



**Ismail & 2 others v Governor, County Government of Mandera & 2 others  
(Petition E003 of 2025) [2025] KEELRC 2028 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2028 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E003 OF 2025**

**B ONGAYA, J  
JULY 10, 2025**

**BETWEEN**

**MOHAMMED ISMAIL ..... 1<sup>ST</sup> PETITIONER  
HUSSEIN NOOR ABDI ..... 2<sup>ND</sup> PETITIONER  
ISSACK ABDI ABDULLAHI ..... 3<sup>RD</sup> PETITIONER**

**AND**

**THE GOVERNOR, COUNTY GOVERNMENT OF MANDERA .... 1<sup>ST</sup>  
RESPONDENT  
THE COUNTY GOVERNOR OF MANDERA ..... 2<sup>ND</sup> RESPONDENT  
THE COUNTY SERVICE PUBLIC BOARD ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The petitioners (applicants) filed an application by the Notice of Motion dated 24.04.2025 and through Naikuni Ngaah & Miencha Company Advocates. The application was under Articles 1, 2, 3, 10, 22, 23, 41, 47, 50(1), 73, 162(2) (a), 232, 258 and 259 of the Constitution of Kenya, 2010; sections 12, and 15 of the Employment and Labour Relations Court Act, sections 4, 7, and 8 of the Fair Administrative Action Act, the Access to Information Act and all other enabling provisions of the law. The applicants prayed for orders as follows:
  - a. Spent
  - b. Spent
  - c. That pending the hearing and determination of the petition herein, a conservatory order do issue restraining the respondents from making or formalizing any further appointments or taking administrative steps in furtherance of the impugned recruitment process.



- d. That pending the hearing and determination of this petition, the respondents be compelled to disclose to the Honourable Court and to the petitioners the following documents and particulars necessary for the fair determination of the issues raised:
    - i. a comprehensive list of successful candidates, their academic qualifications, professional experience and clan affiliations;
    - ii. a report on the ethnic and clan composition of the county public service;
    - iii. a full recruitment report including names, positions and affiliations of the recruitment panel and the criteria applied.
  - e. That the Honourable Court be pleased to issue such further or other orders as it may deem fit in the interest of justice;
  - f. That the costs of this application be provided for.
2. The application is supported by the affidavit of Mohamed Ismail, his Supplementary Affidavit sworn on 29.05.2025 and urged upon the following grounds:
- a. That the respondents have conducted a recruitment process tainted with discrimination, clan based favouritism and lack of transparency, arising from the advertisement dated 06.08.2024 contrary to articles 10, 27, 41, 73 and 232 of the *Constitution*.
  - b. That the appointments made, favour individuals from a few clans while others have been sidelined, raising serious questions of equity, inclusiveness and fair representation in breach of national values and the principles governing public service.
  - c. That the number of persons recruited exceeds the number of advertised vacancies without lawful justification, indicating irregularity and abuse of administrative discretion.
  - d. That the petitioners sought access to key information – including the criteria for selection, composition of the panel and demographic details of appointees – through formal requests dated 02.04.2025 and 04.04.2025 which have gone unanswered in contravention of Article 35 of the *Constitution* and the *Access to Information Act*.
  - e. That the alleged recruitment violates fair labour practices, public service principles and the right to administrative action that is lawful, reasonable and procedurally fair as guaranteed under Articles 41 and 47 of the *Constitution* and the *Fair Administrative Action Act*.
  - f. That while there may exist statutory and administrative mechanisms for redress, the nature of the violations complained of including discrimination, breach of national values and lack of transparency in public recruitment – raise substantial constitutional question which warrant the immediate intervention of the Honourable Court to preserve the subject matter.
  - g. Further the respondents’ failure to respond to formal written requests for information and explanation dated 2<sup>nd</sup> and 4<sup>th</sup> April, 2025 respectively, has rendered any attempt at invoking alternative remedies impracticable and ineffectual within the timelines necessary to forestall the impugned appointments.
  - h. That unless the conservatory orders sought are granted, the recruitment will be finalized and implemented thereby regularizing unconstitutional actions and rendering the petition nugatory.



3. In turn the respondents filed the Replying Affidavit of Hassan Noor Adan sworn on 30.05.2025 as well as Grounds of Opposition dated 20.05.2025 through Duwane & Wethow Company Advocates on the grounds that:
- a. The application, the petition and the supporting affidavit do not raise any substantial constitutional question or demonstrate violation of specific rights to warrant invocation of the Honourable Court's jurisdiction under the Constitution of Kenya, 2010.
  - b. The subject application and the petition are incurably defective for failure to plead constitutional violations with the necessary precision as required under the Anarita Karimi Njeru V. Republic (No 1)(1979) precedent, reaffirmed in Mumo Matemu Vs Trusted Society of Human Rights Alliance & Others (2013).
  - c. The petition is based on generalized speculative and unproven allegations of ethnic bias and favouritism in recruitment, which are unsupported by evidence or data. There is no comparative or statistical analysis provided to demonstrate discrimination or exclusion.
  - d. The application for interim conservatory orders is premature and fails to satisfy the constitutional threshold for grant of such orders as established in Centre for Rights Education and Awareness (CREAW) & others VS. AG (2011).
  - e. The petitioners have not disclosed a prima facie case of constitutional violation. There is no evidence of illegal recruitment, ethnic profiling or breach of statutory or constitutional requirements in the impugned recruitment process.
  - f. The petition amounts to a collateral attack on administrative discretion in public employment matters and seeks to elevate unverified grievances into constitutional questions. The petition is therefore frivolous, vexatious and an abuse of the court process.
  - g. The petitioner's claim that the petition is brought in the public interest is not backed by any objective indication of broad based concern or impact. The petition advances personal grievances under the guise of public interest.
4. The parties filed their respective submissions. The court has considered the parties' respective positions and makes finding as follows:
- a. It is submitted for the respondent that whether the petition and application do not meet the constitutional threshold because there is nothing before the Court to show violation of rights or fundamental freedoms in the Bill of Rights. It is submitted that the petitioners have failed to state clearly with supporting facts and instances where rights have been infringed as was held in Rashid Odhiambo Aloggoh and 245 and others –Versus- Haco Industries Miscellaneous Application No. 1520 of 1999. It was further submitted that the petitioners had not shown even slightest evidence of violation of their constitutional rights as a result of the impugned recruitment process. The respondent relied on Makau J in Christian Juma Wabwire v Attorney General [2019] KEHC 1049 (KLR) thus,
    23. Section 107 of the Evidence Act provides, that he who alleges must prove. The petitioner failed to call evidence to prove his allegation. In the case of Lt. Col Peter Ngari Kaguma and others v AG, Constitutional Application No. 128 of 2006 it was held:

".... it is incumbent upon the petitioners to avail tangible evidence of violation of their rights and freedoms. The allegations of violations could



be true but the court is enjoined by law to go by the evidence on record. The petitioners' allegations ought to have been supported by further tangible evidence such as medical records, witnesses..... the court is deal to speculation and imaginations and must be guided by evidence of probative value. When the court is faced by a scenario where one side alleges and the rival side disputes and denies, the one alleging assumes the burden to prove the allegation... However, mere allegation of incarceration without providing evidence of the same does not at all assist the court. It was incumbent upon the petitioners to provide evidence of long incarceration beyond the allowed period and not to be presumptuous that the court knows what happened....."

24. I am alive to the fact, that the petitioner in his petition alluded to various constitutional violation, but without having availed tangible evidence of violation of his rights and freedoms, I find the allegation by mere words without any other evidence, the court cannot find that the petitioner has proved violations of his rights and freedoms. The petitioner herein ought to have produced documentary evidence such as medical reports and called witnesses to ensure court considers the same. The courts of law are deaf to speculations and irregularities as it must always base its decision on evidence. I therefore find and hold that the petitioner failed to discharge the burden of proof to the required standard of proof. I find that the petitioner did not give evidence of probative value to enable this court decide the petition in his favour and grant the orders sought.”
- b. For the petitioners it was submitted that they had clearly identified the constitutional provisions allegedly violated including Articles 10,27,35, 56, and 232 and had pleaded the factual context with particularity. It was submitted that the petition, affidavits and annexures read holistically supported a coherent case for constitutional interpretation and application. It was submitted that the petitioners had pleaded the manner in which ethnic bias, opacity, and procedural unfairness occurred. Further, prior to filing the petition the petitioners formally demanded that the respondents disclose the information that now forms part of the interim disclosure reliefs sought. Nevertheless, the respondents as custodians of the documents had failed to comply and had not provided the information. The petitioners cited *Ongiri Harun Osinde –Versus- Chief Land Registrar & Another* [2021] KEHC 5104 (KLR) where the Court held that the burden of justifying refusal of access to information lies on the state agency in possession of such records and in the instant case, the burden to rebut the petitioners' claim of non-disclosure rested with the respondents.
- c. The Court has considered the petition and the parties' respective submissions and finds that the petitioners have passed the threshold of particularising the alleged constitutional violations and the manner in which the violations are alleged to have taken place. The 2<sup>nd</sup> and 3<sup>rd</sup> petitioners plead that they applied for the vacancies in issue, they were shortlisted, but, were not successful in the interviews or offered the appointments. It is alleged successful applicants were drawn from few clans as others were side-lined. Further, in some positions more persons were appointed than the advertised positions. In such circumstances the petitioners allege constitutional violations as follows: that national values and principles of governance in Article 10 on transparency, accountability, inclusivity, equality, non-discrimination were violated in favouring certain clans; Article 27 on equal treatment and opportunity in accessing public employment was violated; Article 47 on fair administrative action was violated when more applicants were employed than advertised vacancies and when information as demanded was not provided; Article 73(1) was violated because of want of objectivity, impartiality and



merit; and, Article 232(1) and (2) of the Constitution was violated in failing to consider fair competition, merit-based appointments and representation of Kenya's diverse communities in the county public service. The Court has considered that broad scope of pleadings and returns that the petitioners have indeed pleaded the specific provisions of the alleged constitutional violations and particularised the facts of the alleged violations. The objection as raised for the respondents is declined as it will fail. While making that finding, the Court returns that the issue of whether the allegations in the petition have been established can only be determined after the full hearing of the petition.

- d. In urging that the conservatory order should not issue, the respondents rely on the Court of Appeal judgment in Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR) thus, Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for "prima facie case" in civil cases in the following words:

"In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

We adopt that definition save to add the following conditions by way of explaining it. 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. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant's case is more likely than not to ultimately succeed."

- e. It was submitted that the petitioners seek conservatory orders by invoking Articles 10, 19, 20, 22, 27, 56, 73 and 232 of the Constitution with no factual evidence of the violations. It was submitted that the supporting affidavits express dissatisfaction without setting out evidence for the violations and in circumstances that the impugned recruitment had already been concluded. That the petitioners have not provided evidence to show the alleged ethnic favouritism and marginalization because no statistical or demographic data and analysis is provided.
- f. For the petitioners it was submitted that for conservatory orders to issue the applicant must demonstrate a prima facie case with likelihood of success; if applicant will suffer irreparable harm if the conservatory order is not granted; consideration of the public interest; and the balance of convenience. It was urged that the application discloses favouritism. The 2<sup>nd</sup> and 3<sup>rd</sup> applicants participated as applicants and there was absence of transparency and failure to disclose the full recruitment report, including ethnic composition, clan balance and



qualifications. It was further submitted that the recruitment was a public process and despite demand for information about the recruitment dated 02.04.2025 and 04.04.2025 had not been responded to.

- g. It was submitted that the petitioners are entitled to the information as demanded towards enforcing their rights and constitutional provisions.
  - h. The Court has considered the material on record and the submissions made for the parties. The Court finds that the applicants have established their right to the information as was demanded for to enforce their rights as sought to be done in the instant petition. The respondents have offered no justification for non-disclosure. The Court finds that in view of the absence of the information sought for on record, it cannot be said that the applicant has established the allegations of favouritism and other violations as alleged as a prima facie case has not been established. The costs of the application should be in the cause.
3. In conclusion the application dated 24.04.2025 is hereby determined with orders as follows:
- a. That pending the hearing and determination of this petition, the respondents be compelled to disclose to the Honourable Court and to the petitioners the following documents and particulars necessary for the fair determination of the issues raised:
    - i. a comprehensive list of successful candidates, their academic qualifications, professional experience and clan affiliations;
    - ii. a report on the ethnic and clan composition of the county public service;
    - iii. a full recruitment report including names, positions and affiliations of the recruitment panel and the criteria applied.
  - b. The information in order (a) above be provided by way of a replying affidavit filed and served by 17.07.2025 and the petitioners may file and serve a responding affidavit thereto by 24.07.2025.
  - c. The parties to fix a convenient mention date for further directions on the expeditious hearing and determination of the petition.
  - d. Costs of the application in the cause.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 10<sup>TH</sup> JULY, 2025.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

