



**Kenya County Government Workers Union v Kisumu County Government & another
(Miscellaneous Application E002 of 2024) [2024] KEELRC 1066 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1066 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS APPLICATION E002 OF 2024**

**CN BAARI, J
APRIL 25, 2024**

BETWEEN

KENYA COUNTY GOVERNMENT WORKERS UNION APPLICANT

AND

KISUMU COUNTY GOVERNMENT 1ST RESPONDENT

KISUMU COUNTY PUBLIC SERVICE BOARD 2ND RESPONDENT

RULING

1. This ruling relates to the Applicant's notice of motion application dated 10th January, 2024. The Applicant seeks orders that: -
 - i. Spent.
 - ii. Spent.
 - iii. The Honourable Court be pleased to grant conservatory orders restraining the Respondents either by themselves or by their agents and anyone acting under them, from carrying out any further recruitment exercise and/or activities seeking to employ staff to occupy positions already occupied by qualified members of the Applicant, pending the hearing and determination of the county appeal no. 100 of 2023 filed at the Public Service Commission.
 - iv. The Honourable Court be pleased to issue conservatory orders against the Respondents restraining them, their employees, servants, and/or agents from proceeding with the interviewing of the shortlisted candidates for the positions within the Kisumu County Public Service advertised on 23rd October, 2023, pending the hearing and determination of the Petitioner's appeal to the Public Service Commission.
 - v. The Honourable Court be pleased to give such directions and/or orders as it may deem fit and appropriate in the circumstances of the case.



- vi. The cost of this application be provided and the same be borne by the Respondents herein.
2. The motion is supported by the grounds on the face thereof and the affidavit of Roba Sharu Duba, sworn on 10th January, 2024. The crux of the motion is that the Respondents have advertised and scheduled interviews for positions that are not vacant, and which are currently held by members of the Applicant.
 3. Applicant avers that it has lodged an appeal before the Public Service Commission and which appeal the Respondents are aware of, but have nonetheless proceeded with the recruitment before the said appeal is heard and determined.
 4. It is the Applicant's assertion that Article 47 of the Constitution read with Section 4 of the Fair Administrative Actions Act, guarantees every person the right to administrative action that is expeditious, efficient, reasonable and procedurally fair.
 5. It is her case that the 2nd Respondent's advertisement of positions in the county public service that are otherwise occupied, and the subsequent shortlisting of candidates for interviews is in total disregard of the letter and spirit of the Constitution and the Employment Act, 2007.
 6. It states further that there is an imminent threat of her members affected by the recruitment being unfairly and unjustly rendered jobless despite being qualified for the positions sought to be filled by the Respondent, unless the orders sought are granted.
 7. The Respondents opposed the motion vide a replying affidavit sworn on 27th February, 2024 by one Collins Agutu, the Acting Board Secretary/Chief Executive Officer of the 2nd Respondent.
 8. The Respondents aver that the Applicant's prayers have been overtaken by events, and that the suit is only meant to derail proper service delivery for the residents of Kisumu. The deponent further avers that the matter subject of the application is before the Public Service Commission and is awaiting directions, hence this motion is a waste of court's time.
 9. It is the Respondents' position that the 2nd Respondent thoroughly inspected the personnel files and confirmed that the positions advertised were vacant and that the advertisement was done lawfully, procedurally and in line with the normal Human resource practices.
 10. The Respondents further states that no employee in the revenue collection department has been dismissed as a result of the advertisements. He avers further that some of the revenue officers holding the advertised positions, were doing so temporarily awaiting the recruitment process after incorporation of the Kisumu Revenue Board.
 11. The Respondents state that one Maurice Odhiambo Otieno, an employee discharging his duties at city department informed the 2nd Respondent that he did not give consent to be included in this application, and did not wish to be part of this suit and has gone as far as swearing affidavits to that effect. He further deposes that one Patrick Nyamita, also an employee in the city department cited as an affected party, had reached out to the 2nd Respondent stating that he was not aware of the suit until recently when he was informed by a colleague, and also wishes to be excluded from the suit
 12. It is the Respondents' position that the advertisement and recruitment exercise is open and competitive.
 13. Parties canvassed the motion through written submissions and submissions were received from both parties, and have been dully considered.



Analysis and Determination

14. The Applicant seeks an award of conservatory orders to bar the continued recruitment and filling of positions advertised by the Respondents, pending determination of an appeal lodged before the Public Service commission pursuant to Section 77 of the *County Government Act*, read with Section 87 (2) of the *PSC Act*.
15. For starters, I agree with the Applicant that this court has the jurisdiction to issue orders such as those sought herein, during the pendency of an appeal before the Public Service Commission pursuant to Section 12 of the *Employment and Labour Relations Court Act*, to preserve the substratum of the appeal owing to the fact that the Commission has no power to issue such a relief.
16. The question for this court is whether the Applicant has justified the issuance of conservatory orders staying the recruitment process subject of this motion. In *Center for Rights Education and Awareness (CREAW) & another vs. Speaker of the National Assembly & 2 others* /2017) eKLR, the Court had this to say on conservatory orders: -

“A party who moves the court seeking conservatory orders must show to the satisfaction of the Court his or her rights are under threat of violation; are being violated or will be violated and that such violation or threatened violation is likely to continue unless a conservatory order is granted. This is because the purpose of granting a conservatory order is to prevent violation of rights and fundamental freedom and preserve the subject matter pending the hearing and determination of a pending case or Petition.”
17. Further in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, the Court of Appeal held: -

“... in civil cases 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...”
18. To start with, the positions advertised are not disputed, both parties have provided a list of the advertised positions and which goes to confirm that each of them knows exactly what positions have been advertised. It is also true that the positions are mainly for departmental heads and revenue collection officers.
19. The Applicant has produced a list of names and the departments the employees serve in, but not the position they hold in those departments. It is also telling that some of the Applicant’s members said to be affected by the advertisement and recruitments subject of this case, have sworn affidavits denying being affected and/or being party to this suit.
20. Further, by virtue of the newspaper advertisements, the recruitment exercise mounted by the Respondent has been shown to have been open and competitive, hence any employee holding a position temporarily was at liberty to apply.
21. Recruitment processes come with a huge expense to the employer and to stay a process at the tail end, can only be justified by sufficient prove of breach of the relevant laws and recruitment procedures.



In *Kenya County Government Workers Union v. Nairobi City County Government & another* (2017) eKLR, also cited by the Applicant, the Court held that:

“For this Court to proceed and stop the entire recruitment process, this Court must be satisfied that the employer is proceeding in an unconstitutional or illegal manner. The Court would normally not interfere with HR functions of an employer unless this is proved ”

22. In the circumstances of this case, it is not denied that the Applicant has lodged an appeal with the Public Service Commission. The lodging of the appeal is not in itself sufficient prove that positions already held by members of the Applicant are among those advertised for filling, the Applicant having failed to show that the advertised position are actually held by its members or that those positions are not vacant.
23. Further, the Applicant has not rebutted the Respondents’ assertion that some employees held position temporarily and which they were at liberty to apply for so as to be confirmed into those positions.
24. In the circumstances, I find and hold that the Applicant has not satisfied this court that there exists a clear and unmistakable right which is directly threatened by the Respondents recruitment process and that would cause irreparable harm to her membership as to justify the granting of the orders sought.
25. Having said this, I also agree with the Respondents’ submission that the instant application is fatally defective, on the premise that the Applicant has sought redress through a miscellaneous application which is not anchored on a substantive suit.
26. It is trite law that no substantive orders can emanate from an application that is not anchored on substantive pleadings as is the case in the instant application. Although the Applicant has filed a Notice of Motion, the same is not accompanied by any substantive pleading. In the case of *Tatecob Housing and Coop Aacco Ltd v Qwetu Sacco Ltd* [2021] eKLR the court stated;

“Without much ado, I will agree with the position of the Respondentthat the Appellant cannot seek the orders sought in the miscellaneous application without going through the process of filing a substantive suit.”
27. In the end, I find the motion devoid of merit and is dismissed with no orders on cost.
28. Orders accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 25TH DAY OF APRIL, 2024.

C. N. BAARI

JUDGE

Appearance:

Mr. Oginga Present for the Applicants

N/A for the Respondents

Erwin Ongor - C/A

