



Mativa v Aga Khan University Hospital Nairobi (Cause E927 of 2024) [2025] KEELRC 1310 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KEELRC 1310 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E927 OF 2024**

**AK NZEI, J
MAY 9, 2025**

BETWEEN

DR. BONIFACE MATIVA CLAIMANT

AND

AGA KHAN UNIVERSITY HOSPITAL NAIROBI RESPONDENT

RULING

1. The Claimant/Applicant sued the Respondent vide a Memorandum of Claim dated 30th October, 2024 seeking the following reliefs:-
 - a. A declaration that the Respondent's actions are unlawful, unconstitutional and contrary to the Claimant's contract of employment as they violate Articles 25(a), 27 28, 35, 41 and 47 of the *Constitution* and Section 5(1), (2), (3), (5), (6), (7) and (8) of the *Employment Act*.
 - b. A declaration that the Respondent's actions are actuated by malice, ill will, bad faith and a wilful intention to exploit the Claimant contrary to public policy and the law, and the Respondent's own Human Resource Policies and Procedures.
 - c. An order directing the Respondent to release and implement the authenticated result of the interview for the position of Chief Medical Officer of the Respondent conducted on 26th May, 2024.
 - d. An order preventing advertisement, interviewing or taking any steps towards filling the position of Chief Medical Officer until the outcome of the recruitment process done on 26th May, 2024 is acted upon, in favour of the Claimant.
 - e. An order for payment of underpayments totalling Kshs.62,783,185/=, and remittance of employer pension contributions amounting to Kshs.3,908,138.625/=.



- f. An order preventing the Respondent from taking any retaliatory or hostile actions that would amount to harassment, discrimination or victimization of the Claimant for filing the suit to actuate his rights.
 - g. General damages for discrimination, harassment and unfair labour practices meted out to the Claimant, as the Court will be pleased to award.
 - h. Cost of the claim.
 - i. Interest at Court rates.
 - j. Any other relief that the Court deems appropriate and necessary to grant.
2. The Claimant pleaded that having been in the Respondent's employment for 15 years and holding the position of the Director Clinical Services and Utilization Management by February 2021, he was, vide a letter dated 12th March, 2021, appointed to the position of the Respondent's Acting Chief Medical Officer; and that the understanding was that the Claimant/Applicant was to hold the acting position for a short period to allow the Respondent to carry out recruitment of a substantive office holder. That the Claimant/Applicant was required to perform both the roles of his substantive office as Director, Clinical Services and those of the Acting position as Chief Medical Officer. That the letter dated 1st March, 2021 spelt out the terms, conditions and responsibilities of the acting position.
3. The Claimant further pleaded:-
- a. that the Respondent took more than one year to commence recruitment process, and that during that time, the Claimant's performance was exemplary.
 - b. that eventually, the Respondent placed an advertisement for the position of Chief Medical Officer, with interviews being conducted on 26th May, 2022. That three candidates were shortlisted, the Claimant/Applicant being one of them.
 - c. that the Claimant/Applicant emerged the successful candidate and the other two candidate received regrets confirming that they were not successful.
 - d. that two weeks after the interview, the Respondent's CEO (one Mr. Rashid Khalani) showed the Claimant/Applicant the post interview scores and assured him that he was the successful candidate, and that the process towards confirmation had commenced and would be concluded without delay.
 - e. that the Claimant continued performing the dual roles awaiting formal confirmation to the position of Chief Medical Officer by the Respondent, trusting the CEO to keep his word and to conclude the substantive appointment.
 - f. that after waiting for an inordinate time for a formal letter of confirmation, the Claimant did follow-ups with the Respondent's CEO and Regional Director (Human Resources), but was assured that confirmation would be closed by end of March 2023.
 - g. that there being no confirmation, the Claimant/Applicant formally wrote to the Respondent's CEO on 5th April, 2023 enquiring when the matter would be closed, and on 3rd May, 2023 wrote an email to the CEO asking that his grievance be addressed. That contrary to the Respondent's grievance procedure, the grievance was never addressed.
 - h. that by deceptively and repeatedly promising to confirm the Claimant/Applicant without doing it, the Respondent wilfully exploited the Claimant for 43 months, with intention to



do so for a further 12 months as evidenced by a letter dated 3rd September, 2024; which the Claimant declined to execute.

- i. that by a letter dated 18th September, 2024, the Respondent unilaterally terminated the Claimant's interim appointment as interim Chief Medical Officer effective September 2024, and verbally instructed him to hand over to a new acting Chief Medical Officer.
 - j. that the effect of the letter dated 3rd September, 2023, which the Claimant had declined to sign, was complete alteration of and mutilation of the existing consensual employment contract and replacement thereof with terms that were unjust, in breach of the Employment Act and to the disadvantage and detriment of the Claimant, without his consent. That the said letter had been signed by the Respondent's CEO, HR Director and dean, and sought to reduce the Claimant/Applicant's remuneration and to prolong further the acting appointment as CMO (Chief Medical Officer).
4. The Memorandum of Claim was filed together with an urgent application dated 30th October, 2024 seeking orders that the Court stays recruitment of the Chief Medical Officer of the Respondent unless the results of the interview held on 26th May, 2022 are released and the successful candidate, the Claimant, is issued with a letter of appointment. The application, which the Respondent had opposed, was withdrawn by the Claimant on 14th November, 2024 on ground that the Claimant/Applicant had received an email from the Respondent to the effect that the Respondent had terminated the recruitment process in issue, hence taking away the power of the application.
5. On 29th November, 2024, the Claimant/Applicant filed another urgent application, dated 27th November, 2024 seeking Orders:-
- a. That pending inter-partes hearing and determination of the application, the Court be pleased to grant an order of stay of recruitment of the Chief Medical Officer of the Respondent unless the results of the interview held on 26th Ma, 2022 are released and the successful candidate, the Claimant, is issued with a letter of confirmation or reasons for termination of the recruitment exercise.
 - b. That pending hearing and determination of the claim, the Court be pleased to order a stay of recruitment of the Chief Medical Officer of the Respondent unless results of the interview held on 26th May, 2022 are released and the successful candidate, the Claimant, is issued with a letter of confirmation, or reasons for termination of the recruitment exercise.
 - c. That costs of the application be in the cause.
6. The application sets out on its face the grounds on which it is based, and is anchored on the Claimant/Applicant's supporting affidavit sworn on 27th November, 2024; which basically re-states and amplifies the averments made in the statement of claim, as amended on 27th November, 2024.
7. The foregoing is the application before me for determination.
8. The application is opposed by the Respondent vide a replying affidavit of Catherine Kariba sworn on 13th December, 2024. It is deponed in the said replying affidavit:-
- a. that issues relating to the release of the 26th May, 2022 interview results and the recruitment of CMO are two separate issues; and that release of the interview results is in effect a final order which can only be granted after the suit has been heard, but not at an interlocutory stage.



- b. that the 2022 recruitment process was terminated, and that the Respondent is not obligated, under the *Employment Act* or its policies, to release interview results.
 - c. that there was a requirement that the successful candidate would also be interviewed by the Provost and President of the Respondent, which process was not undertaken.
 - d. that this Court cannot issue orders aimed at restraining the hand of an employer from running its own affairs, as Management of an enterprise is the prerogative of an employer, essential to ensure that the business remains viable and sustainable.
 - e. that the application seeks to suspend a legitimate recruitment process aimed at appointing the Respondent's CMO who not only manages the Respondent's day-to-day affairs, but ensures that the Respondent's hospital runs smoothly.
 - f. that the Claimant's allegation that he was the successful candidate in the interview process have not been substantiated; and that no evidence on the alleged assurances that the Claimant was the successful candidate has been presented.
 - g. that the application is based on disputed facts as pleaded in the Respondent's defence that require substantive hearing.
 - h. that the Respondent is a private entity whose operations are governed by its policies and practices, none of which specify a required timeframe for initiating and completing a recruitment process.
 - i. that the Claimant has no entitlement to the CMO role essentially, and that the hiring process was entirely at the Respondent's discretion and subject to the Respondent's internal recruitment procedures. That the Claimant/Applicant cannot stall a legitimate process based on unproved allegations.
 - j. That on the prayer for injunction, the Claimant has not established a prima facie case as he has no right to the interview results under the *Employment Act* and the Respondent's policies; and that the Claimant has set out a quantified claim at paragraph 4.0 of his amended statement of claim.
9. The Claimant filed a further affidavit, sworn by himself on 19th December, 2024; and deponed that suspension of recruitment of the Respondent's Chief Medical Officer (CMO) will not affect key management and logistical activities central to the Respondent as the position is currently filled by a competent person in an acting capacity; a position the Claimant had held since 2021 upto September 2024. The Claimant further deponed:-
- a. that the only way to find out if the Claimant was successful in the interview is by the Respondent's interviewing committee availing the result of the interview report and score sheet which they have deliberately kept away from the Court.
 - b. that the law envisages that once staff undergo an interview, there is a legitimate expectation by those interviewed that they would be notified of the outcome within a reasonable time, and that failure to do so amounts to an injustice and unfair labour practice.
 - c. that employers, whether public or private, are required to act in good faith and not to subject employees to a work environment that is oppressive and discriminatory.
10. The Respondent filed a detailed memorandum of defence dated 4th December, 2024, denying the Claimant/Applicant's pleadings/allegations and pleading, inter-alia:-



- a. that the Claimant’s allegation that he was the successful candidate in the 2022 interview process and that the other two candidates had received regrets, and the allegations of violation of Articles 27, 28, 41 and 47 of the Constitution and Section 5(5), (6), (7) and (8) of the Employment Act were denied by the Respondent and the Claimant/Applicant put to strict proof thereof.
 - b. that contrary to the Claimant’s allegation that he was the successful candidate in the 2022 recruitment exercise for the CMO position, there was an additional requirement that the final candidate would also be separately interviewed and/or approved by the Respondent’s President and Provost, and that the additional steps were never undertaken; and the Claimant was never assured by the Respondent that he was the successful candidate.
 - c. that the Claimant/Applicant had, in an email dated 3rd May, 2024, confirmed that the Respondent’s CEO had repeatedly told him that the recruitment process had been put on hold due to apprehension of a possible adverse outcome of a Court case against the Claimant and the Respondent (Nairobi ELRC Case No. 1019 of 2021 – JEM – vs – Aga Khan Health Service, Kenya t/a Aga Khan University Hospital, Nairobi & Dr. Boniface Mativa) wherein allegations of sexual harassment and sexual assault had been made against the Claimant/Applicant; and allegations also made in a newspaper report that the Respondent had been supporting and protecting the sexual predator. That the Court case is yet to be determined.
 - d. that the Claimant is not entitled to the reasons that informed the termination of the 2022 recruitment process as there is no legal obligation under the Respondent’s policies and the Employment Act to provide the same. That disclosure of results does not arise as the interview process was not completed.
 - e. that clause 4.0 and 4.1 of the Respondent’s Grievance Handling Policy provides that decisions concerning an employee’s performance, salary and promotion do not fall within the purview of the Grievance Handling Policy.
 - f. that for the reasons set out in the Respondent’s (detailed) memorandum of defence, the Claimant is not entitled to any of the reliefs sought by him.
11. Parties filed written submissions on the application pursuant to the Court’s directions in that regard; which I have considered.
 12. The Claimant/Applicant is seeking an injunctive order. According to *Kerr on Injunctions* (6th Edition) Chapter x (Section 2), a Court of equity has jurisdiction to issue an injunction pending suit. Whether or not the Jurisdiction will be exercised depends on the special circumstances of each case. If there are clear undisputed facts and/or contract, an injunction will issue. But if the facts of the case are disputed, unclear or in case of a contract the validity of the contract is open to doubt, the question of whether or not an injunction will issue pending suit becomes a question of comparative convenience or inconvenience. If greater inconvenience would arise to the plaintiff from withholding the injunction than to the defendant from granting it, an injunction will issue.
 13. If, on the other hand, greater inconvenience would arise to the defendant from granting the injunction than to the plaintiff from withholding it, an injunction will not be granted.
 14. In the present case, the Court was on 14th November, 2024 informed by Counsel for the Claimant/Applicant that the Claimant/Applicant had, on 11th November, 2024, received an email from the Respondent informing him that the Respondent had terminated the recruitment process in issue; and that the termination had taken away the power of the Claimant’s application then before the



Court (dated 30th October, 2024). On the said date, the Claimant withdrew his said application, and subsequently amended his Memorandum of Claim on 27th November, 2024 to, inter-alia, include the following prayer:-

“(c) An order directing the Respondent to release and implement the authenticated results of the interview for the position of Chief Medical Officer of the Respondent conducted on 26th May, 2022 and provide reasons for termination of the concluded recruitment exercise which started in 2022.”

15. Indeed, I have seen and perused the said email dated 11th November, 2024 as it now forms part of the documents filed herein. The same states as follows:-

“Dear Dr. Mativa,

This is to inform you that after careful consideration, the institution has made the decision to terminate the 2022 search process for the position of Chief of Staff/Associate Dean, Clinical affairs.

We thank you for your time and interest in this role as well as your effort throughout the process.

If or when the position is re-advertised, you will be informed for your consideration.

Kind regards,

Donna.”

16. The Claimant has deponed herein that he is no longer acting on the position of Chief Medical Officer of the Respondent, which position was the subject of the now terminated recruitment process, and that another person occupies the position in an acting position. Further, no evidence has been exhibited demonstrating that the Claimant was the successful candidate in the interviews conducted by the Respondent on 26th May, 2022, and that the other two shortlisted candidates received regrets regarding the said interviews as pleaded by the Claimant/Applicant. There is also the pleading by the Respondent that the 2022 interview process was never completed.

17. Indeed, the Claimant deponed in his further affidavit referred to in paragraph 9 of this Ruling:-

“5. THAT the only way to find out if I was successful in the interview is by the Respondent’s interviewing committee availing the result of the interview report and score sheet which they have deliberately kept away from the Court as the same would not advance their case.”

18. The foregoing can only be done in a full trial of the suit. Section 20(4) of the [Employment and Labour Relations Court Act](#) provides as follows:-

“(4) For the purpose of dealing with any matter before it, the Court may by order in writing signed by or on behalf of the Court require any person to –

- a. furnish in writing or otherwise, such particulars in relation to such matters as it may require;
- b. attend before it;
- c. give evidence on oath or otherwise; and



d. produce any relevant documents.”

19. At this stage of the proceedings herein, the question of “who was the successful candidate in the interviews conducted by the Respondent on 26th May, 2022” cannot be determined by this Court. Evidence will have to be taken before determination can be made. The Claimant’s allegation that he was the successful candidate stands unproved, and is denied by the Respondent. An order of injunction/restraining order cannot issue against the Respondent under such circumstances.
20. Further, if, upon trial, merit is found in the Claimant’s allegation (pleading) that the Respondent subjected him to harassment, discrimination, victimization and unfair labour practice, an award of general damages, which relief the Claimant seeks, among others, will suffice. In my view, the Claimant has not met the requirements for granting of an injunction as set out in the case of *Giella – vs Cassman Brown and Company Limited* [1973] EA 358.
21. The Respondent cited in its written submissions the case of *Nguruman Limited – vs – Jan Bonde Nielsen & 2 Others* [2014] eKLR, where the Court stated:-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.”
22. In view of the circumstances of the case herein, this Court will be reluctant to issue orders whose effect will be to injunct the employer/the Respondent from undertaking key human resource functions of recruitment and selection of necessary staff, appointments and promotion. The general principle is that the Court will not, without good reason, interfere with an employer’s right and entitlement to undertake those functions.
23. In view of all the foregoing, and having considered written submissions filed on behalf of both parties herein, the Claimant’s Notice of Motion dated 27th November, 2024 is hereby dismissed with no order as to costs. The suit herein shall be fast-tracked, and shall be set down for hearing.
24. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF MAY 2025

AGNES KITIKU NZEI

JUDGE

Order

This Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Miss Okaka for the Claimant/Applicant

Mr. Bett for the Respondent

