

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA

(Before Hon. Lady Justice Monica Mbaru)

CAUSE NO. E132 OF 2025

SAID GONGO.....1ST CLAIMANT

TITUS KILONZI.....2ND CLAIMANT

VERSUS

BANDARI MARITIME ACADEMY.....1ST RESPONDENT

PUBLIC SERVICE COMMISSION..... 2ND RESPONDENT

RULING

The ruling herein relates to two (2) applications filed by the Claimants and dated 10th December 2025 and 9th March 2026.

The application dated 10th December 2025 is premised under the provisions of Article 22, 23, 41, 47 and 159 of the Constitution, Rule 45 of the Employment and Labour Relations Court (Procedure) Rules, sections 3 and 12 of the Employment and Labour Relations Court Act and Sections 7, 8, 11 of the Fair Administrative Action Act. The Claimants are seeking:

1. *Pending the hearing and determination of the substantive suit, an interim order be issued restraining the 1st Respondent, its servants, agents,*

officers and anybody acting under its instructions from implementing, applying, giving effect to, or taking any steps to implement the new Human Resource Instruments (including but not limited to: Human Resource Policy & Procedure Manual; Organizational Structure, Grading and Staff Establishment; Career Guidelines) approved in or about 2024/2025 (Instruments) and any instrument, circular, policy, implementation matrix or decision which seeks to cage the terms and conditions of service of the Claimants as currently subsisting under the respective contracts.

- 2. An order of injunction restraining the 1st Respondent, its board, officers, agents and servants from effecting any movement, demotion, regrading, retirement pegging, conversion of contract terms (including converting fixed-term contracts to permanent and pensionable terms) or any other change to the Claimants' employment terms or status pending the hearing and determination of the substantive suit and this application.*
- 3. An order directing that the status quo ante as to the Claimants' terms and conditions of employment be maintained, ending the hearing and determination of the substantive suit and this application.*
- 4. An order that the Respondents do preserve, and be restrained from destroying, altering or disposing of any documents, records, minutes, correspondence, approvals, memos, appeals, or appeal determination, board resolutions, board minutes, implementation matrices, emails, notes,*

drafts, and any other document or electronic records relating to the review, approval, adoption and/or implementation of the Instruments.

5. *An order of certiorari, prohibition and mandamus or any other relief as may be just and equitable in the substantive suit.*
6. *Costs of the application.*
7. *Such further orders as the court may deem fit and appropriate.*

The application is supported by the 1st Claimant through his Supporting Affidavit, and on the grounds that the substantive suit challenges the lawfulness, legality, and procedural propriety of the Instruments, the declaration of illegality, and damages for breach of constitutional rights and breach of contract.

In his Affidavit, Gong avers that on 2nd June 2023, he entered into a 3-year fixed-term contract with the 1st Respondent, renewable upon satisfactory performance. His contract places him in job group BMA2, grading, remuneration and conditions of employment.

The 2nd clamant entered into a similar fixed-term contract on 2nd May 2025 for 3 years, renewable subject to satisfactory performance.

In October 2023, the 1st Respondent initiated a review of its instruments, communicated as a consultative process, to align the instruments with the engaging State Corporation's standards. The employees were not meaningfully consulted during the review process. The process was largely carried out by an

internal team of officers and board members, as well as 2nd Respondent, including the State Department of Shipping and Maritime Affairs.

The completed instructions were transmitted to the 2nd Respondent for approval. The 2nd Respondent fundamentally altered the instruments and returned an amended version without ensuring that the 1st Respondent's board or employees had approved the changes.

Gongo avers that the 1st Respondent lodged an appeal against the 2nd Respondent's changes to the instruments. The 2nd Respondent partially determined the appeal and dismissed some grounds. A team of 8 reviewed the instruments, excluding the 1st Respondent's employees. The outcome review was approved by the 2nd Respondent without involving the 1st Respondent's board, the newly appointed board, or the employees.

Gongo avers that the instruments are materially approved to alter the terms and conditions of service for the employees. In his case, the change effectively demotes him from job group BMA 2 to BMA 3 by converting some terms of his contract and features to permanent, pensionable status. These changes constitute a material, detrimental change to his contract.

For the 2nd Claimant. The instruments change and peg future renewal of fixed-term contracts to retirement age, thereby preventing automatic or discretionary renewal as was agreed under the contract.

The instruments omitted critical content required under the PSC Guidelines and by Mwongozo – the Code of Governance for State Corporations. The changes are irregular, unlawful, and contrary to the Constitution. Unless the orders sought are granted, the Claimant will suffer irreparable loss and damage.

In reply, the 1st Respondent asserts there is a ***Replying Affidavit dated 30 January 2026***. This affidavit is not in the court file or the CTS.

The Claimants filed the application dated 9 March 2026 under the provisions of Article 159 of the Constitution, Section 5 of the Judicature Act, Section 3A of the Civil Procedure Act, Order 51 of the Civil Procedure Rules and seeking the following:

1. *Spent.*
2. *The court be pleased to order the contemnor, Dr Eric Katana, the CEO of the 1st Respondent, to appear before this court to show cause why he should not be committed to civil jail for a period of six months for being in contempt of court orders issued by this court on 16 December 2026.*
3. *Upon the grant of prayer (2) above, the court be pleased to issue an order to commit Dr Eric Katana, the CEO of the 1st Respondent, to civil jail for 6 months for contempt of court or impose a fine as it deems fit.*
4. *This court be pleased to declare and nullify in their entirety the proceedings of all the meetings that were held by the board of directors for the 1st Respondent in the exclusion of the 1st Claimant.*

5. Costs of this application be provided for.

The application is supported through the Supporting Affidavit of the 1st Claimant, Said Gongo, who avers that on 16 December 2025, the court issued interim orders directing the Respondents to preserve and maintain the Claimants' terms and conditions of employment pending the hearing and determination of the application. Despite the court order, the director of the 1st Respondent, Dr Eric Katana, served the 1st Claimant with a letter dated 7 January 2026 purporting to revise the job grade downwards after his responsibilities in contravention of the court orders herein.

On 6th January 2026, the 1st Respondent served the 2nd Claimant with a letter notifying him that the process of implementing the Instruments had commenced and advising him of changes to his contract in clear contravention of the court orders herein.

Gongo avers that Dr Eric Katana usurped the functions of the 1st Respondent by contravening the 2nd Quarter Board meetings (Financial Year 2025/2026), deliberately excluding him, who is the appointed secretary to the committee. The 1st Respondent blocked the 1st Claimant from accessing the Electronic Board Application (e-Board App), thereby preventing him from accessing board records in contravention of the court orders herein.

Gongo avers that since the issuance of the court orders on 16th December 2025, Dr.

Eric Katana has disobeyed them and continues to frustrate and hinder the Claimants in performing their duties under their fixed-term contracts. The conduct amounts to a violation of the Claimants' rights to fair labour practices and therefore seeks to restrain the CEO from such conduct. For disregarding the rule of law, Dr Eric Katana should be punished with a 6-month jail term, a fine, or both.

In reply, the 1st Respondent filed the Replying Affidavit of Dr Eric Katana, who avers that he is the CEO of the 1st Respondent and the person cited by the Claimants for alleged contempt. However, the 1st Respondent is a government agency run by a board, and he implements its decisions.

The allegation of contempt of court is false and a total fabrication by the Claimants. The Claimants have not filed evidence with the court to show contempt, but are seeking ways to cripple the institution. Through the order dated 16th December 2025, this Court directed the Respondents as follows:

In the interim, the Claimants' employment shall remain preserved without interference, on the terms and conditions currently in place.

The 1st Respondent is law-abiding and specifically the alleged contemnor, Dr Erick Katana, who has complied with the court order to date. The Claimants

have not suffered any demotion, alteration of contract, or loss of benefits as alleged.

The Claimants have not produced the alleged letter dated 7th January 2026, which

is said to have notified them of any demotion or breach of their contract terms.

The letter dated 9 December 2025 was served upon all the 1st Respondent employees. The order dated 16 December 2026 was issued ex parte and was only served upon the 1st Respondent during Christmas break.

Dr Katana avers that the letter dated 9 December 2025 had long been distributed to all employees before the Claimants obtained interim orders herein. The 1st Respondent has since complied with the court order, and there is no evidence of breach. The board directs its operations; Dr Katana has no mandate to regulate them, and there is no proof that he denied the 1st Claimant access or stopped him from undertaking his duties as alleged.

The 1st Respondent's business remains in jeopardy since the 1st Claimant is the corporation secretary and head of legal services, who, with actual knowledge of good governance practices and laws, insisted on participating in meetings where his conflicted in discussing this current suit, which is explicit against the Mwongozo Code of Governance and the various regulations on conflict of interest. Consequently. The 1st Respondent board was at an impasse when the 1st

Claimant refused to step aside, preventing the board from convening the meetings he was conflicted on, a state of affairs that remains to date.

The orders sought are not justified and should be dismissed with costs.

The 2nd Respondent opted not to file a reply, seeking to support the 1st Respondent,

and stated that the instruments subject to the claim herein apply to many public officers and that stopping their operationalisation would have a public effect.

The claims seek to enforce personal interests that should not supersede the public interest.

Parties attended and made their oral submissions.

On the two applications, the issues which emerge for determination are:

- (i) Whether there is contempt of court on the orders issued on 16 December 2025;
- (ii) Whether the 1st Respondent should be restrained from implementing the HR instruments that affect the fixed-term contracts of the Claimants; and
- (iii) Whether the Respondents should maintain the Claimants' terms and conditions of employment.

On the question of contempt, addressed in the application dated 9th March 2025, while this is a serious issue that the court should address firmly, it should be premised on the records filed by the parties. The Claimants apply under orders

issued on 16th December 2026. If this was an error, it was not corrected. This error fundamentally changes the character of the orders sought.

Additionally, the letter allegedly issued to the Claimants on 7th January 2026 is not attached. The letter is noted to have been issued to change the terms and conditions of employment. Without this document, despite Dr Katana averring that the Respondent was served but opted to proceed on the Christmas holiday, the foundation of the contempt application is lost.

This said, it is imperative that, upon the court orders, each party, whether issued ex parte or not, should comply. If unhappy with the orders, the duty is to move the court to vacate the same. Disobedience is not the option. This cannot suffice.

In **Gladys Vuldi & another v Deniel Kipketer Rugut [2019] eKLR**, the court emphasised that a party served with a court order has a duty to obey it. This obligation is rooted in the principle that court orders are binding directives issued by a competent court. Non-compliance with any court order amounts to contempt of court as defined in common law and section 5 of the Judicature Act.

In the application dated 10 December 2025, the Claimants seek to preserve their employment under their fixed-term contracts and to have the HR instruments not applied to them, as they have fixed-term contracts with the 1st Respondent.

This fact is not denied. There are two contracts, dated 2nd June 2023 and 2nd May 2025, each for 3 years, in favour of the Claimants.

Whether the grant a conservatory order or not, in this case through a restraining order against the 1st Respondent from implementing the HR instruments and changing the contracts issued to the Claimants, the principles are as addressed in the case of **Mwaniki v Ndiga & 3 others [2025] KEHC 9562 (KLR)** and **Gatirau Peter Munya v Dickson Mwenda Kithinji 7 2 Others [2014] eKLR**, where the Supreme Court held:

“Conservatory Orders” bears a more decided public law connotations: for these orders are to facilitate ordered function within public agencies as well as to uphold the adjudicatory authority of the court in the public interests. Conservatory orders, therefore, are not, unlike interlocutory injections, 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 applicant’s case, for orders of stay.

Hence, in the case of **Centre for Rights, Education and Awareness (CREAW) & 7 Others -vs- the Attorney General (2011) eKLR**, the court affirmed that conservatory orders are intended to preserve the status quo pending determination of the main issues in dispute. There is a need for a court to exercise caution when dealing with any request for such prayers for the reason

that matters which are a preserve of the main petition are not to be dealt with finality at the interlocutory stage.

In this case, under section 10(3) of the Employment Act, the parties to an employment contract may regulate the employment relationship by means of a fixed written contract. This is lawful and legitimate employment as held in **Todor Services Limited v Deri [2025] KEELRC 1948 (KLR)** and **Kesi v Krystalline Salt Limited [2025] KEELRC 1097 (KLR)**.

The parties, hence, under fixed-term contracts, grant the Claimants a valid and lawful ground for protection of employment in the first instance, pending the hearing of the main suit. The averments that the HR instruments relate to many employees and are for the public good, and that the orders sought should not be issued, cannot apply in this instance, since the Claimants have moved the court to preserve their term contracts, as the application of the HR instruments is at issue. Whether they can be compensated through damages is not in issue at this point.

A conservatory order seeks to secure the substratum of the suit.

However, the contract for the 1st Claimant ends in May 2026, while the 2nd Claimant attains 60 years in May 2026. It is necessary to hear the claim on priority.

Equally, the changed terms and grading to comply with the HR instruments apply, pending the hearing of the main claim. However, the Claimants shall abide by the lawful instructions and directions of the employer, the 1st Respondent.

Of interest is the fact that the 1st Claimant is the corporation secretary. As this suit proceeds, to ensure no conflict of interest, the 1st Claimant will abide by the directions and instructions of the employer, the 1st Respondent.

Accordingly, the application dated 9 March 2026 is dismissed.

The application dated 10 December 2025 is allowed, and the Respondents are restrained from implementing the HR instruments on the Claimants' fixed-term contracts pending the hearing and determination of the claim herein. The Claimants shall take lawful directions and instructions of the employer, 1st Respondent, to secure conflict of interest pending hearing and determination of the suit. The main suit shall be heard and priority basis.

Delivered in open court at Nairobi, this 23rd day of April 2026

**M. MBARŪ
JUDGE**

In the presence of:

Court Assistant: Catherine and Omar

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