



Gema Watho Association & another v Kenya Airports Authority & 3 others (Employment and Labour Relations Petition E222 of 2024) [2025] KEELRC 1081 (KLR) (2 April 2025) (Ruling)

Neutral citation: [2025] KEELRC 1081 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E222 OF 2024**

**HS WASILWA, J
APRIL 2, 2025**

BETWEEN

GEMA WATHO ASSOCIATION 1ST PETITIONER

FRANCIS WANJIKU 2ND PETITIONER

AND

KENYA AIRPORTS AUTHORITY 1ST RESPONDENT

**CABINET SECRETARY, MINISTRY OF ROADS & TRANSPORT 2ND
RESPONDENT**

CALEB KOSITANY 3RD RESPONDENT

HON ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. The Applicant filed a Notice of Motion dated 30th December 2024 seeking orders that: -
 - i. Spent
 - ii. A conservatory order be issued, ex parte at the first instance to restrain the Respondent, their agents and/or servants from recruiting, processing, interviewing and/or appointing any person for the position of its Managing Director further to the re-advertisement of that vacancy on 20th December 2024 pending the hearing and determination of this Application inter parties;
 - iii. A conservatory order be issued, to restrain the Respondents Respondent, their agents and/or servants from recruiting, processing, interviewing and/or appointing any person for the position of its Managing Director further to the re-advertisement of that vacancy on 20th December 2024 pending the hearing and determination of this Petition;



- iv. An order be issued to compel the 1st Respondent, within three (3) days of the date of service of this Order to supply to the Applicants the following documents, in relation to the recruitment exercise commenced by the advertisement on 11th June 2024:-
 - a. Certified true copy of the List of Longlisted candidates who applied for the vacancy.
 - b. Certified true copy of the List of Shortlisted candidates who applied for the vacancy.
 - c. Certified true copy of the List of Names of the Panel members that conducted the interviews.
 - d. Certified true copy of the score sheet submitted by each Panel Member with respect to every interviewed candidate.
 - e. Certified true copy of the Minutes of the Interview Panel.
 - f. Certified true copy of the Minutes of the Board of Directors approving the re-advertisement (if any).
 - v. An order to compel the 1st Respondent to disclose the name of the Officer and/ or person who authorised the re-advertisement of the vacancy of the position of Managing Director, within seven (7) days;
 - vi. Costs of this application be provided for.
2. The Application was brought under Rule 23 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules; Section 4 & 5 of the *Access to Information Act*, 2016; Rule 3 of Part I of the Rules of Court under the *Judicature Act* and section 1A of the *Civil Procedure Act* and is supported by an affidavit sworn by Francis Wanjiku (the 2nd Applicant/Petitioner).

Applicants/ Petitioners' Case

3. The Applicant avers that the 1st Respondent published an advertisement for the vacancy of the Managing Director on 11th June 2024. Subsequently, the 1st Respondent received applications from interested individuals; shortlisted qualified applicants and the interviews were conducted on 4th December 2024 using hybrid format that is both physical and virtual format.
4. The Applicants further avers that upon conclusion of the interview process, the 1st Respondent re-advertised the position on its website and the Daily Nation newspaper dated 20th December 2024.
5. It is the Applicants' case that the Respondents action of re-advertising the Managing Director position seeks to circumvent the original recruitment process so as the Respondents' candidate of choice may be unlawfully appointed.
6. 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.
7. 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.



8. 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.
9. 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

10. 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.
11. 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.
12. 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*.
13. The 1st and 3rd Respondents also filed their Grounds of Opposition dated 21st January 2024 which raised similar grounds in opposition of the Application.
14. 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

15. 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
16. 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.
17. 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.

18. 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.
19. 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.
20. 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.
21. 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.”

22. 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

23. The Respondents submitted that the applicants 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.



24. 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.”

25. 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.”

26. 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.

27. It is the Respondents' submission that the recruitment process complained of in this Petition has not crystallized to warrant the intervention of this court.

28. 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.”

29. 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.

30. 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.

31. 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.

32. 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

33. I have examined all the averments and submissions of the parties herein. When this application came up before this Court on 3/1/2025 ex-parte interim orders were granted stopping further processing of the recruitment exercise and re-advertisement of the MD'S post of the 1st respondent herein.

34. The applicants sought to be supplied with certain documents which they averred were material to their case. The respondents have submitted that the applicants lack locus to file this petition/application. On this issue, I refer to article 22 of [the Constitution](#) of Kenya 2010 which provides as follows:

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

35. The issue of the applicants lacking locus cannot therefore stand. On the issue of the prayers sought in this application, the respondents have submitted that the application is premature as the letter requesting for documents was issued on 24th December 2024 whereas the petition was filed on 30th December 2024. They contend that the application did not meet the threshold for access the information under article 35 of [the Constitution](#).

36. Article 35 of [the Constitution](#) states as follows:

“35.

- (1) Every citizen has the right of access to—
 - (a) information held by the State; and
 - (b) information held by another person and required for the exercise or protection of any right or fundamental freedom.
- (2) Every person has the right to the correction or deletion of untrue or misleading information that affects the person.
- (3) The State shall publish and publicise any important information affecting the nation.”



37. The respondents have not explained how article 35 of *the Constitution* relates to the information requested by the petitioner.
38. The respondents have also submitted that there are no constitutional violations made by the respondents. Indeed the petitioners have explained the constitutional violations made which included alleged lack of transparency in the recruitment of the 1st respondents MD which they aver was evidenced by a re-advertisement of the position contrary to article 10 of *the Constitution*.
39. The petitioner also averred there is breach of article 201(d) of *the constitution* dealing with unnecessary public expenditure.
40. In consideration of the submissions herein, indeed, there was an advertisement for the position of MD of 1st respondent and shortlisting was done. It is not clear why there is a re-advertisement of the same position without explaining why the previous advertisements have not borne fruit. This is indeed a breach of article 201(d) which states as follows:

“(d) public money shall be used in a prudent and responsible way”

41. Having considered the above submissions and findings, I find that the applicants have established a prima facie case to warrant issuance of orders sought which I hereby grant confirming interim orders granted as follows:
 1. A conservatory order be issued, to restrain the Respondents Respondent, their agents and/or servants from recruiting, processing, interviewing and/or appointing any person for the position of its Managing Director further to the re-advertisement of that vacancy on 20th December 2024 pending the hearing and determination of this Petition;
 2. The respondent to forthwith supply the information sought under prayer (iv) within 14 days.
42. Costs of this application to be in the petition.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 2ND OF APRIL, 2025.

HELLEN WASILWA

JUDGE

