



Ayieko v National Industrial Training Authority & another (Employment and Labour Relations Petition E070 of 2024) [2024] KEELRC 2307 (KLR) (20 September 2024) (Ruling)

Neutral citation: [2024] KEELRC 2307 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E070 OF 2024
AN MWAURE, J
SEPTEMBER 20, 2024**

BETWEEN

VICTOR AYIEKO PETITIONER

AND

NATIONAL INDUSTRIAL TRAINING AUTHORITY 1ST RESPONDENT

NATIONAL TRAINING BOARD 2ND RESPONDENT

RULING

1. The Petitioner/Applicant filed a Notice of Motion dated 7th May 2024 seeking the following orders that: -
 1. spent
 2. pending the hearing and determination of this application, a conservatory order be and is hereby issued suspending the planned interviews commencing on 8th May 2024 by the 2nd respondent to fill 50 vacancies or any part thereof pursuant to the newspaper advertisement of 18th July 2022;
 3. pending the hearing and determination of this petition, a conservatory order be and is hereby issued suspending the planned interviews commencing 8th May 2024(now past) by the 2nd respondent to fill 50 vacancies or any part thereof pursuant to the newspaper advertisement of 18th July 2022;
 4. the cost of this application be provided for.



Petitioner/Applicant's Case

2. The Petitioner/ Applicant avers that 1st Respondent invited applications through the local daily newspapers on 22/7/2022 for 50 vacancies to fill various positions at its headquarters in Nairobi and other centers to ensure delivery of its mandate, these applications were to reach it by 8/8/2022.
3. The Petitioner/Applicant avers that applicant including internal staff members tendered their applications, however, the 1st Respondent went quiet for over 2 financial years until April 2024 when it sent letters to selected applicants to appear for interviews commencing 8/5/2024.
4. The Petitioner avers that the Respondent's plan to conduct interviews for the advertised positions is bound to be opaque and in contravention of the rights enshrined in *the constitution*.

Respondents' Case

5. In opposition to the Application, the Respondents filed a replying affidavit dated 27th May 2024.
6. The Respondents aver that they invited applications from suitable candidates to fill available vacancies on 22/6/2022 in the public dailies with the rider only shortlisted candidates will be contacted.
7. The Respondents aver that it received over 6,000 application necessitating the engagement of a human resource consultant. However, the procurement process for one was delayed due to a complaint lodged at the Public Procurement Regulatory Authority (PPRA).
8. The Respondents aver that they were allowed to proceed with the recruitment on 4/9/2023 and the shortlist was approved by the 2nd Respondent in January 2024. However, the 1st Respondent experienced cashflow problems hence it couldnot constitute interview panels which was subsequently done in April 2024.
9. It's the Respondents' case that there is no statutory requirement compelling them to publish a list of shortlisted candidates neither is it common practice.
10. The Respondents aver that no timeline was given when it would conclude the recruitment process therefore there was no delay on their part.
11. It's the Respondents case that there is no statutory requirement to publish an interview timetable or schedule showing the date, time and place of interview; this information is only given to the shortlisted candidates.
12. The Respondents aver that the Petitioner has failed to enumerate the particulars of the violations complained about and the averment that his right to fair administration action will be infringed is misplaced since he is not one of the applicants for the advertised vacancies.

Petitioner's Submissions

13. The Petitioner submitted that the Respondents has a constitutional mandate to promote the values and principles in Articles 10 and 232 of *the Constitution* of ensuring transparency and accountability; to the extent that they failed to publish the longlist of applicants, the shortlisted candidates, the venue, time and date of interviews accessible to the public. The Respondents therefore failed in this constitutional obligation.
14. The Petitioner submitted that the petition seeks to stop the process of recruitment and not quash appointments post recruitment, therefore, the petition will be overtaken by events and rendered



nugatory if the process of recruitment is allowed to continue. It is essential to maintain status quo as the court determines whether *the constitution* and the law have been violated.

15. It is the Petitioner's submission that it is in public interest that *the Constitution* and the law are respected and followed. Therefore, an allegation that *the Constitution* is violated or is threatened with violation ought not to be lightly taken.

Respondents' Submissions

16. It's the Respondents submission that the Applicant has not demonstrated that he has a prima facie case with a likelihood of success. He did not apply for any of the positions advertised and has not explained which of his alleged rights have been violated and how he has been prejudiced.
17. The Respondents submitted that the Applicant's grievances are presumptive and do not meet the constitutional threshold. The Applicant has not applied for any vacancies advertised and merely asserting he is bringing the petition in public interest is not enough; he must demonstrate the extent he will be prejudiced by the Respondents' actions.

Analysis and Determination

18. The main issue for determination is whether the Applicant is entitled to the conservatory orders sought.
19. The principles guiding the grant of conservatory orders was aptly discussed in *Petition E408 of 2020 Okiya Omtatah Okoiti v Judicial Service Commission; Philomena Mbete Mwilu & another (Interested Parties) [2021] eKLR* as follows: -

“The locus classicus is the Supreme Court in Civil Application *No. 5 of 2014* Gatirau Peter Munya -v- Dickson Mwenda Kithinji & 2 Others (2014) eKLR where at paragraph 86 the Court stated as follows: -

(86) 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 courses.

20. In *Wilson Kaberia Nkunja vs. The Magistrate and Judges Vetting Board and Others* Nairobi High Court Constitutional *Petition No.154 of 2016* (2016) eKLR after going through several decisions, the Court rightly so, summarized three main principles for consideration on whether to grant conservatory orders as follows: -
 - a. An applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is a real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*.
 - b. Whether, if a conservatory order is not granted, the Petition alleging violation of, or threat of violation of rights will be rendered nugatory; and
 - c. The public interest must be considered before grant of a conservatory order.
21. There is also the need to ascertain whether the conservatory order sought will delay the early determination of the dispute. (See Nairobi High Court Constitutional *Petition No. E243 of 2020 Kenya Tea Development Agency Holdings Limited & 55 Others vs. The Cabinet Secretary Ministry of*



Agriculture, Livestock, Fisheries & Co-operatives & 2 Others and Kenya Small Tea Holders Growers Association (Kestega) (Interested Party) (unreported).”

22. The petitioner is seeking conservatory orders to suspend planned interview commencing on 8th May 2024 (now past) to fill 50 vacancies pursuant to a newspaper advertisement of 18th July 2022. Their main concern as per their application is that the respondents after advertising for vacancies in July 2022 called for actual interviews in April 2024 and yet they did not reveal the list of shortlisted candidates and it was not published and so this made the process to be shrouded in mystery.
23. The main issue as earlier observed is that the respondents did not publish the list of the shortlisted candidates before he invited them for the interviews. The court finds there is no legal requirement that shortlisted candidates list are published or details of the interviews are made public. The court concedes it would be good practice to give as much information of the recruitment but I find no legal requirement for such a requirement to justify cancellation of interview.
24. The respondent claims that the advertisement had provided that only shortlisted candidates would be contacted. This the court did not see in the newspaper cutting annexed to the petition. It is however common for employers to only revert to the shortlisted candidates.
25. The court finds the issues raised by the petitioner have not been established. In other words the petitioner did not show if there were people who claimed they had applied for the vacancies and were not shortlisted. He said he got his information from a whistle-blower but again there are no details of who the whistle-blower was and where his interest was or even how he got the information that he passed to the petitioner.
26. The court is persuaded by among others the case of *Wilson Kiberia Nkunja vs The Magistrates & Judges vetting board & Others supra* where the court has earlier summarised the three principles required to be proved in granting conservatory orders.
27. The court has in this application found the petitioner has not established a prima facie case and further he has not laid down the violation or a threat that cannot be cured after the main petition is determined. Further the court has not been shown the public interest that as been violated by the respondent in proceeding to interview for vacancies in their organisation.
28. In conclusion, the court has not found that the petitioner demonstrated the violations committed by the respondents. The court finds the application therefore is not merited and is dismissed accordingly.
29. The court orders each party to meet their respective costs of this application.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF SEPTEMBER, 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

