



REPUBLIC OF KENYA



**Ndengu & 13 others v County Public Service Board of Bungoma & 3 others (Constitutional
Petition E005 of 2024) [2025] KEELRC 247 (KLR) (28 January 2025) (Ruling)**

Neutral citation: [2025] KEELRC 247 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CONSTITUTIONAL PETITION E005 OF 2024**

**DN NDERITU, J
JANUARY 28, 2025**

BETWEEN

**NEWTON SIKOBE NDENGU 1ST PETITIONER
NICHOLAS KIMAGUT 2ND PETITIONER
CAREN SIMIYU 3RD PETITIONER
KIKECH JEMIMA 4TH PETITIONER
AGNES MUSUNGU 5TH PETITIONER
DEBORA KISAKA 6TH PETITIONER
VIVIAN SIMPANO 7TH PETITIONER
LINDA MUSUNGU WALELA 8TH PETITIONER
MIRIAM MUKHWANA 9TH PETITIONER
KEITH WASWA 10TH PETITIONER
EMILY NELIMA BAKARI 11TH PETITIONER
ADEL NAMALWA BAKARI 12TH PETITIONER
JACKLINE MAKOKHA 13TH PETITIONER
JUSTUS AKUKU 14TH PETITIONER**

AND

**COUNTY PUBLIC SERVICE BOARD OF BUNGOMA 1ST RESPONDENT
COUNTY SECRETARY BUNGOMA 2ND RESPONDENT
CHIEF OFFICER HEALTH COUNTY BUNGOMA 3RD RESPONDENT
COUNTY GOVERNMENT OF BUNGOMA 4TH RESPONDENT**



RULING

I. Introduction

1. The petitioners (applicants) commenced these proceedings by way of a petition dated 24th October, 2024, through Wafula Masinde & Company Advocates, seeking for the following reliefs –
 - a. A declaration that the respondents have violated and/or have continued to violate the petitioners and other employees constitutional rights and in particular, Articles 2,3,10,19,20,24,35,41 and 47(2) of the Constitution of Kenya 2010.
 - b. A declaration revoking the advertisement on 2nd day of August 2024 which appeared in the standard and Daily Nation Newspapers of Friday August 16th, 2024, and county website., selection and recruitment therefrom.
 - c. A declaratory Order compelling the respondents to place the affected employees on Permanent and pensionable terms.
 - d. In the alternative to prayer c above, a declaration that the respondents be directed to re-advertise the positions as internal advert and fill the same in accordance with the criteria and qualification in the advertisement within 30 days.
 - e. A declaratory order compelling the respondents to compute, calculate and or tabulate the pending salary arrears, leave days and allowances owing to the petitioners and pay them.
 - f. Damages for violation above.
 - g. Costs of this petition and interest on e above.
 - h. Any other relief which this honorable court may deem just and appropriate.
2. The petitioners plead that they are periodic employees of the 4th respondent on short-term periodic contracts offering various medical services. It is pleaded that their terms of service are less favourable compared to their contemporaries working on permanent and pensionable terms. It is further pleaded that the petitioners have been subjected to hostile and difficult working conditions including delayed salary, lack of insurance medical cover, deduction and non-remittance of statutory dues, underpay, working overtime without pay, denial of leave, denial of right to join and participate in union activities, amongst other violations.
3. It is further pleaded that on 2nd August, 2024 the 1st respondent announced vacancies for permanent and pensionable employment for the roles, positions, and the services that the petitioners have occupied and offered for long periods of time based on the short-term contracts alluded to above. It is pleaded that despite the petitioners meeting the required qualifications and submitting their applications for the advertised vacancies and positions the 1st respondent overlooked them and instead shortlisted “outsiders”. It is hence pleaded that the respondents deliberately elbowed the petitioners and locked them out of the permanent and pensionable vacancies and hence the orders and reliefs sought in the petition.
4. Alongside the petition was filed undated notice of motion (the application) under a certificate of urgency dated 24th October, 2024. This ruling is in regard to that application wherein the petitioners are seeking for the following orders –



- a. This application be certified as urgent and be heard *ex parte* at the first instance.
 - b. Pending the inter parte hearing of this application, a conservatory order do issue restraining the respondent from conducting the interviews of the shortlisted candidates that begins on the 28th day of October 2024.
 - c. Pending the inter parte hearing of this application a conservatory order do issue restraining the respondent from harassing the petitioners herein or interfering with their continued employment.
 - d. The hearing of the applicants petition be fast tracked and prioritized.
 - e. Costs be in the cause.
5. The application is expressed to be based on Articles 2, 3, 19, 20, 21, 24, 50, 258, & 259 of *the Constitution* & Sections 8 & 10 of the *Public Service (Values and Principles) Act*. It is founded on the grounds stated on the face of it and on the allegations in the petition and the supporting affidavit to the petition and the annexures thereto.
 6. The respondents entered appearance through Simiyu Makokha Advocate, the county attorney, and filed a replying affidavit sworn by Joseph Samita Makata, the chief executive officer of the 1st respondent, sworn on 5th November, 2024. They also filed a response to the petition alongside the affidavit and both were received in court on 6th November, 2024.
 7. The petitioners, with the leave of the court, filed a further affidavit sworn by the 1st petitioner on 12th November, 2024.
 8. Counsel for both parties addressed the court by way of written submissions. Mr. Wafula for the petitioners filed his written submissions on 25th November, 2024 while Mr. Simiyu for the respondents filed on 22nd November, 2024.

II. The Evidence

9. In the supporting affidavit it is deposed that the petitioners have been engaged by the 4th respondent through the 1st respondent on various short-term contracts some of them cumulatively, such as the 1st petitioner, adding to 11yrs or more. It is stated that during those various periodic contracts the petitioners have suffered abuse and violations as alluded to in the introductory part of this ruling.
10. It is deposed that as a result of consulted lobbying the respondents agreed to advertise for permanent and pensionable employment in the cadre and positions occupied and held by the petitioners with the primary objective and understanding to enabling and prioritizing the petitioners to join permanent and pensionable terms.
11. It is deposed that to the amazement and bemusement of the petitioners the advert placed by the 1st respondent in two local dailies on 2nd August, 2024 did not indicate that the vacancies were to be filled internally. This purported omission allegedly exposed the petitioners to unfair competition. It is deposed that through this process the respondents negated on their promise of transiting the petitioners from short-term contracts to permanent and pensionable employment.
12. It is deposed that nonetheless the petitioners applied for various positions but the 1st respondent omitted the names of the petitioners in the shortlisted applicants who were to be interviewed from 28th October to 8th November, 2024. It is deposed that no reasons were offered as to why the names of the petitioners were excluded from the list of the interviewees.



13. It is the foregoing state of affairs that offended the petitioners and prompted them to file the petition and the application herein. The application obviously seeks to stop the entire process pending the hearing and determination of the petition as per the prayers set out above.
14. In the replying affidavit it is deposed for all the respondents that on 2nd August, 2024 the 1st respondent advertised for various positions in the department of health and sanitation and municipality boards within Kimilili and Bungoma Municipalities in the department of lands, urban areas, physical planning and housing. The advert for the said vacancies appeared in the Standard and the Daily Nation newspapers of 16th August, 2024. It is deposed that the advert was also placed on the 4th respondent's website.
15. It is deposed that all the petitioners herein were either over-qualified or under-qualified for the various positions that they applied for and that this explains why they were not shortlisted for interviewing. The minimum qualifications for each of the positions applied for by each of the petitioners and the purported qualifications of each of the petitioners are listed in the affidavit.
16. It is deposed that there is no evidence adduced by the petitioners that they indeed have been in the employment of the 4th respondent on whatever terms or conditions and the court is urged to find and hold that the petition herein and the application are misplaced, unfounded, and filed in bad faith.
17. In the further affidavit for the petitioners it is deposed that the advert put up by the 1st respondent did not specify whether the stated minimum qualifications were also the maximum and as such denying the 1st and 2nd petitioners shortlisting by virtue of being over-qualified was callous and malicious.
18. It is deposed that all the petitioners were unfairly and unlawfully denied shortlisting notwithstanding that the positions that they applied for are the same or similar positions to those that they have held for a long time and performed the functions, roles, and duties that the new recruits are expected to execute and perform. It is deposed that the entire recruitment process by the respondents is intended to kick out the petitioners not only from the short-term contracts that they have enjoyed for long but also from any future prospects of clinching permanent and pensionable employment with the 4th respondent.
19. It is deposed that the respondents have breached and violated the constitutional and statutory rights of the petitioners as pleaded and the court is urged to grant the conservatory orders pending the hearing and determination of the petition as prayed.

III. Submissions By Counsel

20. On the one hand, counsel for the applicants identified four issues for determination as follows –
 - i. Whether the Petitioners have demonstrated sufficient grounds to warrant the issuance of conservatory orders restraining the respondents from conducting the interviews of the shortlisted candidates scheduled for the 28th day of October, 2024, pending the hearing and determination of the petition.
 - ii. Whether the petitioners have sufficiently demonstrated the need for conservatory orders restraining the respondents from harassing the petitioners or interfering with their continued employment, pending the hearing and determination of the petition.
 - iii. Whether the petitioners' petition deserves to be fast-tracked and prioritized for hearing in light of the urgency and gravity of the issues raised.
 - iv. Whether costs should be in the cause, given the nature of the application and the petitioners' position.



21. On the first issue it is submitted that the applicants have made out a case for issuance of conservatory orders to stop the interviews that were set to commence from 28th October, 2024. It is submitted that the court has powers to issue the orders under Article 23 of *the Constitution* to protect the fundamental rights and freedoms of the applicants as pleaded. The court is urged to preserve the status quo.
22. Citing *Centre for Rights Education Awareness (CREAW) V Attorney General & 4 Others (2011) eKLR* the court is urged to issue the conservatory orders as prayed to arrest irreparable loss and damage being visited upon the applicants by the respondents. It is further submitted that the applicants have demonstrated a prima facie case with a likelihood of success. It is submitted that the move by the respondents to omit the names of the applicants from the shortlist violates Articles 27, 28, 41, & 47 of *the Constitution*.
23. Citing *Republic V Judicial Service Commission ex parte Pareno (2004) eKLR* the applicants urge the court to consider the urgency in their complains and grant the conservatory orders as sought.
24. On irreparable loss it is submitted that if the alleged tainted and unlawful recruitment process is allowed to commence and conclude the damage to the applicants shall be irreparable considering the long period of service that they have offered to the 4th respondent and that the eminent loss may not be compensated in damages and costs alone. It is submitted that the applicants had legitimate expectation of being absorbed into permanent and pensionable employment. The court is urged to be persuaded by the holding in *Republic V National Environmental Management Authority & 3 Others (2011) eKLR* in that regard.
25. It is further submitted that the balance of convenience is in favour of granting of the conservatory orders as sought. The court is urged to alleviate eminent prejudice that will face the applicants if the conservatory orders are not granted. The court is urged to consider the eminent harm to the applicants and apply the reasoning in *Pius Kipchirchir Kogo V Frank Kimeli Tenai (2018) eKLR* wherein it was held that in a situation where the inconvenience to the applicant is higher or equal to that of the respondent the court should issue conservatory orders to preserve the status quo. The court is urged to hold that the allegedly flawed and discriminatory recruitment process is unlawful and halt the same pending the hearing of the petition.
26. It is further submitted that public interest is in favour of granting the conservatory orders. It is submitted that it is against public policy and interest for the respondents to carry out and implement flawed and unlawful recruitment process. It is submitted that the rule of law is in the public interest and the court is thus urged to stop the un-procedural and allegedly flawed and unlawful recruitment process.
27. Finally, the court is urged to issue the conservatory orders to stop the respondents from harassing or in any other manner affecting the employment relationship between the applicants and the respondents pending the hearing and disposal of the petition which should be prioritized.
28. On the other hand, counsel for the respondents submitted on the following two issues –
 - a. Whether the petition qualifies to be granted any conservatory orders of stay.
 - b. Whether the Executive *Order No. 2 of 2022* dated 7th September 2022 violates *the constitution* and the County Government Act.
29. In regards to the first issue it is submitted that the applicants have not satisfied the principles set out by the Supreme Court for granting of conservatory orders in *Peter Gatirau Munya V Dickson Mwenda Kithinji & 2 Others (2014) eKLR*.



30. It is submitted that the applicants are suffering from a sense of entitlement as their already existing employment relationship with the 4th respondent has allegedly not been in any way affected by the impending recruitment of new staff for the advertised vacancies and positions. It is submitted that the reasons for which the applicants were not shortlisted for the advertised vacancies have been explained and captured in the replying affidavit and the response to the petition. It is submitted that the recruitment process is overboard, non-discriminatory, and competitive in accordance with the law.
31. The court is reminded that, in any event, the applicants have not established or proved any existing employment with the respondents. It is further submitted that the applicants have not demonstrated any prejudice or irreparable loss or damage that may be visited upon them if the conservatory orders are denied. It is submitted that any loss or damage that may be suffered or incurred by the applicants may be compensated by way of damages or other reliefs as provided for in the applicable employment and labour laws.
32. It is further submitted that other than making general and sweeping claims and allegations of constitutional violations and breaches the applicants have failed miserably in demonstrating the particulars of the violations of their rights under the numerous cited provisions of *the Constitution*. It is submitted that the petition is a gross abuse of the court process and the same ought to be struck out in le mine.
33. It is concluded that the application is founded on an incompetent petition that was filed in gross abuse of the court process and as such the application should also fall and fail.

IV. Issues for Determination

34. In my considered view there is only one main issue for determination in this application – Should the court issue the conservatory orders sought pending the hearing and determination of the petition?
35. The court is disadvantaged in that neither of the parties highlighted or disclosed the status quo as at the time of the hearing of the application. No interim orders were issued yet the impugned interviews were to commence on 28th October, 2024. The court is not aware or certain of the status on the ground, if you may. Prima facie this is a ground for the court to deny the application as the court is not sure what status quo is to be maintained or sustained. This fact denies the court the capacity to pronounce itself on prayer (b) in the application because, what purpose shall it serve for the court to issue an order purporting to stop or halt a recruitment process and or interviews that may have already commenced and concluded as at the time of making and issuing such an order? In the considered view of the court, issuance of such an order shall be futile and self-defeating in that the same may not be enforceable as it may have been overtaken by events.
36. Without prejudice to the foregoing, the principles upon which conservatory orders may be issued were enunciated by the Supreme court in *Peter Gatirau Munya V Dickson Mwenda Kithinji* (supra). In distinguishing conservatory orders from orders of injunctions, stay, and other interlocutory orders, the apex court stated 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 public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private party issues such as the prospects or irreparable harm occurring during the pendency of the case or high probability of success in the applicant’s 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.



37. What I understand the apex court to be emphasizing in the foregoing reasoning is that conservatory orders are in the realm of public law with the aim of ensuring proper and orderly functioning, management, and operations and affairs of public institutions, authorities, and agencies. Such orders are therefore more appropriate and applicable in public interest litigation as opposed to litigation in personal relationships such as employment.
38. Therefore, unless the employment relationship between the parties extends to a matter of public interest, it should make sense for the parties to file ordinary causes, unless there is demonstrated threat, violation, or breach of constitutional rights or freedoms. Likewise, unless the cause of action extends to matters of public interest, parties to employment and labour disputes should restrict themselves to the rights, reliefs, and remedies provided for in the [Employment Act](#), the [Employment and Labour Relations Court Act](#) and the rules made thereunder, and any other applicable statute or by-laws.
39. Without prejudice, it is not every dispute that calls for a constitutional petition as such petitions call for specifics as set out in *Anarita Karimi Njeru V Republic (1979) KLR* and *Mumo Matemu V Trusted Society of Human Rights Alliance (2014) eKLR*.
40. While the respondents herein are public bodies, office(r)s, or institutions, the applicants are private individuals who filed this petition in their private interests. It is a fact that public institutions must be managed and operated in accordance with the law as a matter of public policy and interest. However, a litigant who files a cause or a petition for personal gain or protection does not automatically do so in protection of public interest.
41. In *Geilla V Cassman Brown*, a *causa classica* on conditions for granting of mandatory injunctions in causes of personal service, it was pointed out that courts will rarely issue such orders in employment matters which are essentially about personal service.
42. Further, the applicants have not availed or presented evidence of their current engagement with the 4th respondent who has denied that the applicants are in employment. The court takes the view that if the applicants are in employment of the 4th respondent, in whatever way or manner, and the respondents terminate and or breach the terms of such contract of service, such wrong, termination, or breach can be compensated under the statutory laws cited above.
43. Inasmuch as this court is enjoined by [the Constitution](#) and the court's constitutive laws and rules to avoid dwelling on technicalities but rather look into the wider interest of justice, the court takes the view that the applicants have not made out a *prima facie* case warranting granting of the conservatory orders as sought.
44. While this court has original and unlimited jurisdiction in matters employment and labour relations, the court has to be careful not to descend into the arena and manage or micromanage the human resources function in either the private and or public institutions. The court should only intervene when properly called upon and its jurisdiction invoked to intervene based on the constitutional and statutory imperatives applicable.
45. As stated above, the applicants have not demonstrated that they are in current employment with the 4th respondent or any of the other respondents and as such the court has no basis for granting the third prayer stopping the respondents from harassing or interfering with the continued employment of the applicants.
46. However, there are no many matters pending in Bungoma and the court shall be ready to hear the petition as soon as the pre-trial directions are taken and that way the matter shall be fast-tracked and prioritized as requested.



47. The court has said enough in demonstrating that the applicants have neither satisfied nor convinced the court that they are deserving of the conservatory orders as sought. The application is thus denied.

V. Orders

48. The court makes the following orders –

- a. The undated notice of motion filed in court alongside the petition is hereby denied and dismissed.
- b. Costs in the petition.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT BUNGOMA THIS 28TH DAY OF JANUARY, 2025.

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DAVID NDERITU

JUDGE

