



Malinga v National Government Constituencies Development Fund Board (Employment and Labour Relations Cause 1212 of 2016) [2025] KEELRC 1084 (KLR) (3 April 2025) (Ruling)

Neutral citation: [2025] KEELRC 1084 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 1212 OF 2016**

HS WASILWA, J

APRIL 3, 2025

BETWEEN

GEORGE MALINGA CLAIMANT

AND

**NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND
BOARD RESPONDENT**

RULING

1. The Applicant, Loise Museo Malinga, filed a Notice of Motion dated 2nd October 2023 seeking orders that: -
 - i. Spent
 - ii. this Honorable Court be pleased reinstate the Cause and enlarge time to allow for substitution of the deceased Claimant with Loise Museo Malinga, the Applicant, who is willing to continue with the prosecution of the claim.
 - iii. costs be in the cause.
2. The Application was brought under Order 24 Rule 3 and 7(2) of the Civil Procedure Rules and Sections 1, 1A, 3A and 7 OF THE *Civil Procedure Act* and Article 159(d) of *the Constitution*, Section 12 of the Employment and *Labour Relations Act*, Rule 17(1) of the Employment and Labour Relations Court (Procedure) Rules and all other enabling provisions of law and is supported by an affidavit sworn by Loise Museo Malinga.

Applicant's Case

3. The Applicant avers that the Claimant who was her son, died on 14th February 2018 and the prayers made in the claim in this cause survived him. She asserts that the suit abated one year after the Claimant's death.



4. The Applicants avers that the Claimant's death destabilized her and she was unable to seek substitution in this cause immediately. Further, her petition for grant of a limited grant of letters of administration in Kitui Chief Magistrates Court Probate and Administration Succession Cause No. E176 of 2020 took longer than anticipated as it was granted on 19th May 2021 and issued on 21st May 2021.
5. It is the Applicants' case that through her advocates, she initially filed an application for substitution dated 30th August 2021 which was dismissed by this Court vide a ruling delivered on 2nd June 2022 on account of the suit having already abated by the Claimant's demise.
6. The Applicant avers that subsequently her attempts to seek payment of the terminal dues from the Respondent have been unsuccessful as the cause herein was never determined. Therefore, it is only fair that the claim be determined on its merit so that the dues the Claimant's should receive from the Respondent can be processed.
7. It is the Applicant's case that this Court has wide discretion to grant orders prayed for enlargement of time for the abated suit herein to allow for substitution of the Claimant to avoid miscarriage of justice.
8. The Applicants reiterate that the 1st Respondent's actions violates Article 10 of the Constitution as it is devoid of transparency and accountability and by failing to provide the reasons for the re-advertisement, its decision is in breach of the Fair Administrative Act and Article 41 of the Constitution on fair labour practices.
9. Further, the Applicants contends that the 1st Respondent's action to cancel the initial recruitment process undermines Article 232 of the Constitution on public service values and principles and violates the shortlisted candidates' freedom from discrimination.
10. It is the Applicants' position that if the Court does not grant the interim conservatory orders, the re-initiated recruitment exercise will continue allowing the appointment of an unqualified candidate as the Managing Director.
11. Further, the Respondents will suffer no prejudice as there is an Acting Managing Director and the initial recruitment exercise will cause the most qualified candidate be appointed.

Respondents' Case

12. In response to the Application, the 2nd and 4th Respondents filed Grounds of Opposition dated 28th January 2025 opposing the same on grounds that it has not met under *Giella Vs Cassman Brown & Co Ltd* [1973] EA 358; the Petitioner have failed to demonstrate a prima facie case, that that they will suffer irreparable injury which would not adequately be compensated by way of damages and in case the court is in doubt then it can be granted on a balance of convenience.
13. The Respondents further oppose the application on grounds that Petitioners lack locus standi as set out by the Court of Appeal in Civil Appeal No. 119 of 2017, *Public Service Commission and 2 others Vs Eric Cheruiyot & Others* therefore this Court lacks the jurisdiction to hear and determine the issues raised.
14. Lastly, they contend that the application does not disclose any constitutional violation by the Respondents and the allegations made are unfounded and that the application is premature noting the letter requesting for documents was issued on 24th December, 2024 while the petition was filed on 30th December, 2024 and hence does not meet the threshold for access to information under Article 35 of the Constitution.



15. The 1st and 3rd Respondents also filed their Grounds of Opposition dated 21st January 2024 which raised similar grounds in opposition of the Application.
16. The 1st and 3rd Respondent further filed a Replying Affidavit dated 19th February 2025 in which it reiterated that the 1st Respondent is a State Corporation established under the [Kenya Airports Authority Act](#), Cap 395, Laws of Kenya which provides under Section 6 that: “There shall be a managing director of the Authority who shall be appointed by the Cabinet Secretary after consultation with the Board and whose terms and conditions of service shall be determined by the Cabinet Secretary in the instrument of appointment or otherwise in writing from time to time.” Therefore, by dint of the Section 6 and Mwongozo, the orders sought against the 3rd Respondent cannot issue.

Applicants/Petitioners’ Submissions

17. The Applicants/Petitioners submitted that contrary to the Respondents grounds of opposition, this Court has jurisdiction as established under Article 162 of [the Constitution](#) and Article 165 which provides that this Court being of equal status as the High Court has authority to determine if rights or freedoms in the Bill of Rights have been infringed or are under threat, and to interpret [the Constitution](#), including determining whether actions, or laws align with constitutional dictates
18. In respect to the Petitioner having locus standi, they submitted that Article 22 of [the Constitution](#) permits any party to seek relief, including temporary relief, when alleging a violation or threat of violation of constitutional rights or Freedoms; and further a person may also institute proceedings in the public interest.
19. The Applicants submitted that the legal basis for grant of conservatory orders was laid down in Centre for Rights Education and Awareness and 7 Others v The Attorney General [HCCP No. 16 of 2011], where the High Court outlined that for grant of conservatory orders: a party must show a prima facie case with a likelihood of success and demonstrate real danger of prejudice from the violation or threatened violation of [the constitution](#) without such orders. They further relied in the case of Board of Management of Uhuru Secondary School v City County Director of Education & 2 others [2015] KEHC 2174 (KLR) which clarified that for conservatory orders, potential arguability alone does not suffice; there must be a clear likelihood of success beyond mere speculation.
20. In respect to a prima facie case, it is the Petitioners submission that the Respondents aims to manipulate the recruitment process for the Managing Director, initiated on 11th June 2024. This is evidenced by the lack of transparency in the re-advertisement of the position contrary to Article 10 of [the Constitution](#); absence of any board resolution cancelling the prior recruitment exercise or reinitiating the second recruitment exercise and the potential violation of constitutional rights such as fair labour practice, access to information and public participation.
21. As to irreparable harm, the Petitioners submitted that should the Court fail to grant the conservatory orders and allow a repeat recruitment process, the integrity of the process will be compromised leading to an appointment devoid of merit and a loss of public trust in the appointment process; unnecessary public expenditure will be incurred in violation of Article 201 (d) of [the Constitution](#); and the rights of the candidates who have already been interviewed will be unjustly affected, possibly leading to discrimination.
22. The Petitioners further submitted that the public interest nature of this matter does not lend itself to compensation by way of damages and the entire purpose of the Application and the Petition is to uphold the Constitutional imperatives of transparency and accountability.



23. On whether the balance of convenience tilts to the grant of conservatory orders, it is the Petitioners' submission that the Respondents will not suffer prejudice as there is currently an Acting Managing Director in place. Further, the initial recruitment process began and interviews have been conducted, therefore, there is no gap. Lastly, it is Court's role to safeguard public interest as stated in *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 Others* [2014] eKLR,

“Ensuring a lawful, transparent and merit-based appointment process is undeniably in the public interest, which further supports the confirmation of the conservatory orders.”

24. The Petitioners submission on access to information that although the 1st and 3rd Respondents have objected to providing the information sought on the spurious ground of “confidentiality; however, *Access to Information Act*, Cap. 7M, Laws of Kenya distinguishes “information” which has been sought under the instant Application from “personal information” which the Applicants have not sought. Therefore, the Respondents has the onus to demonstrate what is “personal” about the information sought. The Applicants have only requested the names of the panel members conducting an interview; and the names of longlisted and shortlisted candidates; and the remainder of the information requested are public records which ought to be freely shared by the 1st Respondent.

Respondents' Submissions

25. The Respondents submitted that the applicant are not competent parties within the meaning of section 12 of the *Employment and Labour Relations Court Act* (“ELRC Act”) and therefore have no locus standi before this honourable court. They argue that the Petitioners do not have any identifiable employment relationship with the Respondents and their interest in the recruitment exercise is not clear from the pleadings filed.

26. To cement their submission, the Respondent relied on Section 12(2) of the ELRC Act which specifies the parties who may lodge or against whom may be lodged before the court, applications, claims, or complaints, to be an employee, an employer, a trade union, an employer's organisation, a federation, the Registrar of Trade Unions, the Cabinet Secretary or any office established under any written law for such purpose. Further the Court, Nairobi ELRC.C No. 1237 of 2014: *Casmir Nyakuru Nyaberi v Mwakikar Agencies Limited* [2016] eKLR which this Court stated:

“The jurisdiction of the Employment and Labour Relations Court as far as employment matters are concerned is limited by the existence of an employment relationship as defined in law and the Court must always satisfy itself on this account before proceeding any further.”

27. It is the Respondents' submission that the Petitioners' reliance on Article 22 and 258 of *the Constitution* is not enough to state that the petition is brought in public interest. The Petitioners have a duty to identify the person, class of persons or member of an association whose rights have been threatened or violated and state with precision how the said rights have been violated. Additionally, the Petitioners cannot invoke the jurisdiction of this court by merely citing constitutional provisions and describing themselves as “an umbrella association of lawyers practicing in Kenya registered under the *Societies Act*, Cap 108, Laws of Kenya” and “a public-spirited Advocate of the High Court Kenya.”

28. The Respondents submit that Section 6 of the *Kenya Airports Authority Act* provides that the appointment of the 1st Respondent's Managing Director is the joint responsibility of the Board of Directors and the Cabinet Secretary. Additionally, the statutory mandate of the 1st Respondent's Board of Directors as envisaged under section 6 above as well as in the Code of Governance for State



Corporations (Mwongozo) includes the advertisement and the re-advertisement of the position of the Managing Director in cases where no suitable candidate is found in an interview process.

29. It is the Respondents' submission that the recruitment process complained of in this Petition has not crystallized to warrant the intervention of this court.
30. The Respondents submitted that the Petitioners have not established a prima facie case as defined in *Njoroge v Ministry of Education & 3 others; Bunyi & 2 others (Interested Parties) (Petition E015 of 2022)* [2022] KEELRC 13498 (KLR) which provides:

“ A prima facie case is the establishment of a legally required rebuttable presumption and such is sufficiently established in the parties' favour if in initial examination, there is sufficient evidence which appears to exist to support a case.”
31. It is the Respondents submission that the Petitioners have not provided any evidence to support their allegations on possible manipulation of the recruitment process or the various constitutional and statutory violations set out in the petition and neither have they demonstrated how the re-advertisement of the position of the 1st Respondent's Managing Director affected their rights or the rights of those they have lodged this petition on their behalf.
32. The Respondents submitted that the Applicants have not demonstrated how they will be prejudiced considering that the re-advertisement is open to all qualified persons. Additionally, the Petitioners failed to demonstrate prejudice occasioned upon them as a result of the re-advertisement and how the re-advertisement of the Managing Director's position violated their constitutional rights.
33. On public interest, it is the Respondents' submission that the balance of convenience tilts in favour of having a substantive holder for the position of the 1st Respondents Managing Director. They submit that the position is critical to the implementation of the 1st Respondent's statutory mandate as outlined under Section 8 and 9 of the *Kenya Airports Authority Act* and it should be substantively filled without undue delay. Therefore, grant of the orders sought would be against public policy and would be countermanding a statutory mandate bestowed upon the 1st Respondent's Board of Directors and the 2nd Respondent.
34. It is the Respondents' submission that the orders sought by the Applicants on access to information and disclosure of the person who authorised re-advertisement within three (3) and Seven (7) days respectively have been rendered moot by the effluxion of time and that the orders cannot be granted on the basis of protection of the right to privacy of the candidates and the persons affected who are not parties in this suit and have no opportunity to defend themselves as well as in light of the provisions of Data Protection Act on data handling. They relied on the case of *Mwangi v ABSA Bank Kenya PLC (Cause E065 of 2023)* [2024] KEELRC 2399 (KLR) (1 October 2024) (Judgment) which reaffirmed the obligation of employers to protect personal data and uphold the privacy rights of employees.

Analysis and Determination

35. I have examined the averments and submissions of the parties herein. The issue for this court's determination is whether the applicant being a mother to the deceased claimant can be substituted as a fit person to process this claim. At this point this Court cannot go into the merit or otherwise of the claim as has been submitted by the respondent.
36. From the pleadings herein, the prayers sought by the claimant extend beyond matters of information to be supplied. This court has power to consider any part of the claim that is personal to the deceased and render a just decision.



37. Given that the claimant died, this claim indeed survived him and his mother is a fit person to take up the claimant's presentation. I will therefore allow based on the pleadings and submissions the reinstatement of this cause and allow substitution of the deceased claimant with Loise Museo Malinga, the applicant to continue and prosecute the claim.

38. Costs in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 3RD OF APRIL, 2025.

HELLEN WASILWA

JUDGE

