whenever a vacancy arose either permanently or temporarily.
13. That the appointment of the petitioner included payment of special duty allowance at 15% of her basic salary as per the letter dated 12/8/2022. The petitioner was not placed on 20% acting allowance because she was not qualified. Acting in appointment is done in terms of clause 4.5.1. and 4.5.2 of the HR Policy.
14. The Board met on 24/8/2022 and discussed the non-responsive interview and resolved to fill the position of General Manager Supply Chain Management through head hunting. The Board also allowed the Managing Director to appoint the petitioner on temporary basis pending substantive recruitment.
15. That the maximum period for payment of special duty is six (6) consecutive months or until the position is filled. The MD/CEO is at liberty to extend the appointment for a further period of not exceeding six (6) months until the position is filled.
16. That the petitioner emerged the second best in the interviews for the position of Procurement Manager and the Board deemed her the most suitable person to fill that position since she was an internal candidate as compared to the best candidate who was external. The difference between the two was a score of 0.2%. The Board resolved to appoint the petitioner to that position and was so appointed on 30/8/2022. The petitioner accepted the appointment on the same date and was placed on probation for that position.
17. That the special duty appointment did not require any appraisals as it was temporary in nature.
18. The probation period for the substantive position was extended on 24/6/2023 since appraisal was hindered by the two roles she played. The petitioner being the temporary holder of the General Manager position could not express herself on the substantive role of procurement manager. In the circumstances the MD resolved to withdraw the duties assigned to the petitioner as General Manager



Supply Chain Management to pave way for detailed evaluation of the petitioner's performance in her substantive position.

19. On 21/2/2024, the Managing Director reassigned the duties of General Manager Supply Chain Management to Mr. John Kanyoti to enable proper appraisal of the petitioner in her substantive role.
20. The evaluation procedure under clause 2.25 commenced seamlessly and the process culminated in the confirmation of the petitioner to the position of the Procurement Manager by the Board on 5/3/2024 which decision was communicated to the petitioner/applicant on 6/3/2024.
21. That the Managing Director has not breached the rights of the applicant under Article 41 of the Constitution. The applicant accepted the appointment to the position of procurement manager by a letter dated 30/8/2022 and is obliged to perform her duties in that capacity.
22. The withdrawal of the assigned special duties was not part of any disciplinary process nor was it a penalty or sanction arising from any misconduct, performance or incapacity warranting the invocation of the doctrine of natural justice or right to a hearing.
23. That there was no contractual relationship between the respondent and the petitioner/applicant over the position of General Manager Supply Chain Management and so there was no legitimate expectation that she would be confirmed in that position.
24. That the petitioner did not take advantage of the internal grievance procedure under clause 12.2, the applicant having not reported any grievance before coming to court. The motion is premature and against the doctrine of exhaustion of available internal dispute resolution mechanisms.
25. The application and the petition are misconceived and the application be dismissed accordingly.
26. In addition the respondent filed grounds of opposition dated 18/3/2024 stating that the petition does not raise any triable issues, and offends the doctrine of constitutional avoidance and exhaustion of internal dispute resolution mechanisms. That the same be dismissed with costs.

Submissions

27. The parties vide Okubaso advocate for the petitioner and Jamal advocate for the respondent made oral arguments before court in respect of the application dated 18/3/2024.
28. Mr. Okubaso advocate submitted that the applicant had established a prima facie case with a probability of success. That the decision by the M/D to substitute the applicant from the acting position of General Manager Supply Chain Management with one Mr. Kanyotu who did not qualify in the interviews amounted to harassment.
29. That the applicant would now report to Mr. Kanyotu and would in that respect suffer irreparable prejudice to her employment unless the court restrains the respondent from perpetuating that unlawful action. That the applicant had not handed over to Mr. Kanyotu as the acting General Manager and the court should issue interim orders to preserve her position pending the hearing and determination of the petition.
30. Mr. Jamal advocate for the respondent submitted that the applicant had not made out a prima facie case with a probability of success.
31. That the applicant had only been appointed in the position of General Manager Supply Chain Management on a temporary basis pending filing the position substantively. That the applicant had been appointed in a substantive position of procurement manager by the Board which position she had formally accepted. That the applicant could not be appointed in acting capacity to the General



- Manager position because she was not qualified to hold the position in the first place. That she held the position in a special duty capacity which was a temporary position as per the HR manual. That the MD had mandate to appoint her in that capacity and to withdraw the same as he had done.
32. That the MD had withdrawn her from that special duty capacity to pave way for her proper evaluation in the substantive position of procurement manager. That objective was achieved and the applicant was effectively appointed by the Board in that capacity.
34. Mr. Okubasu in rejoinder stated that the alleged 2023 HR Policy used by the respondent was not yet in place. That the special duty alleged to have been conferred on the applicant was not known in law and is not provided in the older HR Policy that was in place.

DETERMINATION

35. The court has carefully considered the depositions and submissions by the parties and is guided in this matter by the case of *Giella v Cassman Brown Ltd* 1978 which sets out the pre-requisites for grant of interim conservatory orders pending the hearing and determination of the main suit to be:-
- i. The applicant must establish a prima facie case with a probability of success.
 - ii. The applicant must establish that he/she would suffer irreparable harm incapable of being remedied by way of damages if the interim order is not granted
 - iii. And that in the case of doubt the court should be guided by balance of convenience.
36. The court in weighing the probabilities in the interim should be minded not to pre-determine the issues before hearing the matter on the merits.
37. The court is minded in this matter that the applicant is holding a substantive appointment in the position of procurement manager at the present and the dispute only revolve around a temporary appointment pending filing of the same on a substantive basis.
38. The court is satisfied that the applicant has not established a prima facie case with a probability of success with regard to holding in whatever capacity that higher position. The applicant has also not demonstrated that she would suffer irreparable harm incapable of being remedied by way of damages in the event she is eventually successful on the merits of the case.
39. Accordingly, the application by the petitioner/applicant must fail and the court orders accordingly. Costs in the cause.

DATED AT NAIROBI THIS 23RD DAY OF MAY, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Mr. Okubasu for petitioner/applicant

Mr. Jamal for respondent

Mr. Kemboi, Court Assistant

