

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KAKAMEGA**  
**MISC. APPLICATION NO. E009 OF 2025**

**BEATRICE ALLOSAH OMUKUTI.....APPLICANT**

**VERSUS**

**THE COUNTY SECRETARY,  
COUNTY GOVERNMENT OF VIHIGA.....1<sup>ST</sup> RESPONDENT**

**VIHIGA COUNTY  
PUBLIC SERVICE BOARD.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF OFFICER, FINANCE  
AND ECONOMIC PLANNING .....3<sup>RD</sup> RESPONDENT**

**(BEFORE HON. JUSTICE DAVID NDERITU)**

**RULING**

**I. INTRODUCTION**

1. The applicant through Bruce Odeny & Company Advocates filed a notice of motion (the application) dated 14<sup>th</sup> August 2025 seeking for the following orders –

***1) For purpose of the record this application be certified urgent and be heard forthwith and ex parte in the first instance.***

**2) A temporary injunction do issue directed at the 2<sup>nd</sup> respondent, its employees, workers, agents and/or whomsoever jointly and severally restraining them from carrying out any recruitment, interviews, appointment or employment of any prospective with respect to the position of Director Accounting Services of the County Government of Vihiga as per the advertisement made on 1<sup>st</sup> August 2025 pending the hearing and determination of this application.**

**3) A temporary injunction do issue directed at the 2<sup>nd</sup> respondent, its employees, workers, agents and/or whomsoever jointly and severally restraining them from carrying out any recruitment, interviews, appointments or employment of any prospective with respect to the position of Director Accounting Services of the County Government of Vihiga as per their advertisement made on 1<sup>st</sup> August 2025 pending the hearing and determination of the Public Service Commission appeal No. 2023 of 2025 filed by the applicant against the respondents.**

**4) The costs of this application be provided for.**

2. The application is expressed to be brought pursuant to **Section 12(3) (i) of the Employment & Labour Relations Court Act and Rule 17(1) & (3) of the Employment & Labour Relations Court Rules.**

3. The application is based on the grounds on the face of it and supported with the affidavit of the applicant, sworn on even date, with several annexures thereto.
4. The court issued a temporary injunction against the 2<sup>nd</sup> respondent on 19<sup>th</sup> August 2025, restraining it from carrying out the recruitment, interview, appointment, employment, or in any way filling the substantive position of Director of Accounting Services in the County as per the advert placed on 1<sup>st</sup> August 2025, pending the hearing and determination of the application.
5. Upon service of the application, the respondents entered appearance through the County Attorney and filed a replying affidavit sworn by Vincent Mwamiri Chanzu, the County Secretary, on 18<sup>th</sup> September 2025.
6. By consent and upon directions by the court, the application was canvassed by way of written submissions. Mr. Odeny for the applicant filed written submissions dated 12<sup>th</sup> November 2025 and Ms. Aresa for the respondents filed submissions dated 18<sup>th</sup> November 2025.

## **II. THE EVIDENCE**

7. In the supporting affidavit it is deponed that the applicant was initially employed by the Public Service Commission (the Commission) in 2013 before she was seconded to the County Government of Vihiga during the transition period.

8. It is further deponed that the applicant is the Director, Financial Services of the County Government of Vihiga, a position she has held since 25<sup>th</sup> August 2014 and a copy of the appointment letter is attached.
9. It is deponed that the Director Accounting Services position was initially designated as Principal Finance Officer before it was redesignated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents, as evidenced by the applicant's attached pay slips.
10. It is deponed that vide a letter dated 2<sup>nd</sup> April 2022 the applicant was suspended pending the hearing and determination of the ***Anti-Corruption Case No. Kakamega CM EACC No. 1 of 2022 – Republic v Wilberforce Ndula & 2 others***, wherein the applicant is charged with others.
11. The applicant's position is that she has neither been issued with any show cause letter, invited to any disciplinary hearing, nor her services terminated. The applicant depones that she is still earning half salary.
12. It is deponed that vide an advert dated 28<sup>th</sup> July 2025 the 2<sup>nd</sup> respondent advertised the applicant's position purporting it to be vacant and invited applications from the public to fill the same. A copy of the advertisement is annexed.

13. It is the applicant's case that should the position be filed she will be rendered jobless as there is only one position of Director, accounting services in the County.
14. It is further deponed that the 3<sup>rd</sup> respondent in suspending the applicant, acted ultra vires, as only the 2<sup>nd</sup> respondent can suspend the applicant in accordance with **Section 59 (1) of the County Governments Act.**
15. It is deponed that the applicant has filed an appeal with the Commission challenging her suspension beyond 21 days and the illegal advertisement of her position pursuant to the provisions of **Section 77 of the County Governments Act.**
16. It is further deponed that the commission lacks authority to issue an injunctive order, which is a preserve of this court and hence her application before this court.
17. It is deponed that the applicant stands to suffer irreparable harm if the recruitment process is not stopped as her job will be illegally taken away.
18. In the replying affidavit, it is admitted that the applicant was absorbed through the Transition Authority into the County Government as a Principal Finance Officer in 2013.
19. It is further deponed that through the transition to the **Devolved Government Act**, the transition period lasted from 2013 to 2016 and during the said period there is no record that the applicant's position

changed to that of a Director Accounting Services other than the changes made in the payroll.

20. It is deponed that there is no record on how the applicant's position changed to that of the Director of accounting services. It is further deponed that the recruitment at Job Group Q and above is done through a competitive process where advertisements must be placed and candidates interviewed before appointment and hence if the applicant holds such a position then her appointment was irregular and subject to regularization pursuant to **Section 75 of the County Governments Act**.
21. It is deponed that as at the time the applicant alleges that her position was redesignated to that of the Director Accounting Services the said position was nonexistent. It is deponed that the first advertisement for the said position was in 2019 when one Benjamin Otwoko was appointed on a 3-year contract that expired in 2014. A copy of the advertisement is annexed to the affidavit.
22. It is deponed that the applicant did not challenge the said advertisement at that time if at all she was the legitimate office holder. It is deponed that the position advertised is that formerly by Mr. Benjamin Otwoko and not the applicant's.
23. It is deponed that the 3<sup>rd</sup> respondent, as the Chief Officer, acted within his authority under **Section 45 (4) of the County**

**Governments Act** in suspending the applicant after she was arraigned and charged in court on corruption charges.

24. It is further deponed that the appeal on suspension is not valid for consideration before this court or before the Commission as it was filed after 4 years beyond the 90 days contemplated under **Section 77(3) of the County Governments Act, Section 86(2) of the Public Service Commission Act and Rule 10(1) of the Public Service Commission (County Appeals Procedure) Regulations, 2022.**
25. It is further deponed that, pursuant to Regulations 12, 13 & 14 of the **Public Service Commission (County Appeals Procedure) Regulations, 2022 (the Regulations)**, the Commission can issue interlocutory orders and thus this court lacks jurisdiction to entertain the application.
26. It is further deponed that by dint of **Order 29 Rule (2) (d) of the Civil Procedure Rules** the court cannot issue injunctive orders against a County Government.
27. It is further deponed that arising from the impugned advertisement, the court has stayed injunctive orders issued in **MCELRC No. E020 of 2025 – Gideon Hawe Amuchuku v Vihiga County Public Service Board & Another** fact the applicant was well aware of but chose to mislead the court, leading to conflicting orders.

### **III. SUBMISSIONS**

28. Counsel for the applicant submitted that the conditions for the grant of temporary injunctive orders are laid out in the *conesa classicus* of ***Giella –vs– Cassman Brown & Co. Ltd (1973) EA 358***. The conditions are an applicant has to establish a *prima facie* case; demonstrate an irreparable injury if a temporary injunction is not granted; and, show that the balance of convenience tilts in favour of the applicant.

29. Citing ***Mrao Ltd –vs– First American Bank of Kenya Ltd [2003] eKLR***, counsel submitted that the applicant has established a *prima facie* case against the respondents for the reason that at all material times relevant to this application, the applicant was and remains the Director of Accounting Services in the County Government of Vihiga.

30. It is submitted that both sides admit that the applicant is under suspension pursuant to a letter by the 3rd respondent, but the applicant contends that her suspension by any entity other than the 2nd respondent the same is irregular and therefore illegal and unlawful warranting the intervention of the Court.

31. It is further submitted that the Respondents' actions are in blatant contravention of ***Article 47(2) of the Constitution*** on the right to fair administrative action.

32. Citing ***Geoffrey Mworira –vs– Water Resources Management Authority & 2 Others (2015) eKLR***, counsel submitted that the

applicant has not received formal communication from the 2nd respondent on the reasons for the suspension yet it is now seeking to irregularly and unlawfully terminate her by advertising her position while she is still lawfully in office.

33. It is submitted that the applicant's suspension by the 3rd respondent was *ultra vires* and has been challenged before the Commission whereat the matter is pending hearing and determination.

34. It is submitted that the applicant remains a lawful employee of the County Government of Vihiga serving as Director of Accounting Services unless lawfully terminated by the 2nd Respondent. It is submitted that advertising the position while she is still in office amounts to a breach of her right to fair administrative action and fair hearing.

35. It is submitted that it is therefore evident that the advertisement of the position shall render the applicant jobless while there are proceedings pending before the Commission over the subject matter.

36. On irreparable harm, counsel cited ***Pius Kipchirchir Kogo –vs– Frank Kimeli Tenai (2018) eKLR*** asserting that the applicant's employment is at stake and she stands to be rendered jobless while proceedings before the Commission are pending. It is submitted that the loss of employment in those circumstances cannot be adequately compensated by way of award of damages.

37. It is further submitted that the proceedings pending before the Commission shall be rendered nugatory should recruitment proceed and the applicant ultimately succeeds as there exists only one position for Director of Accounting Services.
38. It is further submitted that the balance of convenience tilts in favour of the applicant as she is the substantive holder of the impugned office, has not been subjected to any disciplinary process, and her suspension has been challenged with the Commission.
39. It is submitted that advertising the position held by the applicant before the determination of the appeal with the Commission offends the rules of natural justice and the applicant's constitutional right to a fair hearing.
40. It is submitted that this court has the jurisdiction to grant injunctive relief under **Section 12(3) of the Employment and Labour Relations Court Act** that empowers the Court to grant interim preservatory orders including injunctions.
41. It is argued that the applicant has satisfied all the requirements for the grant of temporary injunctive orders and the court is urged to grant the application with costs pending the hearing and determination of *Appeal No. 203 of 2025* pending before the Commission.
42. On the other hand, the respondents' counsel submitted on four issues –

*Whether this Honourable (sic) has jurisdiction to entertain this case or grant the injunctive reliefs sought; Whether the applicant presented a prima facie case with a probability of success before this court; Whether irreparable injury would result if the injunction is not granted; and, Whether there is evidence that the balance of convenience is in favour of the applicant.*

43. On the first issue, it is submitted that ***Regulation 13 of the Public Service Commission (County Appeals Procedures) Regulations, 2022*** provides for parties to seek interim and interlocutory reliefs with the Commission pending the hearing and determination of an appeal.
44. It is submitted that the applicant ought to have pursued interim relief before the Commission instead of instituting parallel proceedings before this Court.
45. Relying on a plethora of decisions – ***Secretary County Public Service Board & another v Hulbhai Gedi Abdulla (2017) eKLR; William Odiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (interested parties)(2020) eKLR; and Mweresa v County Government of Vihiga & another (Constitutional Petition E003 of 2025) (2025) KEHC 12870 (KLR)***, the respondents invoke the doctrine of exhaustion and contend that where a statute provides for a dispute

resolution mechanism, that procedure must be exhausted before recourse to the courts. On this basis, the Court is urged not to assume jurisdiction and dismiss the application.

46. On the second issue, it is submitted that the application does not meet the threshold for the grant of an interlocutory injunction as set out in ***Giella v Cassman Brown & Co. Ltd (supra)***.

47. On *prima facie* case, it is submitted that the applicant has not demonstrated any infringement of a right. It is further submitted that the suspension of the applicant from office was effected pursuant to ***section 62(1) of the Anti-Corruption and Economic Crimes Act (ACECA)*** following the institution of criminal charges. It is argued that such suspension is statutory, lawful, and grounded in public interest, and is intended to safeguard the integrity of public office rather than to punish the officer concerned.

48. It is further submitted that a position cannot be left vacant indefinitely pending the determination of a criminal case that has been pending for several years. Counsel cited ***Grace A. Omolo v Attorney General & 3 others (2012) eKLR*** and ***Moses M. Adome v The County Government of Turkana & Anor***, that emphasized the constitutionality and public interest of suspensions under ***ACECA***.

49. The respondents also point out that in a related matter (*ELRC Appeal No. E018 of 2025*) this court stayed similar injunctive orders and allowed the recruitment process to proceed, contending that the subject matter is identical and that there was no basis to halt the recruitment.
50. On irreparable harm, the respondents submit that the applicant has not demonstrated injury incapable of being compensated through award of damages. They argue that any loss relating to employment, salary, or benefits is quantifiable and compensable by an award of damages or back pay should the applicant ultimately succeed. Accordingly, it is submitted that the alleged harm does not meet the threshold of irreparability required for the grant of injunctive relief.
51. On the balance of convenience, the respondents contend that the same tilts in favour of the respondents and the public interest. It is submitted that the office in question is critical to the effective delivery of public services within Vihiga County and that the continued vacuum undermines operational efficiency and public administration. It is argued that public interest outweighs the applicant's private interest in preserving a position she has not occupied for several years. The respondents further submit that granting the injunction would set an undesirable precedent by allowing suspended public officers to impede recruitment

processes indefinitely, thereby undermining governance and the fight against corruption in public service.

52. It is further submitted that there was material non-disclosure and abuse of process on the part of the applicant in that she failed to disclose the existence of related proceedings in which similar injunctive orders had been stayed. They contend that the application is brought in bad faith and is calculated to disrupt lawful administrative action.

53. The court is urged to dismiss the application for want of jurisdiction and, in the alternative, for failure to satisfy the legal threshold for the granting of interlocutory injunctive relief, and award costs to the respondents.

#### **IV. ISSUES FOR DETERMINATION**

54. The factual background of this matter has been set out by the parties and their respective counsel as per the summary in the preceding part of this ruling. The gist of the application is that the applicant is seeking for conservatory orders set out in the introductory part of this ruling. The respondents are opposed to the application and assert that the commission has the jurisdiction to issue interim orders; thus, this court lacks the jurisdiction to issue the conservatory orders sought.

55. In my considered view, the issue for determination by the court is –

***Whether the court has jurisdiction to grant the conservatory orders***

*sought in the application and or whether the application should be allowed.*

56. Jurisdiction is everything and without it the court must down its tools and take no more step as stated by Nyarangi JA in the landmark decision of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)*.

57. The applicant has admittedly filed an appeal before the Commission over the same subject matter and argues that her appeal shall be rendered nugatory if the conservatory orders sought herein are not granted. The respondents cited *Regulation 13 of the Regulations* to wit – *(1) A party to an appeal may, at any time after the filing of an appeal with the Commission but before the final hearing and determination of the appeal, apply in writing to the Commission for directions or orders before the appeal is heard and determined by the Commission* – to assert that this court has no jurisdiction to issue the conservatory orders sought as the same is a reserve of the commission.

58. This position was buttressed by the Court of Appeal in *Secretary County Public Service Board & Another -vs- Hulbhai Gedi Abdille (2017) eKLR* wherein the court held that – *Section 77 of the County Governments Act has placed no fetter to the jurisdiction of the Public Service Commission.*

59. The applicant argues that the commission lacks the power to issue conservatory orders but the court finds and holds that the commission, in exercise of its unfettered jurisdiction, has the jurisdiction to give any directions or orders to the respondents it deems fit pending the appeal before it based on Regulations is cited above.

60. The applicant has not filed any application as contemplated in ***Regulation 13 of the Regulations***. It is in the considered opinion of the court that the applicant has not made the application before the commission before approaching the court for the same. While the court has jurisdiction to issue injunctive orders, it is my considered view that the application herein is an abuse of court process and in violation of the ***doctrine of exhaustion***.

61. In view of all the above the court finds and holds that the application dated 14<sup>th</sup> August 2025 is devoid of merit.

## **VI. ORDERS**

- (i) The application dated 14<sup>th</sup> August 2025 is hereby dismissed for lack of merit.***
- (ii) The temporary injunction issued on 19<sup>th</sup> August 2025 is hereby lifted and discharged.***
- (iii) No order as to costs.***

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT  
KAKAMEGA THIS 19<sup>TH</sup> DAY OF MARCH, 2026.**

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**DAVID NDERITU**

**JUDGE**

ORIGINAL