



**Shabdin v Mater Misericordiae Hospital (Employment and Labour Relations Cause E006 of 2025) [2025] KEELRC 966 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELRC 966 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E006 OF 2025**

**HS WASILWA, J  
MARCH 27, 2025**

**BETWEEN**

**DR. KHADIJA ESSA SHABDIN ..... PETITIONER**

**AND**

**MATER MISERICORDIAE HOSPITAL ..... RESPONDENT**

*(Before Hon. Lady Justice HELLEN WASILWA)*

**RULING**

1. The matter before court is the Petitioner's/Applicant's application dated 10<sup>th</sup> January 2025 seeking urgent intervention, challenging her arbitrary transfer from Nairobi to Thika Medical Centre in violation of her employment contract. She contends that the Respondent refused to consider her appeal, breaching Article 41 of *the Constitution* on fair labour practices, Article 47 on fair administrative action, and Article 50 on the right to a fair hearing. The transfer was imposed without consultation or justification, violating Articles 19, 21, 23, 27, 28, 41, 43, 47, and 50 of *the Constitution* and Section 5 of the *Employment Act*. The Applicant argues that unless the Respondent is restrained, she and her family will suffer irreparable harm. She seeks priority hearing in the interest of justice and public policy.
2. The Applicant filed Chamber Summons and Notice of Motion applications both dated 10<sup>th</sup> January 2025, seeking urgent intervention from the court. The Applicant was employed by the Respondent as a medical officer under a contract of employment dated 1<sup>st</sup> October 2018, with a three-month probation period after which her employment was confirmed. She was earning a gross monthly salary of Kshs. 211,000. The employment relationship remained cordial until 31<sup>st</sup> December 2024, when the Respondent unilaterally transferred her from Mater Misericordiae Hospital in Nairobi to Thika Medical Centre without consultation or reasons, in contravention of the employment contract.



3. Following the transfer, the Applicant lodged an appeal for reconsideration, but the Respondent refused to grant her an audience and omitted her from the work timetable, violating her rights under Articles 41, 47, and 50 of *the Constitution* and Sections 5, 17, and 18 of the *Employment Act*. The transfer caused the Petitioner and her family undue mental suffering and inconvenience, for which they hold the Respondent responsible.
4. The Chamber Summons and Notice of Motion applications are supported by two affidavits sworn by the Applicant, Dr. Khadija Essa Shabdin, on 9<sup>th</sup> January 2025 and 10<sup>th</sup> January 2025, respectively. Both affidavits reaffirm the contents of the application.

### **Applicant's Written Submissions**

5. The Applicant filed written submissions dated 3<sup>rd</sup> February 2025 in support of the petition and the application seeking conservatory orders. The court issued directions on 20<sup>th</sup> January 2025 for the disposal of the application by way of written submissions. The Respondent opposed the application by filing a statement of grounds of opposition.
6. The issues for determination is whether the Applicant has a prima facie case and is entitled to the prayers sought. In *Barton v Reid Canada Ltd & Alfresh Beverages Canada Corp* (2001) OJNO4116, the court held that a prima facie case must not only demonstrate a serious issue to be tried but must also be clearly right and highly likely to succeed. The definition of a prima facie case in *Mrao v First American Bank of Kenya Limited & 2 Others* (2003) KLR 125 was cited, affirming that a genuine and arguable case exists where there is an apparent infringement requiring explanation.
7. In *Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another* (2015) eKLR, the Court of Appeal emphasized that a prima facie case is essential for interlocutory relief. In *Mirugi Kariuki v Attorney General* (1992) KLR 8, the court underscored that a prima facie case exists where a breach of natural justice is alleged and remains rebutted. In *Re Bivac International SA (Bureau Veritas)* (2005) 2 EA 43, the court stated that determining a prima facie case requires an intellectual exercise considering the remedy sought and applicable legal principles.
8. The Applicant submitted that her contract did not provide for transfers and that the Respondent failed to present any contrary evidence. She was denied a fair hearing upon appeal, violating Articles 41 and 47 of *the Constitution*. In *Centre for Rights Education and Awareness (CREAW) & 7 Others Nairobi Petition No. 16 of 2011*, the court held that a conservatory order requires a prima facie case and a demonstration of potential prejudice. In *Judicial Service Commission v Speaker of the National Assembly & Another* (2013) eKLR, the court distinguished conservatory orders as public law remedies aimed at maintaining the status quo.
9. The Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others S.C. Application No. 5 of 2014* held that conservatory orders should be granted on the inherent merits of a case, considering public interest and constitutional values. The Applicant established a prima facie case by proving that the transfer was unlawful and violated her rights under Articles 41, 47, and 50 of *the Constitution*.
10. The Applicant submitted that the Respondent's failure to provide contrary evidence reinforces her case. Her rights to fair labour practices, fair administrative action, and a fair hearing were infringed, and the orders sought should be granted. The Applicant demonstrated that the Respondent's actions were unconstitutional and against the law, warranting a decision in her favour.



## **Respondent's Case**

11. The Respondents filed a Statement of Grounds of Opposition dated 22<sup>nd</sup> January 2025, opposing the Notice of Motion on the basis that it is incompetent and misconceived, as no substantive prayer for a conservatory order or injunction has been pleaded in the petition. Conservatory orders are public law remedies meant to facilitate orderly functioning within public agencies and uphold the adjudicatory authority of the court in the public interest. The legal principles governing conservatory orders differ from those applicable to injunctions, and the Petitioner ought to have properly pleaded for an injunction in both the petition and the motion.
12. The Respondent submitted the Notice of Motion fails to satisfy the established principles for granting an interlocutory injunction. The Petitioner's grievance is solely dissatisfaction with a managerial decision regarding her transfer, which is an administrative function of the employer and does not constitute a constitutional issue. The employer must retain control over its officers and operations to ensure a harmonious and productive workplace. The Respondents invoke the principle of constitutional avoidance, arguing that the petition does not raise any proper constitutional issue for the court's determination and should therefore fail.

## **Respondent's Written Submissions**

13. The Respondents filed written submissions dated 10<sup>th</sup> February 2025 in opposition to the Notice of Motion, relying on the grounds set out in the Statement of Grounds of Opposition dated 22<sup>nd</sup> January 2025. They argued that the application is incompetent and misconceived as there is no substantive prayer for a conservatory order or an injunction pleaded in the petition. The Applicant ought to have properly pleaded for an injunction in both the petition and the motion, and the failure to do so renders the application without legal basis.
14. The Respondent relied on the Supreme Court in *Gitobu Imanyara & 2 Others v. Attorney General* pronounced those proper pleadings are a prerequisite to granting relief, and the Applicant cannot be granted orders on a matter not pleaded. The Respondents further submitted that conservatory orders are distinct from injunctions, operating in the public law realm to facilitate the orderly functioning of public agencies and uphold the adjudicatory authority of the court in the public interest.
15. The Respondent further relied on Supreme Court in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others* affirmed that the principles governing conservatory orders differ from those applicable to injunctions. The Applicant has not pleaded or prayed for an order for stay of execution, nor has she satisfied the conditions for the grant of an interlocutory injunction. The establishment of a prima facie case alone does not suffice for granting an interlocutory injunction.
16. The Court of Appeal in *Barclays Bank of Kenya Ltd. v. Banking, Insurance & Finance Union (Kenya)* held that an Applicant must satisfy three distinct and sequential conditions for the award of an interlocutory injunction, which the Applicant has failed to meet. The Respondents further argued that the Applicant's grievance is merely dissatisfaction with a transfer, which is a routine managerial decision that does not raise a constitutional issue.
17. The employer must have control over its officers and operations to maintain a productive and harmonious workplace, as affirmed by the Court of Appeal in *Judicial Service Commission v. Shollei & Another*. The decision to transfer an employee falls within the employer's managerial prerogative, even if not expressly stated in the employment contract, as implied terms of employment recognize an employer's authority to reassign duties. The Respondents urged the court to dismiss the Notice of Motion with costs.



18. In the premises, having considered the pleadings, submissions, and applicable law, this Court finds that the Petitioner/Applicant has demonstrated a prima facie case with a likelihood of success. The Respondent's actions, particularly the unilateral transfer of the Petitioner without consultation or a hearing, raise serious questions regarding the violation of the Petitioner's constitutional rights under Articles 41, 47, and 50 of *the Constitution*.
19. The Respondent's failure to provide reasons for the transfer and to accord the Petitioner an opportunity to be heard before effecting the transfer contravenes the principles of fair administrative action and fair labour practices.
20. The Court further finds that the Respondent's reliance on managerial prerogative does not override the Petitioner's constitutional rights. While an employer has control over its workforce, such control must be exercised within the confines of the law and respect for due process. The Court is persuaded that the Petitioner has established a prima facie case warranting the grant of conservatory orders to prevent further prejudice pending the hearing and determination of the main petition. The argument that conservatory orders only apply in public law matters is not persuasive in this case, as the relief sought is to safeguard constitutional rights, which this Court has jurisdiction to enforce.
21. Accordingly, the Court grants the following orders:
  1. A conservatory order is hereby issued restraining the Respondent from effecting the transfer of the Petitioner from Mater Misericordiae Hospital in Nairobi to Thika Medical Centre pending the hearing and determination of the petition.
  2. The Respondent is directed to reinstate the Petitioner to her initial workstation and work schedule pending the hearing and determination of the petition.
  3. The costs of this application shall be in the petition.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27<sup>TH</sup> DAY OF MARCH, 2025.**

**HELLEN WASILWA**

**JUDGE**

