



**Ali v Public Service Commission (Petition E057 of 2024)
[2024] KEELRC 1275 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1275 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E057 OF 2024**

**B ONGAYA, J
MAY 24, 2024**

BETWEEN

ABDISALAN MUKTAR ALI APPLICANT

AND

PUBLIC SERVICE COMMISSION RESPONDENT

RULING

1. The applicant filed the application dated 23.04.2024 through Aluvale & Company Advocates invoking Articles 10(2) (b) (c), 19(2), 22, 23 and 258 (1), 162(2), of *the Constitution*, section 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, Order 51(1) of the *Civil Procedure Rules* and all other enabling laws seeking the following orders;
 - a. The application be certified as urgent and the same be heard ex parte in the first instance.
 - b. Conservatory orders be issued restraining the respondent, its agents and/or servants from recruiting, processing, interviewing and/or appointing any person for the position of Chief II, Burder Location, Diif Sub-county Wajir County pending the hearing and determination of this application inter partes.
 - c. Conservatory orders be issued restraining the respondent, its agents and/or servants from recruiting, processing, interviewing and/or appointing any person to the position of Chief II, Burder Location, Diif sub-county Wajir county pending the hearing and determination of this petition.
 - d. Costs of this application be provided for.
2. The supporting affidavit by the applicant was sworn on 23.04.2024. He stated as follows:



- a. That on 14.10.2021, the respondent advertised a vacancy in the office of Chief II Burder Location, Diif Sub-county, Wajir county in which he applied and was appointed on 25.02.2022.
 - b. That his appointment was challenged at the High Court in ELRC petition no. E040 of 2022 (*Mohamud Bare Mohamed and Ayan Salah Bagay v Deputy county commissioner and 5 others*) and judgement delivered on 25.11.2022 where the Court declared the recruitment exercise unconstitutional for the reasons.
 - c. That being aggrieved by the decision, he appealed to the Court of Appeal in Civil Appeal No. E842 of 2022 (Abdisalan Muktar Ali v Mohamud Bare Mohamed and others which appeal is still pending at the Court of Appeal.
 - d. That on 28.12.2023 Petition No. E245 of 2023 (*Suleyman Siyad Bashir and Hafsa Bille Abdi v Cabinet Secretary, Ministry of Interior and National Administration and others*) was filed challenging the age limit in recruitment of chiefs in which the respondents orally informed the Court that it had dispensed with the age requirement to mean that his appointment was valid.
 - e. That to his surprise on 09.04.2024 the respondent herein advertised for position of Chief of Burder Location, Diif Sub County, Wajir County and yet he is still in office serving the people and earning a salary from the respondent.
 - f. That if the recruitment is allowed to proceed the said location will have two Chiefs which is likely to cause public havoc and a waste of public funds and also deprive the applicant of his employment.
 - g. That it is fair and just that the said recruitment and advertisement is urgently stayed pending the hearing of this applicant and the petition herein.
 - h. He prayed that the sought orders be granted and the application be allowed.
3. In response to the application herein, the respondent filed the replying affidavit of Remmy N Mulati, MBS sworn on the 03.05.2024 . He stated as follows:
- i. That he is the Ag. Secretary/CEO of the respondent herein.
 - ii. That the respondent Commission has constitutional and legal mandate that he outlined in his affidavit.
 - iii. That pursuant to the legal provisions, the respondent through the delegation instrument ref no. PSC/SEC/93/37(37) dated July 2018 delegated its function to the Authorised Officer at the Ministry of Interior and Co-ordination of National Government to exercise its mandate to appoint Chiefs and Sub-chiefs.
 - iv. That following the circumstances that led to the petition as has been stated out in the petitioner's case, after the judgement nullifying the election of the petitioner, the respondent through a letter dated 03.05.2023 instructed the Ministry to comply with the orders of the court and repeat the recruitment exercise in tandem with *the constitution* and relevant statutory requirements.
 - v. That on 12.09.2023 the respondent received a letter from the firm of Mohamed Abdirahman & Co. Advocates informing it that an application filed by the Attorney General in the Court of Appeal Civil Application E451 of 2022 seeking stay of execution had been dismissed on



22.06.2023 and that the respondent should comply with the judgment of the Employment and labour relations court.

- vi. That the respondent then wrote to the Principal Secretary at the Ministry forwarding the letter from Mohamed Abdirahman & Co. Advocates and directing that the Authorised Officer complies with the directions of the respondent through the letter dated 03.05.2023.
 - vii. That on 27.09.2023 the respondent received a letter dated 25.09.2023 from the firm of Kinaro & Associates Advocates informing it that there is a pending Appeal No. E842 of 2022 awaiting hearing by the applicant herein and that the recruitment ought to be left until the appeal is heard and determined.
 - viii. That through a letter dated 29.09.2023 the respondent wrote back to the firm of Kinaro Advocates informing that there being no stay orders, the respondent will go ahead and comply with the court judgement.
 - ix. That on 13.12.2023 the respondent went ahead and advertised for the position of Chief Burder Division, Diif Sub-county.
 - x. That a petition was filed being petition No. E245 of 2023 (Suleyman Siyad Bashir and Hafsa Bille Abdi –Versus-The Cabinet Secretary, Ministry of Interior and National Administration and others) challenging the advertisement on grounds of age requirement as discriminatory and which petition was allowed and the respondent resolved that there was need to remove the requirement of age for position of Assistant Chief II and Chief II which they communicated to the Court on 11.04.2024.
 - xi. That the applicant/petitioner’s appointment had been nullified and yet he continued to hold and undertake functions of the public office and receiving salary and benefits of the said office.
 - xii. That the orders sought are not merited and that the application should be dismissed with costs.
4. The applicant filed a further affidavit dated 06.05.2024 in response to the replying affidavit of the respondent and stated as follows;
- i. That the respondent is exercising unfair labour practice by admitting on one hand that the age requirement is discriminatory and yet the same does not apply to the applicant which is against *the Constitution*.
 - ii. That he is still holding office as Chief of Burder location and serving the people since his services have never been terminated and he is still being paid.
 - iii. That the recruitment process should be stopped to avoid him being forced out of office and the location having two chiefs.
5. Both parties gave oral submissions in court. The court has considered the parties’ respective cases and makes finding as follows:
- a. The dispute appears to be subject of previous litigation and pending cases. The applicant does not deny that his appointment was quashed by the Court but it appears the Ministry has not yet complied with that Court order. The application for stay of implementation of the order appears to have been declined at the Court of appeal.
 - b. Thus prima facie, the applicant appears not to be holding office per law but in contravention of the Court order and the respondent’s directive.



- c. It appears to the Court that in the circumstances the conservatory order as prayed for cannot issue.

In conclusion, the application is hereby dismissed with costs in the cause and the parties to take steps for expeditious hearing and determination of the main petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 24TH MAY 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

