



Matei & 3 others v Kitui County Public Service Board; Public Service Commission (Interested Party) (Miscellaneous Application E088 of 2024) [2024] KEELRC 692 (KLR) (19 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 692 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E088 OF 2024**

**L NDOLO, J
MARCH 19, 2024**

BETWEEN

**STEPHEN MUE MATEI 1ST APPLICANT
DANIEL MUNYAO MUNYOTO 2ND APPLICANT
JUSTUS MIKE KITIVO 3RD APPLICANT
JOYCE MARTHA MWENDWA 4TH APPLICANT**

AND

KITUI COUNTY PUBLIC SERVICE BOARD RESPONDENT

AND

PUBLIC SERVICE COMMISSION INTERESTED PARTY

RULING

1. The Applicants were all employees of the Respondent, having been employed in the position of Sub County Administrators within Kitui County, in May 2018. They worked until 25th August 2023, when they were informed that their contracts had lapsed.
2. The Applicants claim that the five year fixed term contracts, stated in their letters of appointment, ran counter to the permanent and pensionable terms disclosed in the job advertisement. They state that they protested the change of terms between 2018 and 2022 and in 2023, they filed appeals with the Public Service Commission, which appeals are pending determination.
3. In the meantime, the Respondent has advertised the positions held by the Applicants, and it is this action which forms the subject matter of the Notice of Motion dated 4th March 2024.



4. By their Motion, the Applicants seek conservatory orders restraining the Respondent from filling the advertised positions of Sub County Administrators for Mwingi North, Mwingi West, Kitui East and Kitui Central.
5. The application is supported by an affidavit sworn by the 1st Applicant, Stephen Mue Matei and is based on the following grounds:
 - a. That sometime in May 2018, the Respondent advertised for the positions of eight Sub County Administrators within Kitui County and according to the newspaper advertisement, the said positions were on permanent and pensionable terms;
 - b. That the Applicants applied for the said positions but when the appointment letters were released to them on 3rd August 2018 and 27th November 2018, they noted that their terms of service had been changed from permanent and pensionable to fixed term contracts of five years. They were later posted as Sub County Administrators for Mwingi North, Mwingi West, Kitui East and Kitui Central Sub Counties within Kitui County, where they worked until 25th August 2023, when they were informed that their contracts had lapsed;
 - c. That when the Applicants received their appointment letters, they immediately wrote protest letters in 2018 and several reminders in 2019, 2020, 2021 and 2022, questioning the basis upon which the Respondent had altered their terms of employment from permanent and pensionable to fixed term contracts of five years. The Respondent's Chairperson and the Chief Executive Officer are said to have noted the discrepancy and promised the Applicants that the appointment letters would be rectified;
 - d. That when the Respondent went against the promise to rectify the appointment letters, the Applicants decided to file appeals with the Interested Party in line with the *Public Service Commission (County Appeals Procedures) Regulations, 2022*. The appeals filed being Nos 93, 94, 95 and 125 of 2023, challenge the decision of the Respondent to appoint the Applicants on five year fixed term contracts, while their colleagues; Stephen Ngesu, Patrick Kyusya, Ambrose Muthama and Alex Mutemi, who were interviewed on the same day with the Applicants, were appointed in similar positions on permanent and pensionable terms of service;
 - e. That the Respondent did not bother to give the Applicants any written reasons as to why it selectively changed their terms of employment from permanent and pensionable as stated in the newspaper advertisement of 3rd May 2018, to fixed term contracts of five years;
 - f. That by letter dated 7th November 2023, the Interested Party directed the Applicants and the Respondent to file and serve their submissions which directions have been complied with. The Interested Party is yet to make a determination on the appeals;
 - g. That the Respondent has advertised the positions of Sub County Administrators for Mwingi North, Mwingi West, Kitui East and Kitui Central, which are the subject of the pending appeals;
 - h. That unless the Court grants the Applicants interim orders, the Respondent shall proceed to fill the positions, thus rendering the pending appeals nugatory.
6. The Respondent opposes the application by a replying affidavit sworn by its Chairperson, Dr. Florence Munanie Makindi on 11th March 2024.



7. Dr. Makindi depones that in 2018, the Respondent advertised posts in the position of Sub County Administrator, on permanent and pensionable terms. She adds that upon considering key policy factors, the Respondent offered to employ the Applicants on fixed term contracts of five years.
8. Dr. Makindi further depones that the Applicants were issued with letters of appointment, which they accepted and signed. The Applicants reported to work and served for a term of five years, until the end of their contracts on diverse dates in the year 2023.
9. According to Dr. Makindi, the advertisement by the Respondent in 2018 served only as an expression of interest to employ Sub County Administrators; it was an invitation to treat and not an offer of employment.
10. Dr. Makindi maintains that the Applicants are bound by the terms of their respective letters of appointment which they signed. She asserts that after signing the letters, the Applicants reported to work and received salaries for the entire period of their fixed term; they therefore, by conduct and acquiescence, accepted the terms on the letters of offer.
11. It also deponed that throughout the five year period of their contracts, the Applicants did not challenge the Respondent's decision; it is only after the end of their contracts in the year 2023 that the Applicants filed appeals with the Public Service Commission.
12. The Respondent's position is that grant of conservatory orders against the recruitment and filling of the subject positions will greatly hamper service delivery to the residents of Kitui County.
13. The Respondent also challenges the jurisdiction of this Court to entertain the application, stating that the employer-employee relationship between the Applicants and the Respondent terminated upon the lapse of the five year fixed term employment contracts.
14. The order sought by the Applicants falls within the beacons of an interlocutory injunction and the conditions under which such an order may be granted were established in *Giella v Cassman Brown Co. Ltd* [1973] EA 358 as follows:
 - a. That the applicant has established a prima facie case with a probability of success;
 - b. That if the order sought is not granted, the applicant stands to suffer irreparable harm, which cannot be compensated by an award of damages; and
 - c. If the court is in doubt, it will determine the application on the balance of convenience.
15. A *prima facie* case was defined by the Court of Appeal in *Mrao v First American Bank Kenya Limited & 2 others* [2003] KLR, 123 in the following terms:

“A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It 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 as to call for an explanation or rebuttal from the latter.”
16. The Applicants' complaint is based on their employment on five year fixed term contracts, which they claim was contrary to the terms contained in the public advertisement posted by the Respondent. It is however evident that by the time the Applicants lodged their appeals with the Public Service Commission, their employment contracts had been fully served.
17. The Court is unable to comprehend why the Applicants went ahead to serve the full term of their contracts before formally challenging the terms of employment. As it stands, there is no subsisting



employment relationship upon which this Court can grant any orders. For this reason, I have no difficulty in reaching the conclusion that the Applicants have failed to establish a *prima facie* case as defined in law.

18. As held by the Court of Appeal in its decision in [Nguruman Limited v Jan Bonde Nielsen & 2 others](#) [2014] eKLR the triple requirements set in *Giella v Cassman Brown* (supra) are separate, distinct and logical hurdles to be surmounted sequentially.
19. Having failed to establish a *prima facie* case, the Applicants plea fails at the first hurdle and I do not need to proceed to the remaining two hurdles on irreparable harm and balance of convenience. I need however to state that recruitment for vacant positions falls within the category of an employer's prerogative, which ought not to be curtailed, save in exceptional circumstances.
20. In this case, the Applicants have not only failed to establish a *prima facie* case but have also not demonstrated any special factors that would move the Court to interfere with the employer's prerogative.
21. In the result, the Applicants' Motion dated 4th March 2024 is declined with an order that each party will bear their own costs.
22. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF MARCH 2024

LINNET NDOLO

JUDGE

Appearance:

Ms. Wangare h/b for Ms. Ngunjiri for the Applicants

Ms. Kyalo h/b for Mr. Wanyama for the Respondent

