



Ombati & 4 others v Judicial Service Commission & 2 others; Kenya Magistrates & Judges Association (KMJA) (Interested Party) (Employment and Labour Relations Petition E149, E150 & E182 of 2023 (Consolidated)) [2024] KEELRC 155 (KLR) (7 February 2024) (Ruling)

Neutral citation: [2024] KEELRC 155 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION
E149, E150 & E182 OF 2023 (CONSOLIDATED)

AN MWAURE, J
FEBRUARY 7, 2024

BETWEEN

OMWANZA OMBATI 1ST PETITIONER
ROBINSON KIGEN 2ND PETITIONER
BRIAN OCHIENG’ SAKA 3RD PETITIONER

AND

JUDICIAL SERVICE COMMISSION 1ST RESPONDENT
CHIEF REGISTRAR OF THE JUDICIARY 2ND RESPONDENT
CLARENCE AWUOR OTIENO 3RD RESPONDENT

AND

KENYA MAGISTRATES & JUDGES ASSOCIATION (KMJA) INTERESTED PARTY

AS CONSOLIDATED WITH
EMPLOYMENT AND LABOUR RELATIONS PETITION E150 OF 2023

BETWEEN

LAW SOCIETY OF KENYA PETITIONER

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

AS CONSOLIDATED WITH



EMPLOYMENT AND LABOUR RELATIONS PETITION E182 OF 2023

BETWEEN

CHERONO GLORIA TONGAI PETITIONER

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

RULING

1. The Petitioners filed a Notice of Motion dated 27th July 2023 in E149/2023 seeking the following prayers. The files E150/2023, 182/2023 and 149/2023 were consolidated as per court order on 17th October 2023 in consensus of all the parties. Petition E149/2023 was the lead file.
 1. This matter be certified as urgent and service thereof be dispensed with in the first instance.
 2. Pending the hearing and determination of this application, the honourable court be pleased to issue a conservatory ordering the nature of an injunction staying the implementation of the appointment of the interested party as the Registrar, High Court as communicated by the respondent vide the notice of 25th July 2023 and any consequential step based on the said notice.
 3. Pending the hearing and determination of the petition filed herewith the honourable court be pleased to issue a conservatory order in the nature of an injunction staying the implementation of the appointment of the interested party as the Registrar, High Court as communicated by the respondent vide the notice of 25th July 2023 and any consequential step based on the said notice.
 4. Costs of this application be provided for.

Case No E150/2023 prayers

1. This matter be certified as urgent and service thereof be dispensed with in the first instance.
2. Pending the hearing and determination of this application, the honourable court be pleased to issue a conservatory order in the nature of an injunction staying the implementation of the appointment of the interested party as the Registrar High Court as communicated by the respondent vide the notice of 25th July 2023 and any consequential step based on the said notice,.
3. Pending the hearing and determination of the petition filed herewith the honourable court be pleased to issue a conservatory order in the nature of an injunction stating the implementation of the appointment of the interested party as the registrar, high court as communicated by the respondent vide the notice of 25th July 2023 and any consequential step based to the said notice.
4. Costs of the application be provided for.



Case No E 182/2023

1. That the application be certified as urgent, service of the same be dispensed with and ipso facto heard ex parte in the first instance
2. That pending the hearing and determination of this application inter partes this honourable court be pleased to issue a conservatory order of injunction restraining the 1st interested party from assuming the office of the Registrar High Court and staying her appointment, execution of duty and serving as the registrar of the high court.
3. That pending the hearing and determination of this application inter partes this honourable court be pleased to issue conservatory order by way of injunction restraining the respondent, its officers, staff, agents servants and/or any other persons acting at its behest however from recognizing, paying salary, remuneration or assigning duties to the 1st interested party as the registrar of the high court.
4. That pending the hearing and determination of the petition this honourable court be pleased to issue a conservatory order of injunction restraining the 1st interested party from assuming the office of the registrar high court and staying her appointment, execution of duty and serving as the registrar of the high court.
5. That pending the hearing and determination of the petition, this honourable court be pleased to issue conservatory order by way of injunction restraining the respondent, its officers, staff, agents, servants and/or any other persons acting at its behest however from recognizing, paying salary, remuneration or assigning duties to the 1st interested party as the registrar of the high court.
6. That pending the hearing and determination of the petition, the court be pleased to issue a mandatory injunction compelling the respondent herein to furnish the petitioner with the list of all the applicants who applied for the position of the registrar high court.
7. That pending the hearing and determination of this petition the court be pleased to issue a mandatory injunction compelling the respondent to release the names of all shortlisted applicants who took part in the interview for the position of the registrar high court.
8. That this court gives certain directions as it may deem just and fit.
9. That the respondents be condemned to pay costs.

Petitioners' Case

2. The Petitioners in the three petitions aver that on 13th January 2023, the 1st Respondent advertised a vacancy in the office of Registrar, High Court in which it received 24 applications and shortlisted the following judicial officers:
 - a. Hon. Anne Wanjiru Mwangi
 - b. Hon. Mbulika Pauline Wangari
 - c. Hon. Mikoyan Denis Kipkirui
 - d. Hon. Nyamora Fredrick Momanyi



- e. Hon. Juma Elizabeth Nyarangi
 - f. Hon. Elizabeth Tanui
3. The Petitioners aver that the 1st Respondent invited the aforementioned candidates for interviews on 31st May 2023 and on 26th July 2023, via its Directorate of Public Affairs and Corporate Communication announced that the 3rd Respondent had been appointed as Registrar, High Court.
 4. The Petitioners aver that they are aggrieved with the appointment as it wouldn't be expected that a person who had not been shortlisted would be the successful candidate. Further, the Petitioners are entitled to draw inference that the 3rd Respondent never applied or that her candidacy was rejected by the 1st Respondent at the shortlisting stage.
 5. The Petitioners aver that shortlisting of candidates is an important step in the recruitment process and it is expected that the appointee would be chosen from the shortlist. They relied on *Trusted Society of Human Rights Alliance & 3 Others vs Judicial Service Commission & Another* [2016] eKLR.
 6. The Petitioners aver that the 1st Respondent's HR Manual states that only shortlisted candidates may be subjected to an interview.
 7. The Petitioners aver that the impugned appointment of the 3rd Respondent contravened the laid down procedure and national value and principles of good governance as enshrined in the *Constitution* and additionally impeding the competence of the holder of the office.
 8. The Petitioners challenge the 3rd Respondent's appointment on grounds of unreasonableness and irrationality.
 9. The Petitioners aver that the evidence of the said violations of the *Constitution* and illegal appointment of the 3rd Respondent has been laid down both on an ex facie and prima facie level, therefore the grant of the conservatory reliefs is merited.

1st and 2nd Respondent's Case

10. In opposition to the application, the Respondents' filed a replying affidavit dated 1st September 2023.
11. The Respondents aver that the 1st Respondent resolved to recruit internally when the Office of the Registrar of the High Court fell vacant, hence the internal advert of 13th January 2023 inviting qualified persons to make applications for the position by 3rd February 2023.
12. The Respondents aver that the shortlisted candidates were invited for an interview on 31st May 2023 and *vide* a press release of 2nd May 2023, the general public was notified of the aforesaid recruitment and shortlisting.
13. The Respondents aver that on 31st May 2023, and in fulfilment of the Constitutional requirement for stakeholders' participation in the appointment to public offices, the Commission held a consultative meeting with the Law Society of Kenya, Kenya Magistrates and Judges Association, Kenya Judges Welfare Association representatives and the High Court Principal Judge, Hon Justice E.K. Ogola in respect to the selection of Registrar, High court and Registrar, Magistrate courts.
14. The Respondents aver that on the same date, each of the shortlisted six candidates were interviewed by the Commission having constituted itself as a panel pursuant to section 32 of the *Act* and used a professionally curated tool dubbed an Interview Score Sheet, to facilitate the standardization and



- promote objectivity in the interview process, each candidate was scored independently by each member of the panel. Subsequently, the candidates were ranked from highest to the lowest score.
15. The Respondents aver that they thereafter held a meeting for the rationalization of the interview results and upon deliberations it was noted that none of the candidates met the required threshold for the appointment thus the selection process was found non-responsive. Each of the six candidates were informed in writing of the outcome of the process.
 16. The Respondents aver that guided by sections B.20 and B.21 of the Judiciary Human Resource Policies and Procedures Manual resolved that pending the appointment of a substantive office holder, there was need to have a person in the Office of the Registrar on an acting capacity.
 17. The Respondents aver that the Commission identified the 3rd Respondent, Senior Principal Magistrate with effect from 31st May 2023, for the following reasons;
 - a. She met the minimum requirements for the acting position first for being a Senior Principal Magistrate and second for having been previously interviewed for the position of Registrar, Environment and Land Court wherein she had a stellar performance emerging second overall after the candidate who was eventually appointed; and
 - b. She had the necessary seniority having worked in the Judiciary for over 15 years, competence from an academic and experience perspective and possessed the ability to perform the roles of the office in an acting capacity.
 18. The Respondents aver that the Commission held a meeting on 13th July 2023 deliberating on the recruitment process to appoint a substantive office holder of the Office of Registrar of the High Court and was guided by the alternatives provided under the Third Schedule to the Act.
 19. The Respondents aver that the Commission was satisfied that the vacancy should be filled by the appointment or reappointment of a public officer held against the establishment of the Judicial Service or by the continued employment of a public officer on temporary terms. It resolved that the 3rd Respondent, be invited for a suitability interview to be considered for substantive appointment.
 20. The Respondents aver that the 3rd Respondent was thus invited for an interview on 24th July 2023 during which her performance reports were submitted by the Judiciary Directorate of Planning and Organisation Performance and the Chief Registrar of the Judiciary.
 21. The Respondents aver that a meeting held on 24th July 2023, it was noted the 3rd Respondent's performance in the Court station and other administrative duties, her performance in the interview for the position of Registrar-ELC, her academic qualifications and experience, and the favourable reports from the Directorate of Planning and Organizational Performance and the Chief Registrar of the Judiciary were all positive. The Commission found the 3rd Respondent suitable and resolved to appoint her as the substantive Registrar of the High Court with effect from 24th July, 2023.
 22. The Respondents avers that the appointment of the 3rd Respondent conformed with the law and was based on merit, competence and transparent in every aspect as it conformed with Paragraph 10(1) of the Third Schedule to the Act.

Petitioners' Submissions

23. The Petitioners submitted that the 1st Respondent is bound by the provisions of Articles 10 and 232 of the Constitution and by dint of being a commission established under Article 171 of the Constitution. They relied on the case of George Bala vs Attorney General [2017] eKLR.



24. The Petitioners submitted that it is trite law that shortlisting of candidates plays a key role in sieving out non-compliant applications. The 1st Respondent concurs with this position as was seen in *Trusted Society of Human Rights Alliance & 3 Others vs Judicial Service Commission & Another* [2016] eKLR. Therefore, it is expected that the 1st Respondent would have chosen an Appointee from the six shortlisted candidates.
25. The Petitioners submitted that the actions of the 1st Respondent of hand-picking the 3rd Respondent, who was neither shortlisted nor interviewed is not only capricious, inequitable, opaque and discriminative but also contra above constitutional provisions.
26. The Petitioners submitted that the 1st Respondent neither considered Constitutional provisions, nor its own *Judicial Service Act* in settling to appoint the 3rd Respondent.
27. The Petitioners submitted that Paragraph 14 of the 3rd Schedule of the *Judicial Service Act* does not grant the 1st Respondent discretion in public interest to consider appointments. The reading of the *Constitution* and other relevant statute cannot arrive at an interpretation permitting the 1st Respondent to oust the national values and principles of public service or act as it did. They relied on the case of *J Harrison Kinyanjui vs Attorney General & Another* [2016] eKLR.
28. The Petitioners submitted that the main principles for granting conservatory orders are public interest, constitutional values and proportionate magnitude and the 1st and 2nd Respondents herein have violated constitutional values and principles of good governance as espoused in Article 10 of the *Constitution*.
29. The Petitioners submitted that if the interim conservatory orders are not granted, the petition or its substratum will be rendered nugatory.

Respondents' Submissions

30. The Respondents submitted that the Petitioners have not demonstrated that on a prima facie basis the recruitment and appointment of the 3rd Respondent was unlawful and/or unconstitutional. What can be construed on a prima facie basis is that the law does allow the Commission to adopt a procedure that does not require advertisement in the recruitment of judicial officers. Further, on a prima facie basis, the Commission has demonstrated its adherence not only to the letter but the spirit of the *Constitution* and the governing statute.
31. The Respondents submitted that the prejudice to be suffered is that public funds shall be irrevocably expended towards a futile cause in case the Petitions succeed is not sufficient enough to render the Petition nugatory. The Court still has jurisdiction to quash and reverse any appointment that would result from the implementation of the impugned appointment in the unlikely event that the Petition succeeds. They relied on the case *Nelson Andayi Havi vs Law Society of Kenya & 3 Others* [2018] eKLR; Civil Application 28 of 2018 (UR 26/2018).
32. The Respondents submitted that the 3rd Respondent has already assumed office and is currently discharging her duties as the Registrar as it is a critical role that cannot be downplayed as it serves the general public interest.
33. The Respondents submitted that vacancies for public offices ought to be filled within stipulated timelines as set out by law and failure results to breach of the law. Since there is no malice or political motivation behind the impugned recruitment, implementation of the same will not erode public confidence.



Analysis and Determination

34. The main issue for determination is whether the Petitioners have met the threshold of granting of conservatory orders.
35. The threshold for grant of conservatory orders was established by the Supreme Court inter alia in the case of *Gatirau Peter Munya vs Dickson Mwenda Kitbinji & 2 Others* [2014] eKLR as follows:

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.

The issue before us, therefore, is whether this is a proper case where the interlocutory reliefs sought by the applicant should be granted. The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:

- i. the appeal or intended appeal is arguable and not frivolous; and that
- ii. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.

These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of the *Constitution* of Kenya, 2010, a third condition may be added, namely:

- iii. that it is in the public interest that the order of stay be granted.

This third condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the *Constitution*.”

36. For the issue of determination is whether the Petitioners/Applicants have established a prima facie case with a likelihood of success therefore the court is persuaded by the case herein below.
37. In the case of *Adrian Kamotho Njenga vs Selection Panel for the Appointment of Commissioners of the Independent Electoral and Boundaries Commission (2021) & 2 Others; Independent Electoral and Boundaries Commission* [2021] eKLR the court held:

“When a court is called upon to determine whether a prima facie case has been established, it should not delve into a detailed analysis of the facts and law but should focus on determining whether the Applicant has put forward a case that is arguable and not frivolous. In the case of *Board of Management of Uburu Secondary School vs City County Director of Education & 2 Others* [2015] eKLR the Court posited that:

“It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a



conservatory order but rather there must also be evident a likelihood of success.
The prima facie case ought to be beyond a speculative basis...”

38. In the third schedule of *judicial service act* paragraph 2 sub paragraph 2 provides:
- a. Subject to subparagraph (2) applications for appointment to vacancies shall be invited by public advertisement in such manner as the commission may determine.
 - b. A vacancy need not be advertised where the commission is satisfied that a vacancy should be filled by the appointment or reappointment of a public officer held against the establishment of the judicial service or by the continued employment of a public officer on temporary terms; or
 - c. Where, in the opinion of the commissions, it is likely for a suitable public officer to be found in some ministry or department other than the judiciary, the commissions may invite applications from serving officers only.
39. On 24th July 2023 the 3rd respondent was invited for an interview and her performance was submitted by the judiciary directorate of planning and organisation performance and the Chief Registrar of The Judiciary.
40. After considering her qualifications and experience and performance she was found suitable to serve as the registrar of the High court and was appointed effective 27th July 2023.
41. The 1st respondent and 2nd respondent did not appoint the 3rd respondent as a continuation of the interview which was initially conducted and was declared non responsive. They conducted fresh recruitment exercise after they did not get a suitable candidate and were therefore guided by the schedule II of the Act.
42. The Respondents in their submissions have demonstrated clearly and that what can be gleaned on a prima facie basis is that the law does allow the Commission to adopt a procedure that does not require advertisement in the recruitment of judicial officers.
43. The second issue is whether the applicant will suffer prejudice as a result of the violation or threatened violation of the *Constitution*.
44. In the case of *Martin Nyaga Wambora vs Speaker of the County Assembly of Embu & 3 Others* Petition No. 7 of 2014, the court pointed out that:
- “In determining whether or not to grant conservancy orders, several principles have been established by the courts. The first is that: “... [an applicant] must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the *Constitution*”
- To those erudite words I would only highlight the importance of demonstration of “real danger”. The danger must be imminent and evident, true and actual and not fictitious; so much so that it deserves immediate remedial attention or redress by the court. Thus, an allegedly threatened violation that is remote and unlikely will not attract the court’s attention.
45. The second principle, which naturally follows the first, is whether if a conservancy order is not granted, the matter will be rendered nugatory.



46. In the instant case no damages has been proved will be suffered by the petitioners if conservatory orders are not granted. The 3rd respondent and interested party in Petition 150 and 182 of 2023 has in any event been serving as a registrar since 27th July 2023.
47. The Petitioners have not satisfied this court that if court fails to grant the conservatory orders there is real danger that they will suffer prejudice as a result of the violation or threatened violation of the Constitution. As submitted by the Respondents, the 3rd Respondent has already assumed office and this court has jurisdiction to quash and reverse the appointment if the petition succeeds. The prayers in the notice of motion application are now overtaken by events since the 3rd respondent has already been appointed and has been serving since July 2023.
48. The prayers in the notice of motion applications have not been supported with concrete evidence by the petitioners in the three consolidated applications and have not satisfied prima facie case to grant the respective prayers in the respective petition. The court finds they are overtaken by events since the 3rd respondent was appointed in July 2023 and has been serving since then.
49. The applications E149/2023, E182/2023 and E150/2023 have therefore not met the threshold for granting conservatory orders and are all dismissed accordingly as none of the respective prayers are merited.
50. This is a public litigation matter. Each party will therefore meet their respective costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 7TH DAY OF FEBRUARY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

