



Khamisi v Institution of Engineers of Kenya & 4 others; Engineers Board of Kenya (Interested Party) (Employment and Labour Relations Petition E179 of 2023) [2024] KEELRC 681 (KLR) (15 March 2024) (Ruling)

Neutral citation: [2024] KEELRC 681 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E179 OF 2023
AN MWAURE, J
MARCH 15, 2024**

BETWEEN

ENG BUTICHI RAMADHANI KHAMISI PETITIONER

AND

THE INSTITUTION OF ENGINEERS OF KENYA 1ST RESPONDENT

ENG ERIC OHAGA 2ND RESPONDENT

ENG ERASTUS MWONGERA 3RD RESPONDENT

ENG SHAMMAH KITEME 4TH RESPONDENT

ENG VICTOR MWONGERA 5TH RESPONDENT

AND

ENGINEERS BOARD OF KENYA INTERESTED PARTY

RULING

1. The Petitioner/ Applicant filed a Notice of Motion dated 21st September 2023 seeking the following orders: -
 1. spent
 2. pending the hearing and determination of this Application, a conservatory order and is hereby issued suspending the letter implementation of the decision by the Council of the 1st Respondent appointing the 5th Respondent herein, Eng. Victor Mwongera as the Chief Executive Officer of the 1st Respondent.



3. pending the hearing and determination of this Application, the ordinary meeting convened by council of the 1st Respondent on 21.09.2023 and any resolution and decisions made during the meeting be declared null and void.
4. pending the hearing and determination of the Petition, a conservatory order and is hereby issued suspending the letter of implementation of the decision by the Council of the 1st Respondent appointing the 5th Respondent herein, Eng. Victor Mwongera as the Chief Executive Officer of the 1st Respondent.
5. pending the hearing and determination of this Petition, the ordinary meeting convened by council of the 1st Respondent on 21.09.2023 and any resolution and decisions made during the meeting be declared null and void.
6. the costs of this Application be provided for.

Petitioner/ Applicant's Case

2. The Petitioner/Applicant avers that the Respondents undertook a sham recruitment exercise for the position of CEO of the 1st Respondent, bereft of constitutional thresholds of good governance, transparency and accountability. The exercise returned the 5th Respondent as the purported appointed CEO of the 1st Respondent.
3. The Applicant avers that 3rd and 5th Respondent have a consanguineous relationship of father and son. The 3rd Respondent is the Chairman of both the Eminent Engineers Forum, an organ of the 1st Respondent and the Chairman of the Interested Party, the regulator of the 1st Respondent disqualifies the candidature of the 5th Respondent as the CEO.
4. The Applicant avers that the impugned appointment smirks of real and perceived conflict of interests and ex facie biasness in decision making, reducing the 1st Respondent's affairs to a family matter.
5. The Applicant avers that the Respondents deliberately and wilfully failed to put in place safeguard mechanisms that would protect the recruitment process of the patent biasness given the relationship between the 3rd and 5th Respondents.
6. The Applicant avers that the recruitment process was carefully calculated to benefit the 5th Respondent as against other applicants and to the detriment of the membership of the 1st Respondent.
7. The Applicant avers that the 1st Respondent's council has given the members a 2-day notice of an ordinary meeting to held on 21.09.2023 with the agenda of discussing the appointment of the new CEO which contravenes clause 11.03 and 12.04 of the 1st Respondent's constitution which prohibits such an agenda in the ordinary meeting.
8. The Applicant avers that unless this court urgently intervenes through a conservatory order, the 5th Respondent shall take office, make and implement decisions that are detrimental to the members of the 1st Respondent thus perpetuate unconstitutionality and illegality of his appointment.

Respondents' Case

9. In opposition to the Application, the Respondents filed a replying affidavit dated 2nd October 2023.
10. The Respondents aver that the prayers sought are intended to revert the status quo by suspending the 1st Respondent's letter communicating the appointment of the 5th Respondent as the CEO despite the appointment taking effect.



11. The Respondent avers that the orders if granted, will have effect of removing the 5th Respondent from office in the case of interlocutory mandatory injunction hence cannot be purported to be of the nature of conservatory remedies. Temporary mandatory injunctions have to be issued only in rare cases where there are compelling circumstances and where the injury is immediate and pressing and likely to cause extreme hardship.
12. The Respondents aver that the Applicant has not given any compelling reasons or circumstances to warrant the grant of the interlocutory mandatory orders sought. Further, he did not demonstrate the nature of injury he stands to suffer that cannot await the substantive determination of the Petition.
13. The Respondents aver that the operational functions of the 1st Respondent are executed by the Secretariat headed by the CEO whose functions and duties are published in the 1st Respondent's job advertisement inviting applicants to express interest.
14. The Respondents aver that the 1st Respondent stands to suffer greater harm should this court issue the orders sought, which have the effect of creating a vacuum in the 1st Respondent's establishment thereby paralyzing its operations. If this court finds that the petition is merited, the appointment of the 5th Respondent as the CEO will simply be quashed and the 1st Respondent ordered to conduct a fresh recruitment.
15. The Respondents aver that both the 3rd and 5th Respondents are professionals' engineers and paid up members of the 1st Respondent. Despite the relationship between them, they are individually entitled to the benefit of their membership to the 1st Respondent without being limited only for the reason of being relatives.
16. The Respondents aver that the 3rd Respondent currently serves as a board member of the Engineering Board of Kenya (EBK) which is a state corporation established under the *Engineers Act*. EBK and the 1st Respondent are separate legal entities with separate missions and visions and EBK has no role in the 1st Respondent's activities.
17. The Respondents avers that the 3rd Respondent being a member of EBK should not be used to deny the 5th Respondent the rights and benefits accrued to him by virtue of his membership to the 1st Respondent. Further, denying him such benefits on account of being the 3rd Respondent's son is discriminatory on account of identity contrary to *the constitution*.
18. The Respondents aver that the 1st Respondent's constitution creates an organ known as Eminent Engineers Forum (EEF) whose roles do not include operational functions of the 1st Respondent. It does not run the 1st Respondent's affairs or participate in the appointment and employment of the members of the secretariat. EEF is merely an advisory to the council and the council is not obligated to take such advice when given.
19. The Respondents aver that even though the 3rd Respondent chairs the EEF, nowhere in its deliberations as EEF did they discuss the recruitment of the CEO.
20. The 3rd Respondent averred in the replying affidavit that he was not aware that the 5th Respondent was interested in the CEO position until the 1st Respondent made an offer to him. Therefore, he could not have influenced the appointment of the 5th Respondent when he had not been informed of his interest in the first place.
21. The 3rd Respondent averred that the 5th Respondent is a qualified professional engineer and does not need any intervention from him or any other person to secure employment.



22. The Respondents aver that the 5th Respondent met all qualifications set by the 1st Respondent for the post of CEO and the 5th Respondent being satisfied that he met the said criteria applied just like any other prospective candidate.
23. The Respondents avers that at the time of his application, the 5th Respondent was employed at Kenyatta University and is not desperate for employment to do whatever including involving in conducts bordering on fraud in order to secure employment.

Interested Party's Case

24. The Interested Party avers that it is distinct from the 1st Respondent and runs their affairs independently save that the President and 3 nominees of the 1st Respondent are board members of the 1st Respondent.
25. The Interested Party avers that the 3rd Respondent is a registered consulting engineer under the Engineers Act, 2011; and the 5th Respondent is registered by the Interested Party as a professional engineer hence fully qualified to practice.
26. The Interested Party avers that it is mandated to keep and maintain the Register being the register of registered persons and firms kept by the Registrar in accordance with Section 27 of the Engineers Act. The Interested Party has carried out its mandate as per the law.

Petitioner/Applicant's Submissions

27. The Petitioner submitted that the process of appointment of the 5th Respondent as the 1st Respondent's CEO is in question since the 5th Respondent has never been qualified to be the 1st Respondent's CEO and that the position held by the 3rd Respondent, both in the 1st Respondent and in the Interested Party contributed greatly to his appointment as the CEO of the 1st Respondent. Hence, he has a genuine and arguable case deserving of conservatory orders has been made out.
28. The Petitioner/ Applicant submitted that the matter at hand raises cardinal issues worth consideration. The Applicant has also disclosed a reasonable cause of action and arguable issues for the grant of conservatory orders and as such ought to be allowed.
29. It is the Petitioner/Applicant submission that the matter beforehand is a matter of Public Interest as it affects the members of the 1st Respondent and the Engineer fraternity at large. Also, the danger looming over the realization of rights in the instant case is imminent, real and not theoretical.
30. The Petitioner/Applicant submitted that Section 11 of the 1st Respondent's Constitution, provides for agendas that can bring forth an ordinary meeting or special general meeting. The 1st Respondent's council opted to go by way of an ordinary meeting to avoid the requirements for holding a special general meeting.
31. Section 11.05 of the 1st Respondent's constitution provides:

“A Special General Meeting of Corporate Members and Associates may be called at any time by the Council for any specific purpose relating to the direction and management of the affairs of the Institution...”. Further, Section 11.09 states that: “At least fourteen (14) days’ notice shall be given of all annual and Special General Meetings.”
32. The Petitioner/Applicant submitted that the ordinary meeting should not have taken place since the agenda came forth as a result of the council's contravention of Section 5 of the Fair Administrative Actions Act. The action of appointing the son of the Chairperson of EEF and Interested Party as the



CEO of the 1st Respondent, is likely to materially and adversely affect the legal rights and interests of the members of the 1st Respondent.

33. It is the Petitioner/Applicant's submission that status quo should be maintained as soon as contravention of the Fair Administrative Actions Act was established. Therefore, it can only be rectified by declaring that the ordinary meeting convened by the council of the 1st Respondent on 21.09.2023 and any resolutions and decisions made during the meeting, as null and void.

3rd Respondent's Submissions

34. The 3rd Respondent submitted that that conservatory orders are issued in order to preserve status quo so that the substantive determination of the matter may not be an academic exercise due to change in circumstances. Conservatory orders can therefore not be deployed to undo what has been done so as to revert to status quo.
35. It is the Respondent's submission that the orders sought by the Petitioner, couched as conservatory orders, are not available as such orders would, if granted, go beyond the scope of conservatory orders. If the orders were granted and the 5th Respondent vacates office, the 1st respondent will suffer greater prejudice as it will not have a head of its secretariat.
36. The 3rd Respondent submitted that the Petitioner has not met the threshold for grant of conservatory orders. Firstly, the Petitioner has not demonstrated a prima facie case with a likelihood of success. The Petitioner's case is based on unfounded suspicions and no material has been placed before court to attempt to substantiate his allegations.
37. The 3rd Respondent submitted that it is not in dispute that he served as the chairperson of the EBK and EEF. However, the Applicant did not demonstrate how his position disqualifies the 5th Respondent from working in the engineering industry. Further, the Petitioner mischievously ignored the differing mandates of the 1st Respondent and its council, the EBK and EEF.
38. It is the Respondent's submission that it would be discriminatory to deny the 5th Respondent an opportunity just because his father is an eminent engineer. The Petitioner has not demonstrate that the 5th Respondent did not meet the academic/professional qualifications sought by the 1st Respondent, therefore, he has not demonstrated a prima facie case with the likelihood of success, for that reason alone, the application should be dismissed. He relied on *Elizabeth Agutu Odhiambo v Waumini Sacco Society* [2018] eKLR.
39. The Respondent submitted that the Petitioner has not demonstrated what prejudice he stands to suffer if conservatory orders are not granted. The Petitioner filed the petition in his personal capacity even though he purports it to be a public interest matter, therefore, no demonstration at all that the public shall suffer any prejudice if the orders sought are not granted.
40. The 3rd Respondent submitted that no evidence has been adduced to show that the petition will be rendered nugatory unless the orders sought are granted. Should the court find that the petition is merited, it will simply order the 5th Respondent to vacate office as the 1st Respondent conducts a fresh recruitment exercise. He relies on the Court of Appeal decision in *Andayi Havi v Law Society of Kenya & 3 others* [2018] eKLR; Civil Application 28 of 2018 (UR 26/2018).
41. It is the 3rd Respondent's submission that declaring resolutions of an organization's general meeting null and void is tantamount to the court interfering with decision making powers of an entity. In the instant case, no exceptional circumstances have been alluded to by the Petitioner so as to justify



the court taking such a drastic step. He relies on the case of Geoffrey Mworia v Water Resources Management Authority [2015] eKLR.

Interested Party's Submissions

42. The Interested Party submitted that it is responsible for the registration of engineers and engineering firms, regulation of engineering professional services, setting of standards, development and general practice of engineering as envisaged under Section 6 and 7 of the *Engineers Act*, 2011. It confirms that the 5th Respondent is registered by the Interested Party as a professional engineer and hence fully qualified to practice as such.
43. The Interested Party submitted that the Applicant's contention that the 5th Respondent is illegally registered and licenced by EBK are untrue. The Applicant has not furnished any proof to claim the produced certifications are invalid and/or fabricated.
44. The Interested Party submitted that for a person to be registered as a professional engineer he/she must meet the qualification under section 16 of the *Engineers Act*; the 5th Respondent was qualified as evidenced by the certifications produced that include Certificate of Registration as a Graduate Engineer, Certificate of Registration as a Professional Engineer and his Engineer Practising License.
45. The Interested Party submitted that it adhered to its mandate as per the *Engineers Act* and maintained a register to include the 5th Respondent as a professional engineer subject to the requisite qualifications he had.

Analysis and Determination

46. Having considered the application, affidavits and submissions on record, and authorities the main issue for determination is whether the Petitioner/Applicant is entitled the conservatory orders sought.
47. The threshold for grant of conservatory orders was established inter alia by the Supreme Court in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 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*.”

48. Further in *Muturi v Havi & 21 others* (Civil Application E435 of 2021) [2022] KECA 938 (KLR) (19 August 2022) (Judgment) held:

“In order for the appellant to lay a proper basis for the issuance of conservatory orders, she had to first meet the threshold set in *Giella vs. Cassman Brown*, that is the three sequential requirements of first establishing a prima facie case with a probability of success; secondly, showing that damages would not be an adequate remedy; and, thirdly, demonstrating that the balance of convenience tilts in her favour. Thereafter, she had to go further and meet the further threshold set in the *Munya* decision by showing that the public interest element was also in her favour.”

49. The petitioner has not established a prima facie case that the respondents failed to put in place safeguard mechanisms that would protect the recruitment process of the patent biasness and that the recruitment process was carefully calculated to benefit the 5th Respondent as against other applicants and to the detriment of the membership of the 1st Respondent. There is a lot of perceptions that since the 3rd respondent is the EEF Chairman of Eminent Engineers forum and Chairman of Engineers Board of Kenya he must have influenced the appointment of the 5th respondents to be appointed CEO of Institution of Engineers of Kenya. There is no evidence that the 5th respondent is not qualified for the position and so at the best the said allegation is a mere speculation.

50. On the second requirement, the injury likely to be suffered by the Applicant is not irreparable, however, the Respondents have proved to this court that if the orders were granted and the 5th Respondent vacates office, the 1st respondent will suffer greater prejudice as it will not have a head of its secretariat.

51. The Court of Appeal in *Muturi v Havi & 21 Others* (Supra) observed:

“As the appellant failed to meet the sequential test set in *Giella vs. Cassman Brown*, supra the learned Judge did not have to consider the public interest element that was underscored by the Supreme Court in the *Munya* decision. Moreover, the appellant had alleged violation of her constitutional rights, but did not demonstrate any element of public interest that was involved in such violation, and the learned Judge would not have come to a different conclusion even if he was to consider the public interest element.”

52. Having considered the pleadings and the submissions the court finds and holds the conservatory orders sought are not merited and the petitioner has failed to meet the threshold set in *Giella vs. Cassman Brown* and *Gatirau Peter Munya v Dickson Mwenda Kithinji*. The application is therefore dismissed.

53. In view of the nature of the application, the court orders respective parties to meet their costs of this application.

Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15TH DAY OF MARCH, 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

