



Agure & 6 others v Kenya Railways Corporation & 7 others (Employment and Labour Relations Petition E049 of 2024) [2024] KEELRC 2144 (KLR) (31 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 2144 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E049 OF 2024**

**AN MWAURE, J
JULY 31, 2024**

BETWEEN

**ERIC AGURE 1ST PETITIONER
JONATHAN KYALO 2ND PETITIONER
IDRIS SHWAIB 3RD PETITIONER
RACHAEL NJERI 4TH PETITIONER
STANLEY SIMIYU 5TH PETITIONER
HUDSON IMALWA 6TH PETITIONER
MERCY ESTHER 7TH PETITIONER**

AND

**KENYA RAILWAYS CORPORATION 1ST RESPONDENT
PUBLIC SERVICE COMMISSION 2ND RESPONDENT
HONOURABLE THE ATTORNEY GENERAL 3RD RESPONDENT
ETHICS & ANTI-CORRUPTION COMMISSION 4TH RESPONDENT
OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION . 5TH RESPONDENT
KENYA NATIONAL EXAMINATION COUNCIL 6TH RESPONDENT
KENYA SCHOOL OF LAW 7TH RESPONDENT
KENYA INSTITUTE OF MANAGEMENT 8TH RESPONDENT**



RULING

1. The Petitioner/Applicant filed a Notice of Motion dated 5th June 2023 seeking the following orders: -
 1. spent
 2. pending the hearing and determination of this Application and Petition, this Honourable Court be pleased to issue orders restraining the Respondents from punishing, harassing, prosecuting, recovering assets and taking any other adverse actions against the Petitioners/Applicants based on any matters arising from this Application.
 3. pending the hearing and determination of this Application and Petition, this Honourable Court be pleased to issue orders restraining the Respondents, their agents and any other law enforcement agency and or asset recovery agency from taking any recovery against the Petitioners/Applicants on any assets they may have acquired during their tenure of employment from the salaries they had been paid.
 4. pending the hearing and determination of this Application and Petition, this Honourable Court be pleased to issue orders compelling the 1st Respondent to avail a full report of how the process hiring of the Petitioners/ Applicants was conducted.
 5. pending the hearing and determination of this Application and Petition, this Honourable Court be pleased to issue orders compelling the 6th, 7th and 8th Respondents to avail a full report of how the process of verification of Petitioners/Applicants documents was conducted.
 6. pending the hearing and determination of this Application and Petition, this Honourable Court be pleased to issue orders compelling the 1st Respondent to compute and pay the Petitioners/Applicants their employment benefits for the tenure of their employment period.
 7. pending the hearing and determination of this Application and Petition, this Honourable Court be pleased to issue orders compelling the 6th, 7th and 8th Respondents to avail a full risk assessment audit report of their Information and Computer Technology (ICT) Systems at all the material times the certificates of the Petitioners/Applicants were issued.
 8. pending the hearing and determination of this Application and Petition, this Honourable Court be pleased to issue orders compelling the 6th, 7th and 8th Respondents to avail a full risk assessment audit report on the safety and quality assurance of their ICT systems during the period that the Petitioners/Applicants were issued with their certificates.
 9. this application be heard and determined before a 3-bench judge.
 10. this Honourable Court certifies that this Application and the Petition filed herein raises substantial questions of law warranting the appointment of an uneven number of judges and subsequently the Honourable Chief Justice empanel the present bench to hear and dispose the Petition.
 11. the costs of the application be provided for.

Petitioners/ Applicants Case

2. The Petitioners/Applicants aver that the 6th, 7th and 8th Respondents at the behest of the 1st, 2nd and 4th Respondents conducted a process of verifying their certificates that was opaque, unverifiable, indicative



and prejudicial to themselves. And based on this process, the 1st Respondent dismissed them without according them a fair hearing.

3. The Petitioners/Applicants aver that despite the dismissal without fair hearing, the 1st Respondent unlawfully failed to pay their terminal dues and employment benefits.
4. The Petitioners/Applicants further aver that the 2nd Respondent instructed the 1st Respondent to recover all that was paid to them as salary for services already rendered.
5. It is the Petitioners/Applicants' case that the Respondents' actions are prejudicial and a violation to their fundamental rights and freedoms as they diligently served the 1st Respondent during their respective terms of employment.
6. The Petitioners/Applicants aver that unless the court intervenes, they will suffer irreparable harm by being denied their employment benefits and being forced to forfeit their hard earned money to the 1st Respondent, an action akin to slavery and double jeopardy.

1st Respondent's Case

7. In opposition to the Application, the 1st Respondent filed a replying affidavit dated 15th June 2024.
8. The 1st Respondent avers that the 2nd Respondent vide a letter dated 19/10/2022 gave a directive requiring authorised officers at all ministries, departments, agencies and state corporations to:
 - i. Undertake an audit of academic and professional certificates of all newly appointed officers in the last 10 years in ministries, departments, agencies and state corporations (MDA's) and submit the report of the exercise by 31/1/2023;
 - ii. Continuously validate academic and professional certificate prior to appointments and promotions and filed the same through the compliance and quality assurance quarterly (M&E) and annual reports to the commission and;
 - iii. Dismiss from the service in accordance with the provisions of the *Public Service Commission Act*, 2003 and the *Leadership and Integrity Act*, 2012 any officer found in possession of forged certificates.
9. The 1st Respondent avers that in response to the notice, it commenced the process and issued a circular dated 16/11/2022 to all its staff requesting the staff to submit copies of their academic certificates for verification by 30/11/2022.
10. The 1st Respondent avers that as it could not verify the academic certificates as it did not issue them, it requested validation of the academic certificates from the various institutions and/or examining bodies that issued them vide a letter dated 4/1/2023 to the 6th Respondent and a letter dated 17/3/2023 to the 8th Respondent.
11. The 1st Respondent avers that the 6th Respondent responded vide a letter dated 24/5/2023 and established that the 1st, 3rd, 4th, 5th, 6th and 7th Applicants were either not registered for the year claimed they had done examinations or their certificates were deemed inauthentic.
12. The 1st Respondent avers that the 7th Respondent indicated in its response that the 2nd Applicant's Diploma Certificate in Law (paralegal) was not genuine and that the same was forged as he had not graduated from the institution.
13. The 1st Respondent further averred that the 8th Respondent confirmed that the 4th Applicant's academic diploma certificate in secretarial course was a forgery and did not emanate from its institution.



14. It's the 1st Respondent case that it subsequently began disciplinary proceedings against the Applicants and issued them suspension letters and required them to respond to the allegations within 7 days. The Applicants each responded and addressed the allegations levelled against them.
15. The 1st Respondent aver that upon conducting its investigations, it found the Applicants have a case to answer and were invited individually to a disciplinary hearing to enable them explain why they were in possession of forged documents and why they submitted the same during recruitment and onboarding.
16. The 1st Respondent avers that the disciplinary hearings were conducted and upon being questioned on their conduct, the Applicants could not justify why they were in possession of forged documents and whether they had any documents to rebut the allegations of inauthentic documents. Having found their explanations unsatisfactory, it dismissed the Applicants employment in compliance with the 2nd Respondent's directive.
17. It's the 1st Respondent's case that the Applicants have not adduced any evidence to establish that their academic documents to it by the academic institutions or bodies are genuine.
18. The 1st Respondent avers that the grant or denial of the conservatory orders by the Applicant does not affect the substratum of the main petition and the petition will not be rendered nugatory if the court fails to award the orders sought.
19. The 1st Respondent avers that the 4th Respondent issued an advisory dated 11/3/2024 that all authorised officers should not process benefits including pensions or unpaid allowances and accrued leave to persons found to have used fraudulent academic qualifications to gain employment in the public service. Further all cases of forged academic and professional certificates be submitted to the 4th Respondent to further action as the actions amount to criminal offence.

4th Respondent's Case

20. The 4th Respondent avers that the Petitioners are not disputing to have been in possession of forged academic and professional certificates and/or challenging the outcome of the document authentication and this amounts to a breach of Chapter Six of *the Constitution*, the *Ethics and Anti-Corruption Commission Act*, 2011 and the *Leadership and Integrity Act*, 2012.
21. The 4th Respondent avers that the 2nd Respondent's directive dated 19/10/2023 directing authentication of academic and professional certificates and advised employment based on forged certificates is void ab initio and persons found with such shall not be entitled to any form of benefits including pensions or unpaid allowances and accrued leave.
22. Further, the directive directed that such cases should be referred to the Directorate of Criminal Investigations for prosecution and recovery of monies owed and assets procured from the fraudulent activities.
23. It is the 4th Respondent's case that investigations on the Petitioners are being carried out by DCI and upon conclusion, the report shall be forwarded to the 5th Respondent in accordance with their mandate.
24. The 4th Respondent avers that pursuant to its mandate, it issued an advisory dated 11/3/2024 on payment of terminal benefits to public officers on account of forged academic and professional certificates and advised all accounting officers should not process benefits for such persons as the contract was based on fraud and/or illegality by such Petitioners.



25. It's the 4th Respondent's case that the allegation that the intention to prosecute the Petitioners and others is an abuse of state power and violates Article 10 of *the Constitution* would amount to double jeopardy is misleading as the law allows for both criminal and civil proceedings against a person.
26. The 4th Respondent further filed grounds of opposition dated 10th July 2024 in opposition to the application on grounds that:-
 1. The Petition failed to meet the requirements under Article 165(4) of *the Constitution*.
 2. The Petition does not raise substantial question of law as required under Article 165(3)(b)(d).
 3. The Petition does not raise complex issues to warrant an empanelment of an uneven number of Judges.
 4. The Petition does not raise any novel point as held in *Sir Chunilal v Mehta and Sons, Ltd v The Century Spinning & Manufacturing Co. Ltd* 1962 AIR1314.

6th Respondent's Case

27. The 6th Respondent avers that by invoking this court's jurisdiction to exercise judicial authority over the duties and mandate of other institutions; the Petitioners are inviting the court to sanitize their academic certificates. However, the duty of authenticating academic certificates is not judicial but it is administrative duty and those of institutions the Petitioners attended.
28. It's the 6th Respondent's case that the Petitioners have not adduced any evidence to establish that their academic documents and information subject to its investigations were genuine; instead they created parallel academic documents that suit their circumstances and were never in the 6th Respondent's custody.
29. The 6th Respondent's avers that the application discloses not cause of action against it and the same is incompetent as all annexures are not marked and attested by a commissioner of oaths hence should be struck off.

Analysis and Determination

30. The main issue for determination is whether the Petitioners/Applicants are entitled to the conservatory orders sought.
31. The nature of conservatory orders was discussed in the Supreme Court case of Civil Application No. 5 of 2014 *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 Applicant's case for orders of stay.



32. Further, in Nairobi Civil Appeal 151 of 2011 Invesco Assurance Co. Ltd vs. MW (Minor suing thro' next friend and mother (HW) [2016] eKLR defined a conservatory order as follows: -

“A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”

33. The principles for grant of conservatory orders was summarised in Board of Management of Uhuru Secondary School vs. City County Director of Education & 2 Others [2015] eKLR, as: -

- i. The need for the applicant to demonstrate an arguable prima facie case with a likelihood of success, and to show that in the absence of the conservatory orders, he is likely to suffer prejudice.
- ii. The second principle is whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the Bill of Rights.
- iii. Thirdly, the Court should consider whether, if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory.
- iv. Whether the public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order.”

34. On the applicability of the aforementioned principles, the court must establish whether the Petitioners/Applicant's have established a prima facie case.

35. What constitutes a prima-facie case was further dealt with by the Court of Appeal in *Mirugi Kariuki vs- Attorney General Civil Appeal No. 70 of 1991* (1990-1994) EA 156, (1992) KLR 8. The Court, in an appeal against refusal to grant leave to institute judicial review proceedings by the High Court, stated as follows: -

“It is wrong in law for the Court to attempt an assessment of the sufficiency of an applicant's interests without regard to the nature of his complaint. If he fails to show..... that there has been a failure of public duty, this court would be in error if it granted leave. The curb represented by the need for the applicant to show, when he seeks leave to apply, that he has a case, is an essential protection against abuse of the legal process. It enables this court to prevent abuse by busy-bodies, cranks and other mischief-makers... In this appeal, the issue is whether the applicant in his application for leave to apply for orders of certiorari and mandamus demonstrated to the High Court a prima facie case for the grant of those orders. Clearly, once breach of the rules of natural justice was alleged, the exercise of discretion by the Attorney General under section 11(1) of this Act was brought into question. Without a rebuttal to these allegations, this appellant certainly disclosed a prima-facie case. For that, he should have been granted leave to apply for the orders sought. (emphasis added).”

36. Further, in *Re Bivac International SA (Bureau Veritas)* (2005) 2 EA 43, the Court while expounding on what a prima-facie case or arguable case is, stated that such a decision is not arrived at by tossing a coin or waving a magic hand or raising a green flag, but instead a Court must undertake an intellectual exercise and consider without making any findings, the scope of the remedy sought, the grounds and the possible principles of law involved.

37. Having considered the above, the Petitioners/Applicants herein have not established a prima facie case as they merely stated the actions of the Respondents in respect to their allegedly fraudulent academic



- and professional certificates. However, no evidence was adduced in court to show that the Respondents illegally, unfairly and unlawfully came to its conclusion or acted ultra vires to their duties as mandated.
38. The Court of Appeal in Nairobi Civil Appeal No. 44 of 2014 Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & Another (2015) eKLR while dealing with what a prima facie case is, referred to Lord Diplock in *American Cyanamid vs. Ethicon Limited* (1975) AC 396, when the Judge stated thus: -
- “If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities, that is the end of any claim to interlocutory relief.”
39. The 2nd respondent ordered on 19th October 2022 all authorised officers of all Ministries and Departments Agencies, and State Corporations to undertake an audit of all newly appointed officers in the last ten years for authentication of academic and professional certificates. That in keeping with this directive the 1st respondent sent a circular dated 16th November 2022 requiring its staff to submit copies of their academic certificates for verification.
40. The 1st respondent requested validation of academic certificates for verification.
41. The 1st respondent requested validation of academic certificates to the examining bodies being 6th and 8th respondents. The 6th respondent responded by his letter dated 24th May 2023 and confirmed that the 1st, 3rd, 4th, 5th and 6th and 7th applicants were either not registered for the year they claimed they had done their examinations or their certificates were not registered and so were not authentic. As for the 2nd applicant the 7th respondent indicated his diploma certificate was not genuine.
42. The examining bodies having given evidence that the certificates were not genuine the duty shifted to the applicants to prove their certificates were genuine. In Civil appeal case No 76 of 2016 Kenya Ports Authority vs Fadhil Juma Kisuma the appellate court held that:
- “Where a respondent failed to respond to the show cause letter related to forged documents was a failure on his part and justified the appellant to dismiss him and the court found we failed to prove a case of unfair dismissal since he did not prove the authenticity of his certificates. The court held that therefore the burden of proof of gross misconduct against the respondent was therefore discharged.”
43. The petitioners did not present certificates that were validated by the examining bodies save to complain in paragraph a and b and c of their supporting affidavit dated 9th April 2024 where they said the exercise of verification of their documents was opaque, unverifiable, indicative and prejudicial to them apart from their complaint. They did not establish how the exercise was prejudicial and they did not produce evidence to verify that their certificates were authentic.
44. The court also wish to point that 1st and 4th petitioners resigned from their employment and so have no case of unfair termination.
45. The court has considered the principles pertaining to grant of the requested orders by the petitioners and sincerely finds the applicants have not established sufficient grounds to prove that their prayers are merited.
46. The respective respondents were all conducting their legal and constitutional mandate in verifying that their staff had genuine documents. The applicants have failed to give evidence how the process was prejudicial and they did not tender evidence to show their certificates were genuine. The court finds the various prayers from numbers 1-19 are not merited and are not granted.



47. A particular mention of prayer 19 on granting applicant an appointment of an uneven number of judges to hear and dispose the petition is considered. The court finds no reasons to handle this matter that way and is not even clear what issue they want to be dealt with by an uneven panel of Judges appointed by the honourable the Chief Justice.
48. The court finds there is no application that supports the prayer for an empanelment of a three Judge bench. In conclusion, the prayers in the notice of motion dated 9th April 2024 is not merited and are all dismissed.
49. The court orders each respective party to meet their costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31ST DAY OF JULY, 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

