



**Tindi v Board of Directors, Kenyatta National Hospital; Kamuri (Interested Party)
(Petition E081 of 2024) [2024] KEELRC 2060 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2060 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E081 OF 2024**

B ONGAYA, J

JULY 26, 2024

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA, 2010;

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27,
73 AND 232 OF THE CONSTITUTION OF KENYA, 2010;**

AND

IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT (NO. 10 OF 2017);

AND

**IN THE MATTER OF THE HUMAN RESOURCE POLICY AND
PROCEDURES MANUAL OF THE KENYATTA NATIONAL HOSPITAL**

BETWEEN

GEORGE TINDI PETITIONER

AND

BOARD OF DIRECTORS, KENYATTA NATIONAL HOSPITAL RESPONDENT

AND

DR EVANSON NJOROGE KAMURI INTERESTED PARTY

RULING

1. The Petitioner filed the Notice of Motion dated 29.05.2024 through the firm of Adera & Kenyatta Advocates. The application was under rules 4, 23 and 24 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 & rules 7(1) and 17 of the



Employment and Labour Relations Court (Procedure) Rules, 2016. The petitioner prayed for orders as follows:

- a. The application be certified as urgent and be dispensed with ex-parte in the first instance.
 - b. A conservatory order by way of an injunction do issue barring the interested party from accessing the office of the Chief Executive Officer of Kenyatta National Hospital or the premises Kenyatta National Hospital generally pending the hearing and determination of this application inter-parties.
 - c. A conservatory order by way of an injunction do issue barring the Interested Party from accessing the office of the Chief Executive Officer of Kenyatta National Hospital or the premises of Kenyatta National Hospital generally pending the hearing and determination of the Petition herein.
 - d. Costs be provided for.
2. The Application is based upon the following grounds:
- a. The interested party was, on 22nd May 2024, arrested and bonded by the Ethics and Anti-Corruption Commission (EACC) for corruption and economic crimes in the sum of Kshs. 634,465,000/- related to the exercise of the functions of the office of the Chief Executive Officer (CEO) of Kenyatta National Hospital.
 - b. On the same day, 22nd May 2024, the EACC obtained court orders to freeze Kshs. 28,000,000/- in the account of the interested party, monies suspected to be the proceeds of corruption and economic crimes committed by the Interested Party while exercising the functions of the CEO of Kenyatta National Hospital.
 - c. The interested party is being accused of extremely serious and grave offences involving corrupt use of public funds committed while in his office and so it is in the public interest that the investigations are not impeded or interfered with.
 - d. The interested party as the CEO of Kenyatta National Hospital, has the capacity to interfere with or impede the ongoing investigations not only by the EACC but by any other authorized and competent persons and authorities including the Respondent while he is in office,
 - e. According to the Human Resource Policy and Procedures Manual of the Kenyatta National Hospital, any officer is to be precluded from the exercise of his functions to allow investigations into allegations that may lead to his dismissal.
 - f. The allegations against the interested party are gross misconduct offences under the Human Resource Policy and Procedures Manual of Kenyatta National Hospital and so the order being sought herein is not only in the public interest but also apt.
3. In the Supporting Affidavit dated 29th May 2024, the applicant, a Kenyan taxpayer, stated that the interested party herein is facing allegations of corruption and economic crimes relating to procurement irregularities, which are gross misconduct offences under section 11 of the Human Resource Policy and Procedures Manual of Kenyatta National Hospital. That notably, the respondent is responsible for the discipline of the CEO of Kenyatta National Hospital under section 11.2.2 of the aforesaid Manual and is thus mandated to investigate in the public interest the aforementioned allegations made against the Interested Party.



4. The applicant averred that following the grave allegations against the interested party, he wrote to the respondent to undertake internal investigations against the interested party but the respondent did not reply. He stated that the failure, inaction, or refusal of the respondent to initiate and undertake the said administrative action against the interested party is dereliction of public duty that calls for the intervention of the Court in the public interest.
5. While noting that investigations by the EACC against the interested party's office of the CEO were ongoing, the applicant stated that the interested party is likely to interfere with the investigations and thereby defeat the public interest with regard to accountability and transparency. He averred that it is therefore important that the interested party is barred and precluded from performing the functions of the office of the CEO and accounting officer of Kenyatta National Hospital so as to imbue the public with confidence that he will not interfere or impede the investigations.
6. The applicant argued that the criminal investigations by the EACC are not a bar to the respondent undertaking its internal administrative investigations against the interested party. That the respondent has a duty to ensure that the values and principles of governance under Article 10 of the *Constitution of Kenya*, and the values and principles of public service are observed by all members of staff of Kenyatta National Hospital including the interested party. That however with its inaction, the respondent has deliberately failed to ensure compliance with the values and principles of governance and public service.
7. Further, the applicant stated that the use and management of public funds is a great constitutional obligation and includes principles that public money shall be used in a prudent and responsible way. That the *Constitution* also sets out principles that guide public procurement including transparency. He stated that therefore the continued stay of the interested party in his office of CEO and accounting officer begets the possibility of either concealing other forms of corruption and economic crimes or committing more in a mockery of public interest.
8. In the further affidavit dated 12th July 2024, the applicant stated that under section 8 of the Mwongozo, the respondent is obligated to ensure that policies, institutional frameworks and administrative procedures of Kenyatta National Hospital actively support the implementation of the *Constitution of Kenya* and comply with the provisions of the *Leadership and Integrity Act*, 2012 and *Public Officers Ethics Act*, 2003. That the Respondent Board being an independent institution, it cannot claim that its hands are tied in the face of the serious allegations against its appointee, the interested party.
9. The respondent filed a Replying Affidavit dated 24.06.2024 through Kounah & Co. Advocates stating that the CEO has not been charged in any court of law nor has the Board received any complaints against him relating to corruption or economic crimes and procurement irregularities. The respondent stated that there is therefore no reason for it to initiate administrative investigation against the interested party as the applicant is solely relying on newspaper cuttings, which is not a credible source for the Court to consider.
10. The respondent argued that fair labour practices cannot be sacrificed at the altar of allegations whose basis is yet to be tested in Court. It noted that the applicant's demands undermine the principles of justice and due process as they pre-emptively penalise the interested party without a thorough examination of the facts.
11. The parties filed their respective submissions as directed by the Court. The Court has considered the material on record and returns as follows:
 - a. As stated by the applicant there are ongoing investigations against the interested party by the Ethics and Anti-Corruption Commission. The investigations appear not concluded. As urged for the respondent, there is no complaint or adverse report made as against the interested party



for the respondent to invoke its powers of disciplinary control over the interested party as envisaged in the respondent's human resource policies, Mwongozo Code, the cited [Leadership and Integrity Act](#), 2012 and, the [Public Officers Ethics Act](#), 2003. To that extent, the applicant has failed to establish the basis for the conservatory order as prayed for in the application.

- b. The purpose of a conservatory order is to preserve the substratum of the suit so that it is not rendered nugatory. The applicant has not shown how the petition will be rendered nugatory if the purported conservatory order is not granted. The Court further considers that it would not be appropriate to keep the interested party out of the office in circumstances that the respondent says it has not received a report to justify the initiation and continuation of disciplinary proceedings against the interested party.
- c. Thus, the order in the nature of a prohibitory or restraining injunction will not issue as prayed because no *prima facie* case has been established to keep the interested party out of office. While making that finding, it is the applicant's case that the respondent is the one vested with the power of disciplinary control over the interested party and it would appear that the applicant is inviting the Court to usurp the respondent's power to bar the interested party from accessing the premises. The Court is not being asked to order the respondent to bar the interested party from so accessing. The Court finds that the prayer is misconceived especially that while not mentioning the interested party as a respondent, the applicant has proceeded to seek an order directed at the interested party. The Court finds the prayer as framed misconceived and untenable.
- d. The Court therefore upholds the submissions made for the respondent that the applicant has failed to meet the threshold for grant of a conservatory order and the order as framed falls short of a conservatory order. Thus, in [Judicial Service Commission v Speaker of the National Assembly and Another](#) (2013) eKLR it was held that conservatory orders are not ordinary civil law remedies but are remedies provided for under the Constitution and they are not remedying between one individual as against another but are meant to keep the subject matter of the dispute *in situ*. The remedies are *in rem* and not *in personam*.

In conclusion, the application is hereby dismissed with costs in the cause and parties to fix a date for further steps for expeditious determination of the main petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 26TH JULY 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

